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# UNIT 14 LEGAL FRAMEWORK OF FOREIGN TRADE

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## 14.0 OBJECTIVES

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After studying this Unit, you should be able to:

- explain the legal framework or dimensions of foreign trade when the relationship of the parties is contractual.
- describe the legal framework of foreign trade when the relationship of the parties is non-contractual.
- explain major provisions of Indian Contract Act.
- describe major provisions of Indian Sale of Goods Act.

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## 14.1 INTRODUCTION

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You may be aware that international trade transactions, as in domestic trade transactions, contracts form the legal basis between the parties because the parties belonging to different countries are separated by geographical distance. The various national commercial laws and regulations having a bearing on the formation and operation of the contracts are different, and more complex than those applicable to domestic trade transactions. Over years due to the growth of the network of internationally agreed rules and regulations, the legal framework of international trade within which the parties operate or have to operate has become increasingly vast and complex. Although lot of useful efforts at different levels have been made to harmonize the international trade laws and to frame universally acceptable rules and regulations to reduce and remove obstacles to smooth flow of international trade, such efforts appear to have remained inadequate. The parties in general and the parties more particularly in developing countries continue to experience great difficulties.

Therefore, it is essential to have required knowledge and insight into the various contracts the parties enter into during the course of international trade transactions and the relevant

international trade laws and regulations within the limits of which the parties have to contract and operate. In this Unit, you will learn the legal framework or dimensions of foreign trade within which the parties to international trade transactions have to operate and discharge or perform their contractual and non-contractual obligations.

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## 14.2 LEGAL FRAMEWORK OF FOREIGN TRADE WHEN THE RELATIONSHIP OF THE PARTIES IS CONTRACTUAL

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### Contracts and the Applicable Law

It needs to be emphasised that all international trade transactions are legalised and if not so done should be legalised and regularised through contracts. In view of this, contract is considered central to all international trade transactions. It is central mainly because the general principles including the limiting principles of contract are applicable to all types of contracts. Such general principles relate to formation, validity, operation etc. of contracts.

The next question that arises is what is a contract? and what is its function? Contract has been defined as **an agreement enforceable by law**. It has therefore, two broad features or elements, viz a) it is basically an agreement and b) it is or will be or needs to be such an agreement which must graduate to a contract so that law of contract can enforce. We can, therefore, say that the contract = an agreement + its enforceability by law. So **all contracts are agreements but all agreements are not contracts**.

An agreement has been defined as a promise or set of promises forming consideration for each other. The promise is an accepted proposal or offer. A person (Say A) is said to be making a proposal (or offer) when he (A) signifies to another person (Say B) his willingness to do or to abstain from doing something with a view to obtaining the assent of that other person (B) to such act or abstinence. When that other person (B) to whom the proposal or offer is made accepts the proposal, it becomes a promise. Logically we can say that an agreement is an accepted proposal. In other words, **an agreement is the sum total of offer and acceptance**. An agreement can therefore, be formed by at least two persons and there must be an offer by one party and the acceptance of the offer by the other with an intention to create legally binding obligations. Such an agreement to be enforceable must graduate or become a contract provided it fulfils certain other conditions or essential elements of a valid contract which reflect the general as well as the limiting principles applicable to all types of contracts. If one or more of these conditions or elements are lacking the agreement is void abinito (right from the beginning) and the agreement is destitute of all legal effects.

After discussing the definition and certain essential elements of a valid contract, we may like to highlight the most important function of the contract. **Contract creates legally binding relationship and obligations i.e. rights and duties between the contracting parties**. The commercial relationship between the parties are regulated and the contract is governed by the law of contract which otherwise means that the commercial relationship and obligations are created and regulated by the law of contract. One of the most important features of the law of contract is that it permits the parties to create their own rights and duties and establish a legal relationship between them which the law of contract will respect and enforce provided the contract has been concluded within the general including limiting principles of the law of contract.

You have seen that all commercial or business transactions whether international or national (domestic) should be legalised through a contract which is governed by the law of contract. We can therefore, conclude that no contracts can survive without the law of contract. The domestic or national law of contract governs or applies to domestic or national contracts. If a contract is entered into between two parties belonging to India, Indian Contract Act 1872 will be automatically applicable. In the case of foreign or international trade transactions which are legalised or regularised through contracts, the *lex causae* or the proper law of the contract (PLC) will be applicable which may not or may be

the Indian laws on contract and sale of goods depending upon the presence or absence of a choice of law clause in the contract. This is mainly because the international trade transactions involve a foreign element and the parties belong to two different countries and legal systems. Moreover, in the absence of universally acceptable system of international trade laws the PLC will be applicable the details of which are discussed in Unit 15.

### **Export Sales Contract and the Applicable Law**

Exports (or Imports) are the beginning of all international trade transactions. All export transactions are legalised through contracts called Export Sales Contracts (ESC) or Export Contracts and all imports are also legalised through contracts called Import Contracts.

Briefly we can define an export sales contract (ESC) as a contract whereby the exporter transfers or agrees to transfer the property in goods to the importer for a price. From this definition we find that ESC is broadly divided into two parts namely:

- a) export (or sale) where the exporter transfers the property in goods (ownership) to the importer then and there or immediately and
- b) an agreement to export (or an agreement to sell) where the exporter only agrees to transfer the property in goods (ownership over the goods) at a future date or on the fulfilment of certain conditions. Export or an outright sale is an absolute, unconditional and executed contract involving a contract plus conveyance. Export sales because of its peculiar nature involve a lot of legal formalities. Hence, exports cannot be effected across the counter and there cannot be an outright sale as it happens in case of domestic sales.

The agreement to export (or agreement to sell) operates as a present sale of future goods. All export contracts are mostly in the nature of an agreement made at present to export goods at a future date when these are either procured or manufactured. Hence, all agreements made at present to export are conditional, executory and only contracts pure and simple without involving any conveyance or delivery of goods at the time when the agreement is concluded. However, an agreement to export becomes an actual export (or sale) at a future date when goods are supplied and the ownership over the goods is transferred from the exporter to the importer. Hence, the agreement to export which continues to operate as an executory contract becomes an executed contract when actual exports take place.

Apart from the nature, the export contract (ESC) has the following basic elements.

- a) ESC must involve two parties — the exporter (seller) and the importer (buyer)
- b) Goods form the subject matter of ESC may be existing or future goods. Existing goods which are within the control i.e. possession and ownership of the exporter form the subject matter of export (or sale). The future goods which are yet to be procured or manufactured by exporter, form the subject matter of an agreement to export. The goods include all movables as defined by the law on sale of goods.
- c) In case of export (or sale) the property in goods (ownership) is transferred immediately from the exporter (seller) to the importer (buyer). The importer or buyer becomes the owner and he bears all risks of loss or damage to the goods. In case of an agreement to export (or an agreement to sell) the property in goods is transferred at a future date. As the exporter (seller) continues to be the owner of goods, he bears all the risks arising out of loss or damage to the goods. According to the law on sale of goods, risk follows property.
- d) Price is the consideration in a contract of export sales. An export sales contract must be supported by consideration. If it is without a price, it is only a gift pure and simple and cannot be called an export sales contract (or a contract of sale). Price therefore, forms an essential element of a contract of export sales (or a contract of sale).
- e) All other elements of a valid contract are also applicable to a contract of export sales.

ESC which creates a legally binding relationship between the exporter and the importer is governed by the law on sale of goods. In case of a domestic sales contract, the domestic or national law on sale of goods automatically applies. For example, in a contract of sale between a seller and a buyer both belonging to India, the Sale of Goods Act 1930 automatically applies to their contract. But if there is an export sales contract between an Indian exporter (seller) and an overseas importer, the law applicable to their contract is the proper law of the contract (PLC) for reasons already explained earlier. The PLC may not or may be the Indian exporter's country law depending upon the existence or non-existence of a choice of law clause in the ESC. The details of PLC are discussed in Unit 15.

### **Other Contracts and the Applicable Law**

Once the export sales contract is concluded between the exporter and the overseas importer, the exporter takes various steps for the execution/performance of the export contract. After conclusion of the export contract, the exporter has to execute a number of other contracts. These contracts, which revolve around the ESC are distinctly different contracts although related or connected to ESC. These contracts, like the contract and export contract are also governed by their relevant laws and the concerned parties (to these contracts) have to contract and operate subject to the provisions of these relevant laws. Since, these contracts are international in character, the law that governs or applies to these contracts may not or may be the national or domestic law of the exporter. So for the time being we can say that *lex causae* or the proper law of the contract (PLC) will be applicable to these contracts. As a matter of clarification here we can cite at least few examples of contracts which follow conclusion of the export sales contract. The exporter after conclusion of the export contract with the importer has to arrange shipment of goods. He approaches the concerned shipping company and enters into a contract called contract of affreightment. This contract is governed by the Carriage of Goods by Sea Act and other relevant laws and some international conventions. Similarly, if the exporter is requested by the importer to get the goods insured, he enters into a contract of insurance with the insurance company which is governed by the Marine Insurance Act. The various contracts and their governing or applicable laws have been conveniently given in Table 14.1 for better understanding and insight.

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## **14.3 LEGAL FRAMEWORK OF FOREIGN TRADE WHEN THE RELATIONSHIP OF THE PARTIES IS NON-CONTRACTUAL**

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You have learnt the contractual relationship and obligations between the parties to international trade transactions and the relevant laws governing these contracts. Now, we will discuss a set of circumstances where the parties to international trade transactions are obligated to comply with the provisions of certain laws and international conventions although their relationship are not contractual as they have not entered into any contract or there is no need for the same.

### **Exporter and the Government**

Export contract is a private contract between the exporter and the importer and the Government (say the Government of India) not being a party to this contract has nothing to interfere with this contract. But the Government of India has enacted various laws and regulations like Foreign Trade (Development and Regulation) Act 1992, Foreign Exchange Regulations Act, Customs Act, Customs Tariffs Act, Preshipment and Quality Control Act etc. and it mandates the exporter to conclude his export contract subject to the provisions of these laws. This simply means that the international trade transactions legalised through export contract has to be concluded subject to the provisions of these laws although the exporter has no contractual relationship with the Government. The exporter is obligated to operate within the limits of the provisions of these laws.

## Exporter and International Agencies

Secondly, the International Chamber of Commerce (ICC), Paris has formulated certain conventions like INCOTERMS (International Contract Terms) 1990 and UCPDC — in short UPC (Uniform Customs and Practices for Documentary Credits) 1993 which have been universally accepted by the international business community to be applicable in international trade transactions. Since these conventions have assumed the force of law over a period of time and have become universally acceptable to the international business community, the parties to international trade transactions, although they have no contractual relationship with ICC, Paris, are bound to honour the provisions of these conventions once they agree and accept that their contract is subject to the provisions of these conventions.

## Exporter and Consumers

Thirdly, increased consumerism in recent years has given rise to a set of Consumer Protection Acts, Product Liability Laws and Directives. EC has a Directive on Product Liability and other laws to ensure protection to consumers. Several countries world over have enacted Consumer Protection Acts to safeguard the interests of the consumers. The exporter, although is not contractually related to and has no contractual liability towards the consumers, is liable to compensate the consumers for any injury caused to them or damage done to their properties by his defective products under and in accordance with the provisions of the above mentioned laws. The exporter cannot escape liability as he is subject to these laws even if he has no contractual responsibility and liability towards the consumers. Apart from consumer protection laws, the parties to foreign trade transactions are also subject to the provisions of Environment Protection Acts enacted by different countries and have to operate within the limits of Environment Protection Laws even if they have no contractual relationship with the authorities formulating and enforcing these laws. Look at Table 14.1 which provides an overview of legal framework of foreign trade.

**Table 14.1 Legal Framework of Foreign Trade**

Parties/Nature of Relationship	Type of Contract	Governing or Applicable Law
<b>I-CONTRACTUAL</b>		
1. Exporter-Importer	Export Sales Contract	Proper Law of Contract (PLC) which may or may not be Indian Contract Act 1872 & Sale of Goods Act 1930 depending on the existence or non-existence of a choice of law clause in the contract.
2. Exporter-Servicing Agencies	Other Contracts	
a) Exporter-Shipping Company	Contract of Affreightment	Carriage of Goods by Sea Act 1925, Carriage of Goods by Air Act 1934, Indian Bills of Lading Act 1956, Common Carriers Act 1965 The Multimodal Transportation of Goods Act 1993 International Conventions on Carriage of Goods by Sea and Air. Like Hague Convention & Warsaw Pact
b) Exporter-Insurance Company	Contract of Insurance	Marine Insurance Act, 1963
c) Exporter-Importer (for settlement of trade disputes)	Contract of Arbitration	The Arbitration and Conciliation Act 1996
d) Exporter-Issuing Bank	Letter of Credit Foreign Exchange Management Act, 1999 UCPDC of ICC Paris	Indian Contract Act 1872,
e) Exporter-Distributor	Distributorship Agreement	Indian Contract Act 1872 Sale of Goods Act 1930.

Parties/Nature of Relationship	Type of Contract	Governing or Applicable Law
f) Exporter-Agent	Agency Agreement	Indian Contract Act 1872 including the Law on Agency Foreign Exchange Management Act, 1999
g) Exporter-Port-Trust Authority (PTA)	Agreement with PTA	Major Port Trust Act 1963
h) Exporter-E.C.G.C. Contract	Export Risk	— E.C.G.C. Regulations
i) Exporter-Raw Material or Semi-Finished Product Supplier.	Import or Purchase Contract	— Indian Contract Act 1872 — Sale of Goods Act 1930
<b>II-NON CONTRACTUAL</b>		
3. Exporter-Government of India	Non Contractual	a) Foreign Trade (Development and Regulation) Act 1992 b) Foreign Exchange Management Act, 1999 c) Preshipment Inspection and Quality Control Act, 1963 d) Customs Act, 1962 e) Customs Tariffs Act, 1975
4. Exporter-International Agencies	Non-Contractual	1) INCOTERMS, 1990 of ICC Paris. 2) Uniform Customs and Practices for Documentary Credits, 1993 of ICC, Paris. (Commercial Practices/uses having a bearing on Export Import Contracts.)
5. Exporter-Consumers	Non-Contractual	3) Product Liability Laws or Directives. 4) Consumer Protection Acts. 5) Environment Protection Acts.

**Check Your Progress A**

1. What is contract?

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2. What do you mean by Export Sales Contract?

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3. What is Proper Law of Contract?

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4. State whether following statements are true or false:
- i) Contract is considered central to all international trade transactions.
  - ii) An agreement is the sum total of offer and acceptance.
  - iii) The agreement to export operates as a future sale of future goods.
  - iv) A contract can be called export sales contract without a price.
  - v) Export contract has a directive on product liability and other laws to ensure protection to consumers.

## **14.4 AN OVERVIEW OF INDIAN CONTRACT ACT 1872**

You have learnt that in the absence of an acceptable international trade law applicable to international contracts the national laws apply either by express or implied choice or selection or in the absence of such a choice by the law of the principal place of business of the exporter whose performance is the characteristic of the contract. In this context knowledge of the exporter's country laws and more particularly the laws on contract and sale of goods is essential as these laws are relevant as applicable laws for international contracts. Let us learn the major provisions of the Indian Contract Act 1872 and the Sale of Goods Act 1930.

### **14.4.1 Structure of the Law of Contract**

Broadly the structure of the law of contract is given as follows indicating the relevant sections of the Indian Contract Act 1872 for reference and study.

- Definition or Interpretation clause including definition of contract, proposal, promise, consideration, agreement, void agreement voidable contract, void contract etc. — Sec 2(a to i)
- Offer and Acceptance including the essential elements and legal rules of offer and acceptance, communication and revocation of offer and acceptance. — Secs 3-9
- Essential Elements of a Valid Contract including conditions of enforceability (Sec 10), capacity or competency (Sec 11 and 12) consent (Sec 13), lawful object and consideration (Sec 23 & 24), consideration (Sec 25), contracts declared void (Secs-26 to 28 & 30), certainty (Sec 29) — Secs 10-30
- Classification of Contracts based on Intention or Mode of Formation (express or implied), validity-(valid, voidable, void contracts, void including unlawful and illegal agreements, unenforceable contracts), Performance (executed or executory), Obligation (bilateral or unilateral)
- Quasi Contracts — Secs 68-72
- Contingent Contracts — Secs 31-36
- Performance and Discharge of Contracts including perform and offer to perform (Secs 37 and 38), refusal to perform (Sec 39), who must perform (Sec 40 - 45), time and place of performance (Secs 46 - 50), performance of Reciprocal promises (Secs 51 - 54 & 57), time as the essence of contract (Sec 55), contracts need not be performed (Secs 56, 62, 63, 64 & 67), discharge of contract by performance, agreement or consent, impossibility, lapse of time, operation of law and breach, remedies for breach of contract including damages, specific performance etc. (Sec 73-75) — Secs 37-67 and Secs 73-75

## 14.4.2 Special Features of the Law of Contract

The Indian Contract Act 1872 contains the law relating to contract. The Act (as stated in Sec 1) does not affect any usage or custom of trade.

Although based on British Common Law on Contract, the Indian law is more comprehensive and differs in details and principles and has been enacted in the Indian context taking into account Indian circumstances.

Indian contract Act is not a complete code on contract. Originally the Act contained 11 chapters with 266 sections. In course of time only first six chapters with section 1-75 have been retained as the core of this Act and the remaining chapters and sections have been either separated or separately enacted to keep pace with changing requirements. For example, the laws on sale of goods and Partnership once forming part of the Contract Act have been separately enacted as Sale of Goods Act 1930 and Partnership Act 1932. Some special contracts like Indemnity and Guarantee, Bailment and Pledge and Agency have been separated from the main Act. Some statutes dealing with special type of contracts like the Negotiable Instruments Act 1881, the Indian Arbitration and Conciliation Act 1996, Marine Insurance Act 1963 do not form part of the main Contract Act.

This Act (Secs 1 to 75) deals with general including limiting principles which are applicable to all contracts. The principles relate to formation, essential elements of validity, performance or breach and the remedies for the breach of contract.

The Contract Act permits the parties to create their own rights and duties which the law of contract will uphold and enforce provided such rights and duties have been created with the general including limiting principles laid down by the law of contract. The law of contract is not the whole law of agreements. Contract is an agreement enforceable by the law of contract. It covers and enforces only those agreements which create legally binding obligations. In view of this, social and domestic agreements which do not intend to create legally binding obligations are not covered by the law of contract.

The Law of Contract is not the whole law of obligations. The law of contract covers only contractual obligations i.e. obligations which originate from or spring from an agreement. In this context certain obligations arising out of social and domestic agreements, Tort or civil wrong, Quasi contracts, court judgements, status (husband-wife, trustee & beneficiary) are not covered by the law of contract although these are otherwise enforceable.

Law of contract creates *jus in personam* meaning personal rights available only to the parties to the contract as distinguished from *jus in rem* meaning rights over a thing available against the world at large. If A owns some money to B, B alone has personal right to recover the amount from A and none else can exercise this right. If X owns some land or building X has the right in rem to possess and enjoy the land or building against all others who have a duty or an obligation not to disturb X's possession or ownership.

### Definition of Contract

Sec 2 (h) defines a contract as an agreement enforceable by law. Contract has two elements viz a) an agreement and b) its enforceability by law.

Sec 2(e) defines an agreement as a promise or set of promises forming consideration for each other.

According to Sec 2 (b) a promise is an accepted proposal. A person is said to be making a proposal (offer) when he (say A) signifies his willingness to another person (say B) to do or abstain from doing something with a view to obtaining his (B's) assent to the act or abstinence (Sec 2a). When the assent is given by B, he (B) is said to have accepted the proposal or offer.

Logically, an agreement is an accepted proposal or sum total of offer and acceptance. An agreement can therefore, be formed atleast by two parties/persons and there must be a valid

offer given by one party and unconditionally and absolutely accepted by the other with an intention of creating legally binding obligations.

### 14.4.3 Essential Elements of a Valid Contract

All contracts are agreements but all agreements are not contracts. The law of contract enforces only those agreements which graduate to contract. The agreements in order to be enforceable by the law of contract must graduate to a contract. For the purpose the agreement must fulfil certain essential conditions or elements. In the absence of one or more of these elements the agreement is void ab initio (right from the beginning) and destitute of all legal effects. In view of this the agreement must have the following essential elements as contained in Sec 10 of the Indian Contract Act 1872.

- i) **Parties** : The agreement must be made between two or more parties/persons as one person cannot form an agreement.
- ii) **Offer and Acceptance** : There must be a valid offer and valid acceptance of the offer. As such the terms of the offer must be definite and certain and communicated to the person to whom the offer is made and offer must be made with an intention to create legal obligations. The acceptance of the offer must be absolute and unconditional and according to the mode prescribed and must be communicated to the offeror.
- iii) **Intention to Create Legal Obligations**: The parties must have the intention to create legally binding obligations. Obligation should be commercial and not social or domestic.
- iv) **Competency or capacity of the parties (Secs 11 and 12)** : The agreement must be between parties who are competent or capable to contract. For the purpose parties should not be minors or persons of unsound mind or disqualified from contracting by any law to which they are subject.
- v) **Genuine consent (Sec-13)** : Consent is the foundation of an agreement. As such, there must be consensus ad idem for the validity of the agreement which means consent given by the parties to the agreement must be real and genuine and it should not be vitiated by mutual or common mistakes. The parties must understand and agree the same thing (subject matter) in the same sense (terms). Lack of consensus renders the agreement void ab initio.
- vi) **Consideration (Sec-25)** : The agreement must be supported by consideration. If consideration (some thing in return or something for something) is lacking, the agreement is only a 'nudum pactum' (naked promise) and void ab initio.
- vii) **Lawful object and consideration (Secs 23 & 24)** : The object as well as the consideration must be lawful. In other words, the object and consideration of the agreement should not be unlawful, illegal, immoral or opposed to public policy (public good).
- viii) **Certainty (Sec-29)** : The agreement must be certain and not vague or indefinite. If the terms of the agreement are uncertain the agreement is void ab initio.
- ix) **Possibility of performance (Sec 56(i))** : The agreement must not be entered into to do an act impossible in itself i.e. the act must be capable of performance. If the terms are not capable of performance the agreement is void ab initio.
- x) **Agreement not declared void (Sec 26-30)** : The agreement must not have been expressly declared void by any law in force in the country. In view of this the agreements against public policy which have been declared to be void by the Contract Act cannot become contracts to be enforceable. Here we are listing some of these agreements which are against public policy as contained in the Act.
  - a) Agreements in restraint of marriage of any person other than a minor are void ab initio. (Sec -26)
  - b) Agreements in respect of trade which restrain a person from exercising a lawful profession trade or business excepting reasonable restraints are void ab initio. (Sec. 27).

- c) Agreements in restraint of legal proceedings excepting arbitration agreement are void ab initio. (Sec. 28).
- d) Agreements by way of Wager are void ab initio subject to certain exceptions as specified under Sec. 30 including a contract of insurance which is not a wager.

#### 14.4.4 Classification of Contracts

In English Law contracts are broadly classified into a) formal contracts, and b) simple contracts.

- a) **Formal Contracts** : Briefly the formal contracts include 1) contracts of record and 2) contracts under seal. A contract of record is only an obligation arising out of a court judgement which is strictly speaking not a contract. A contract under seal which is a deed or a special contract is made in writing, signed, sealed and delivered by a person to another. Its validity depends only on the form and no consideration is necessary for its validity. Indian Law on contract does not recognise the British type formal contracts as mentioned above.
- b) **Simple contracts** : Contracts other than the above formal contracts are called simple contracts or parol contracts which may be express-(written or by words spoken) or implied and must be supported by consideration for their validity.

**Classification Under Indian Law** : The Indian Law on contract recognises only the simple contracts. Contracts under the Indian contract Act have been classified on certain basis as follows :

1. **Intention or mode of formation** : On the basis of intention the simple contracts may be either express or implied.

**Express contracts** : Express contracts are contracts the terms of which are stated in words spoken or written. Express contracts may therefore, be written contracts or oral contracts. Where the offer or acceptance is expressed or made in words, the promise is express (Sec 9). An express promise results in an express contract.

**Implied Contracts** : Implied contracts are contracts the terms of which are inferred from the acts or conduct of the parties or the circumstances of the case. Where the offer or acceptance of the promise is made otherwise than in words, the promise is implied (Sec 9). An implied promise results in an implied contract. When, for instance, you put a coin in the slot of a weighing machine or you get into a public transport and pay for travelling to a particular place or enter into a restaurant pay and take tea, you have entered into a contract known as implied contract.

2. **Validity or Enforceability** : Based on validity or enforceability the contracts have been classified as valid, void, voidable and unenforceable contracts.

- i) **Valid Contracts** : Valid contracts are contracts which have all the essential elements of a valid contract. In the absence of one or more of these elements the agreement can not graduate to a contract. Hence, the agreement is void ab initio and cannot be enforced by law.

- ii) **Void Agreements** : As defined under Sec.2(g) void agreement is an agreement not enforceable by law. It does not create any legal right or obligations. It is void ab initio (right from the beginning) it is a nullity and destitute of all legal effects. An agreement with a minor or with a lunatic or without consideration, or with an unlawful object is void.

- iii) **Unlawful Agreement** : As defined under Secs 23 & 24 an agreement is unlawful and void if its object or consideration is unlawful or both are unlawful. The object or consideration of an agreement is unlawful if a) it is forbidden by law, b) it defeats the provisions of any law, c) it is fraudulent, d) it implies or involves injury to the person or property of another and e) the court regards it as immoral or opposed to public policy.

- iv) **Illegal Agreements** : Illegal agreement is an unlawful agreement whose object or consideration is criminal in nature or immoral in character or both involve criminality or immorality. An illegal agreement is void ab initio and not enforceable by law. If the main agreement is illegal its collateral agreement is also tainted with illegality. If 'A' agrees to pay Rs. 5000/- to 'B', if 'B' assaults 'C' which is a crime. Here, both the object and the consideration are not only unlawful but additionally illegal, hence the agreement is not only void ab initio but unlawful including illegal. If the money promised to be paid for commission of the crime is borrowed by 'A' from 'D' which is a subsidiary or collateral transaction the same is also illegal and void. It should be remembered that all illegal agreements are unlawful and void, but all unlawful and void agreements are not necessarily illegal.
- v) **Voidable Contracts** : According to Sec 2(i) a voidable contract is a contract which is valid in the beginning but can be avoided subsequently at the option or instance of one of the parties to the contract, but not at the option of the other party. The voidable contract continues to be valid until it is avoided by the party entitled to do so. This happens in cases when the consent given by a party to a contract is not free (Sec 14) which means the consent of the party was present but the same was obtained by coercion (Sec 15) or undue influence (Sec 16), or fraud (Sec 17), or misrepresentation (Sec 18) or unilateral mistakes of fact induced by fraud (Sec 22). Since the consent is caused by either of these factors the contract is voidable at the instance of the party whose consent was so obtained (Sec 19 and 19A). Suppose A is forced to sign a promisory note at pistol point his consent cannot be said to be free and he can avoid the contract.
- vi) **Void Contract** : According to Sec 2(j) a contract which ceases to be enforceable by law becomes void. A contract valid in the beginning becomes void firstly, due to subsequent impossibility or illegality Sec 56 (2) or contingent contracts to do or not to do something if an uncertain future event happens becomes void if the event becomes impossible. (Sec 32). For example, A & B agreed to marry each other on a particular date. A became mad before the appointed date of marriage — contract becomes void according to Sec 32 and 56 (2). A contract to import goods from a foreign country becomes void subsequently due to illegality if war breaks out between the importing and exporting country. Secondly, a contract when ultimately avoided by the affected party under sec 19 and 19A as said earlier becomes void which means voidable contracts become void ultimately.
- vii) **Unenforceable Contract** : An unenforceable contract is a contract which is neither void nor voidable but cannot be enforced in a court of law due to a) some technical defects like inadequate stamp duty (which can be later corrected after payment of additional stamp duty), b) lack of a written contract, c) absence of a written and registered contract. Certain contracts like bill of exchange, cheques, promisory notes according to Negotiable Instruments Act 1881 or a promise to pay a time barred debt according to Sec 25 of Indian Contract Act 1872 which are required to be in writing become unenforceable if these are not reduced to writing in the beginning. Transfer of immovable property under Transfer of Property Act 1882 and documents under the purview of Sec 17 of the Registration Act 1908 which are required to be in writing and registered become unenforceable if these formalities have not been complied with from the beginning.

3. **Performance** : Based on performance contracts are classified as executed or executory contracts.

**Executed Contracts** : Executed contracts are contracts in which both the parties have executed or performed their respective obligations. Sale is an executed contract where price is paid and goods are delivered then and there.

**Executory Contracts :** A contract is executory when both the parties are yet to perform their contractual obligations like an agreement to sell where goods have to be delivered at a future date and price to be paid at a future date. The executory contract becomes an executed contract at a future date when goods are delivered and price is paid.

- 4. **Obligations :** Based on obligations contracts are classified as Bilateral and Unilateral contracts.

**Unilateral Contracts :** Unilateral or one sided contract which is similar to executed contract is one where one party has fulfilled his obligation and the other party has to fulfil his part of the obligation at the time of formation of the contract. For example, when your luggage is carried by a coolie and placed in your carriage the coolie has performed his obligation now you have to fulfil your obligation by paying his charges.

**Bilateral Contracts :** Bilateral contract which is similar to executory contract is one where obligations on the part of both the parties to the contract are outstanding at the time of the formation of the contract.

- 5. **Quasi Contracts :** Quasi Contracts covered under secs. 68-72 of the Indian Contract Act, represent certain relations resembling those created by contracts. Contracts are agreements which create legal obligations. Sometimes legal obligations are created by law without agreements. These are enforceable by law - as if there is a contract, (Quasi-means as if). Strictly speaking Quasi contract is not a contract at all. Although it is enforced like a contract only on equitable grounds as this contract is based on equity. The equity and justice do not permit a person to be unjustly enriched at the cost of another. So the benefit received must be returned as the quasi contract is based on the principles of restitution. For example, a) if you find a gold ring lying on the floor belonging to somebody, you have a quasi contractual obligation to return the gold ring to the true owner (Sec 71), b) if you pay some money to B by mistake which is due to be paid to C. B has a quasi contractual obligation to refund the money to you (Sec. 72). Sections 68-72 contain five different examples of quasi contractual obligations which may be seen for more insight into the quasi contracts.

**Check Your Progress B**

- 1. What is genuine consent?

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- 2. Write three examples of those agreements which are void.

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- 3. Distinguish between express contracts and implied contracts.

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 4. Write three examples of voidable contracts.

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5. State whether following statements are true or false.

- i) Indian Contract Act is a complete code on contract.
- ii) The law of contract enforces only those agreements which do not graduate to contract.
- iii) In implied contracts, the terms are inferred from the acts or conduct of the parties or the circumstances of the case.
- iv) An agreement with a minor is void.
- v) Quasi contract is a contract but it cannot be enforced like a contract.

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## 14.5 SALE OF GOODS ACT 1930 — AN OVERVIEW

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You have learnt the salient features of Indian Contract Act. Sale of Goods Act is another important area for the foreign trade. Let us discuss them in detail.

### 14.5.1 Structure of the Law of Sale of Goods

Broadly the structure of the law on sale of Goods as contained in Sale of Goods Act 1930 is given as follows along with the relevant sections for reference and study.

- Definition of Terms including, buyer, seller, delivery, document of title to goods, future goods, goods, price, property in goods, etc. Sec. 2.
- Definition and Formation of a Contract of Sale including the concept of sale and an agreement to sell, essential elements of a contract of sale, formation of a contract of sale, subject matter, price etc. Secs. 4-10
- Conditions and Warranties including stipulations relating to time (Sec. 11), stipulations regarding goods (Sec. 12), implied conditions (Secs 14a, 15, 16 17), implied warranties (Sec. 14b and c) Secs. 11-17.
- Transfer of Property and Risk including transfer or passing of property in goods (Secs-18 to 25) Passing of risk (Sec. 26), sale of goods by non-owner. (Sec. - 27-30). Secs. 18-30
- Performance of the Contract of Sale including delivery of goods, buyer's rights and duties etc. (Sec 31 - 44), Seller's rights and duties etc. (Secs 45-54) Secs 31-54
- Remedies for Breach of Contract of Sale and Miscellaneous Provisions. Secs. 55-64  
 Seller's remedies (Secs 55, 56, 60 & 61(2)a  
 Buyer's remedies (Secs 57, 58, 59, 60 & 61(2)b)

### 14.5.2 Special Features of the Law of Sale of Goods

The law on sale of goods is contained in Sale of Goods Act 1930. Before this Act was enacted the law on sale of goods was contained in chapter viii (Secs 76-123) of the Indian

Contract Act 1872. The Indian Act is based mainly on the English Sale of Goods Act - 1893.

Although the law on sale of goods has been separately, enacted, the general provisions and principles of the Indian Contract Act 1872 continue to apply to contracts for the sale of goods unless these are inconsistent with the express provisions of the Sale of Goods Act (Sec. 3). In view of this, the general principles of contract like, offer and acceptance, competency of the parties, consent, consideration, legality of the object, certainty etc. are applicable to contracts of sale. Again the remedies for breach of contract prescribed under Sections 73 and 74 of Indian Contract Act 1872 are also applicable to a contract of sale.

The law on sale of goods provides certain special features which are not found in the general law on contract. These features can be stated as - implied conditions and warranties in a contract of sale, transfer of property in goods to the buyer and acquisition of good title to goods, rights and duties of the buyer and seller, etc.

In case expressions used but not defined in the Sale of Goods Act - 1930, the definition and meaning assigned to these expressions in the Indian Contract Act 1872 will apply.

As mentioned earlier the Sale of Goods Act -1930 along with Indian Contract Act 1872 are relevant as applicable laws to international contracts if the parties have choiced these laws as applicable laws and in the absence of a choice, these laws will apply if the exporter has his principal place of business any where in India. Application of these laws as the proper law of the contract is subject to the qualifications and limitations discussed in Unit 15.

#### **Definition of a Contract for Sale of Goods**

According to Sec. 4 a contract of sale is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price.

A contract of sale includes both a sale (outright sale) and an agreement to sell. In a sale the property in goods is transferred from the seller to the buyer then and there or immediately where as in an agreement to sell the property in goods is transferred at a future date or on the fulfilment of certain conditions [Sec. 4(3)]. An agreement to sell is therefore, a present sale of future goods and it becomes an actual sale at a future date when goods are supplied or the conditions are fulfilled [Sec 4(4)]. An Agreement to sell is an executory or conditional contract and involves a contract pure and simple without conveyance or delivery of goods when the contract is made. The Sale, on the other hand is an executed, absolute and unconditional contract involving a contract plus conveyance.

An agreement to sell involves future goods meaning goods yet to be manufactured or procured, where as sale involves sale of existing goods meaning goods which are within the control (Possession & ownership) of the seller.

From the definition and explanations given above the essential elements of a contract of sale can be stated as follows:

- i) **Parties** : There must be at least two parties in a contract of sale i.e. the seller and the buyer, who should be competent to contract with the intention of creating legally binding relations. The seller is defined as a person who sells or agrees to sell goods [Sec.2(13)] and the buyer is a person who buys or agrees to buy goods [Sec 2 (1)].
- ii) **Transfer of Property** : The contract of sale involves transfer of general property in goods i.e. ownership. In sale transfer of property takes place immediately where as in an agreement to sell it takes place at a future date.
- iii) **Transfer of Risk** : Risk (of loss or damage to goods) follows property. In sale the buyer (owner) bears the risk, while in an agreement to sell the risk remains with the seller because the ownership is yet to be transferred to the buyer.

- v) **Goods** : Goods which form the subject matter of a contract of sale must be only movable goods. Sale is concerned with existing goods while agreement to sell involves sale of future goods.
- v) **Price** : Price is the money consideration in a contract of sale. Price is defined as the money value of goods expressed in the currency of a country. Consideration in a contract of sale must always be in terms of money. A counter trade in which consideration is partly in money and partly in goods is a sale, but a barter where goods are exchanged for goods is not a sale.
- vi) The other elements of a valid contract as indicated earlier in this unit, are also applicable to a contract of sale.

### **Formation of contract of Sale**

A contract of sale may be expressed (made in writing or by word of mouth ) or implied from the conduct of the parties [Sec 5(2)] or from the course of dealing between the parties. Like any other contract, a contract of sale is formed by offer and acceptance and no particular form is necessary for the purpose. The contract of sale may provide for immediate delivery of goods or payment of the price or both or the delivery or payment by instalments or the delivery or payment or both can also be postponed [Sec 5 (1)].

### **Subject matter of Sale**

You know that goods form the subject matter of a contract of sale. Goods have been defined in Sec. 2(7) as every kind of movable property other than actionable claims and money and includes stocks and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before or under a contract of sale. Trade marks, copyrights, patent rights, goodwill, electricity, water, gas are all goods. Actionable claims and money are not goods. Money means currency in circulation (excluding old coins which are goods) Actionable claims (as defined under Transfer of Property Act 1882) are claims which can only be enforced by action in a court of law. For example, unsecured debt, claims for salary or arrears of rent, or prize on a lottery ticket are actionable claims which can not be bought and sold.

Goods are classified as i) Existing goods ii) Future goods and iii) Contingent goods.

- i) Existing goods are goods which are owned and possessed by the seller at the time of the contract of sale. Existing goods forming the subject matter of sale may be ascertained (identified) or unascertained
- ii) Future goods are goods which are yet to be acquired or manufactured and to be owned and possessed by the seller. These goods form the subject matter of an agreement to sell Sec 2(6).
- iii) Contingent goods are goods the acquisition of which by the seller depends upon a contingency which may or may not happen.

### **Price**

Price, as you know, forms an important or essential part of a contract of sale as money consideration [Sec 2(10)]. Price is expressed in terms of money. Price may be determined a) by the contract itself or b) in a manner agreed at the time of contract or c) in course of dealing between the parties Sec 9(1). If the price is not determined by any one of these methods buyer must pay a reasonable price to the seller Sec 9(2).

## **14.5.3 Conditions and Warranties in a Contract of Sale**

As you know in a contract of sale of goods there may be various terms and stipulations which may be either conditions or warranties.

Condition is a stipulation which forms the very basis of the contract, or, as stated in Sec. 12(2) is essential to the main purpose of the contract. The breach of a condition entitles the

buyer to repudiate or avoid the contract, to reject the goods and claim damages. Sometimes the buyer may waive the condition and treat the breach of condition as a breach of warranty Sec 13 (1).

Warranty is stipulation collateral or subsidiary to the main purpose of the contract. Its breach which is not considered to be serious entitles the aggrieved party to claim only damages without any right to avoid the contract or reject the goods Sec 12 (3).

The stipulation in a contract of sale is a condition or warranty depends on the construction of the contract in each case Sec 12(4). For example, A agrees to supply a suit to B on 15th November which B wants to wear on the occasion of his marriage on 16th November. Here the time of delivery is a condition. If A agrees to supply a suit to B on 15th November which B wants to use in the following winter season. Here the time of delivery is a warranty. It is, therefore, essential to look into the intention of the parties from the circumstances and the terms of the contract to ascertain whether a stipulation is a condition or warranty in a contract of sale.

Conditions and warranties may be express or implied. Express conditions and warranties are those stipulations which are agreed to by the parties at the time of the contract. Implied conditions and warranties are those which are implied by law unless the parties stipulate to the contrary. Sec 16 (4) and Sec 62.

### **Implied Conditions**

Implied conditions in a contract of Sale as provided in Secs 14 to 17 are as follows:

- 1) **Implied Condition as to Title — Sec 14(a) :** In a contract of sale there is an implied condition on the part of the seller that i) in the case of a sale, he has a right to sell the goods, and ii) in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass.
- 2) **Implied Condition of Sale by Description — Sec 15 :** Where there is a contract for sale by description, there is an implied condition that the goods supplied shall correspond with the description. If the sale is by sample as well as by description, the goods supplied shall not only correspond with sample but must correspond with the description. The description relates to class or the kind of the goods, weight or measurements, condition of goods, type of packing etc. which are relied upon by the buyer.
- 3) **Implied Condition as to Quality or Fitness — Sec 16 (1) :** There is an implied condition as to quality or fitness where a) the buyer relies on the seller's skill or judgement as to the fitness of the goods for a particular purpose, b) the buyer expressly or impliedly makes known to the seller the purpose for which he wants the goods and c) the goods sold or supplied are of such a description which the seller deals in the ordinary course of business. In view of this, the rule of Caveat Emptor does not protect the seller. Condition as to quality and fitness does not apply to a contract for sale of patented and trade mark goods (provision to Sec. 16 (1).
- 4) **Implied Condition as to Merchantable Quality — Sec 16(2) :** When goods are bought by description from a seller who deals in goods of that description whether he is the manufacturer or not, there is an implied condition that goods shall be of merchantable quality. Merchantable quality signifies that the goods must have use and exchange value, i.e. it should be usable and commercially saleable at their full value. For example, a watch that does not keep time and a pen which does not write cannot be regarded as merchantable. The implied condition as to merchantable quality also applies to patented or trade mark goods. The implied condition as to merchantable quality applies when there is a latent defect in the goods even if the buyer has examined the goods. But, this implied condition will not be applicable for any patent defects in goods if the buyer has the opportunity to examine and he has thoroughly examined the goods.
- 5) **Condition Implied by Custom — Sec 16 (3) :** An implied condition as to quality or fitness for a particular purpose can be annexed by the usage of trade.

- 6) **Implied Condition as to Wholesomeness** : In case of eatables and provisions there is an implied condition that the goods shall be wholesome and fit for human consumption in addition to the implied condition of merchantability.
- 7) **Implied Condition in a Sale by Sample — Sec 17** : In the case of a contract of sale by sample there is an implied condition that a) the bulk of the goods supplied shall correspond with the sample in quality; b) the buyer shall have a reasonable opportunity of comparing the bulk with the sample; and c) the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

#### **Implied Warranties — Sec 14(b) and (c)**

In a contract of sale unless there is a contrary intention, there is an implied warranty that

- a) the buyer shall have and enjoy quiet or peaceful possession of the goods, Sec 14(b), which means that buyer's possession of the good should not be disturbed and
- b) the goods are free from any charge or encumbrance in favour of any third party, Sec. 14(c). The buyer has a right to be compensated by the seller if he discharges any charge or encumbrance on the goods. The buyer will have no such rights if he purchases the goods with the knowledge of such charge or encumbrances.

Apart from these the following two additional implied warranties are also applicable to a contract of sale.

- c) An implied warranty as to quality or fitness for a particular purpose can be annexed by the usage of trade.
- d) When goods are inherently dangerous or are likely to be dangerous to the buyer, there is an implied warranty that the same should be brought to the notice of the buyer or the seller shall warn the buyer of the probable danger, otherwise the seller shall be liable.

#### **14.5.4 Transfer of Property in the goods**

You know that transfer of property in the goods from the seller to the buyer is the essence of the contract of sale. Sometimes the property in goods (ownership over the goods) is transferred at the time contract is made (sale) and sometimes at a later date or time (agreement to sell). The point of time when the ownership passes from the seller to the buyer becomes important for the following reasons.

- a) Risk follows ownership or property whether delivery has been made or not and whether price has been paid or not subject to the agreement between the parties.
- b) If goods have been damaged or destroyed by a third party the owner of the goods can take action against him.
- c) In case of insolvency of the parties, the ownership helps the official receiver to take over the goods or not.

**Rules for Transfer of Property — Secs 18-25** : The rules for transfer of property in goods are as follows.

##### **1. Unascertained Goods — Secs 18, 23 & 25**

In a contract for sale of unascertained goods, no property in the goods is transferred to the buyer unless the goods are ascertained (identified or earmarked) Sec 18. Similarly, if the subject matter is future goods [Sec. 2(6)], the contract operates as an agreement to sell [(Sec. 6(3)]. Hence the buyer does not become the owner at the time of making the contract.

Firstly, after the goods have been ascertained the property in them will pass when the parties do intend it to pass. [Sec. 19(3)].

Secondly, if the parties have expressed no intention the property in unascertained goods passes in accordance with the provisions of Sec. 23 in the following manner.

- (a) In case of unascertained or future goods sold by description, property in goods passes to the buyer only when goods of that (or the same) description and which are in a deliverable state are unconditionally appropriated to the contract either by the seller with the assent of the buyer or by the buyer with the assent of seller. Delivery to the buyer or to a carrier or other bailee (the seller not reserving the right of disposal) amounts to an unconditional appropriation.
- (b) The property in goods, whether specific or subsequently appropriated to the contract does not pass to the buyer if the seller reserves the right of disposal of goods until certain conditions are fulfilled Sec 25.

**2. Specific or Ascertained Goods — Secs 19, 20, 21, 22 & 24**

In case of a contract for sale of specific goods or ascertained goods, the property in goods is transferred to the buyer at such time when the parties do intend the same to be transferred. Intention of the parties can be ascertained from the terms of the contract, the conduct of the parties and the circumstances of the case [Sec 19. (1) (2)].

In case the intention of the parties can not be ascertained the following rules as contained in Secs 20 to 22 and 24 shall be applicable for passing of the property to the buyer. [Sec. 19(3)]

**a) Specific Goods in a Deliverable State — Sec 20**

Property in specific goods in a deliverable state passes as soon as the contract is entered into if the contract is unconditional.

**b) Specific Goods not in a Deliverable State — Sec 21**

Property in specific goods passes only after the seller has done something to put the goods in a deliverable state and the buyer has notice there of.

**c) Specific Goods in a Deliverable State to be Weighted Measured, etc. by the Seller — Sec 22**

Property in specific goods in a deliverable state passes when the seller has weighted, measured, tested etc. to ascertain the price of the goods with the notice of the buyer.

**d) Goods Sent on Approval or on Sale or Return — Sec. 24**

Property in goods passes to the buyer when the buyer signifies his approval or acceptance to the seller or when he does some act adopting the transaction. When he does not signify his approval to the seller but retains the goods without giving notice of rejection the property passes to the buyer when the time agreed for returning the goods expires and if no time has been fixed on expiration of a reasonable time.

**14.5.5 Transfer of Title to Goods**

According to the general rule of law as contained in Sec. 27 when the seller himself is the owner of the goods which he sells or when he is specifically authorised to sell as somebody's agent, he can convey a good title in goods to the buyer. If the seller is neither the owner nor has he the authority to sell, the title of the buyer will not be better than that of the seller. This rule is derived from the 'Latin Maxim Nemo dat quod non habet' which means that no body can give what he himself has not got i.e. **a seller cannot convey a better title than that of his own.** If the seller's title is defective the buyer's title will also be subject to the same defect. This implies that the buyer's title will not always be a bad one although the buyer cannot acquire a superior title to that of the seller. If a thief sells stolen goods, the buyer of such goods will have the same title as the thief or seller had. If a hire purchaser sells the goods to a buyer before paying all instalments the owner can recover the goods from the buyer.

## Exceptions to the nemo dat rule

The general or the nemo dat rule contained in Section 27 is subject to the provisions of Sale of Goods Act 1930 and the Indian Contract Act, 1872 which incorporate various exceptions under which the seller may not be having a good title to the goods, yet the buyer can get a good title to them. The exceptions are stated as follows:

- 1) **Transfer of Title by Estoppel (Sec 27):** When the owner of the goods by his act or omission makes the buyer believe that the seller of the goods has the right or authority to sell, subsequently the owner will be estopped from denying the right of the seller and the buyer in such a case gets a better title than that of the seller.
- 2) **Sale by a Mercantile Agent (Proviso to Sec 27):** When a mercantile agent having authority to sell (the goods of the principal or owner) he can convey a good title.
- 3) **Sale by one of the Joint Owners (Sec. 28):** If one of the several joint owners or co-owners is in sole possession of the goods with the permission of other co-owners, a sale by him will convey a good title to the buyer who buys in good faith without notice of the fact that the seller has no authority to sell.
- 4) **Sale by a person in possession under a voidable contract (Sec 29):** If a person has the possession of goods under a voidable contract and sells the goods before the contract is avoided by the aggrieved party under Sec 19 and 19A of Indian Contract Act; the buyer of that goods acquires a good title provided the buyer buys in good faith without notice of the seller's defective title.
- 5) **Sale by the Seller in Possession After Sale (Sec 30(1)):** If a seller or his mercantile agent continues to be in possession of the goods or the documents of title to goods after sale, effects a sale (to a second buyer) or pledges the goods or delivers the documents of title to the goods, conveys a good title to the buyer acting in good faith having no notice of the previous sale.
- 6) **Sale by the Buyer in Possession (Sec 30(2)):** If the buyer has obtained the possession of goods or the documents of title to the goods with the consent of the seller, he can effect a sale, pledge etc. and convey a good title to the buyer or transferee provided the buyer or transferee acts in good faith with no notice of the lien or other rights of the original seller in respect of these goods.
- 7) **Sale by an unpaid Seller (Sec 54 (3)):** If an unpaid seller has exercised his right of lien or stoppage in transit and the buyer has not paid him, he can resell the goods and convey a good title to the second buyer.
- 8) **Sale by finder of Goods (Sec 169 of Indian Contract Act):** The finder of goods can sell the goods belonging to the true owner and convey a good title provided goods are likely to perish or lose its value and when the true owner refuses to pay the lawful charges paid by the finder for the goods amount to two thirds of the value of good.
- 9) **Sale by Pawnee (Sec 176 Indian Contract Act):** If the Pawnor makes a default in the payment of the debt (secured by goods), the pawnee may either sue him for the debt or may sell the goods pledged on giving the pawnor reasonable notice of sale. In such cases the buyer acquires a good title to goods.
- 10) **Sale of Goods in Market Overt:** According to the English Sale of Goods Act in case of sale of goods in market overt or open market, the buyer acquires a good title to the goods from a seller who generally deals in such goods according to the usage of the market provided he buys in good faith without notice of any defect or want of title.

### Check Your Progress C

1. What do you mean by an agreement to sale?

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2. Distinguish between conditions and warranties.

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3. What do you mean by transfer of title by Estoppel?

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4. Distinguish between future goods and contingent goods.

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5. State whether following statements are true or false.

- i) A contract of sale includes both a sale and an agreement to sale.
- ii) Unsecured debt is an example of actionable claims.
- iii) A pen which does not write may be regarded as merchantable.
- iv) If goods have been damaged or destroyed by a third party the owner of the goods cannot take action against him.
- v) If a thief sells stolen goods, the buyers of such goods will have the same title as the thief or seller had.

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## 14.6 LET US SUM UP

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The exporter, in the course of international trade transactions, is related contractually to importer and the various servicing agencies and non-contractually to the International Agencies, the Government and the consumers. This relationship becomes legal and binding. Such contractual and non-contractual relationships are subject to the limits of various laws and regulations framed thereunder. The parties have to operate within the units and in accordance with the provisions of such laws.

In the absence of an acceptable international trade law applicable to international contracts, the national laws apply either by express or implied choice or selection or in the absence of such choice by the law of the principal place of business of the exporter whose performance is the characteristic of the contract. Thus, the exporter's country laws, more particularly the laws on contract and sale of goods becomes important and relevant for international contracts. The major provisions of Indian Contract Act briefly discussed in the text include: structure of the law of contract, special features of the law of contract, essential elements of a valid contract and classification of contracts. The major provisions of Sale of Goods Act briefly discussed include: structure of the law of Sale of Goods, special features of the law of Sale of Goods, conditions and warranties in a contract of sale, transfer of property in the goods and transfer of title to goods.

## 14.7 KEY WORDS

**Void Ab Initio** : Void right from the beginning

**Proper Law of the Contract (PLC) or *lex causae*** : The law expressly or impliedly selected by the parties to govern their contractual relationship. In the absence of such a choice PLC is the law of the principal place of business of the exporter whose performance is the characteristic of the contract.

**Jus in personam & Jus in rem** : A personal right available against a specific person. Contract creates only jus in personam.

**Consensus ad idem** : Consensus ad idem means consent. When in an agreement the parties understand the same thing (i.e. subject matter) in the same sense (under same terms) we can say that the parties mind have met together and there is consensus ad idem, which is the foundation of an agreement.

**Consideration** : Consideration is something for something or something in return. All agreements to be enforceable by Law must be supported by consideration.

**Cross Offers** : Offers are cross offers when two identical offers made to each other without the knowledge of each others offer.

**Counter Offers** : Any variance to the original offer is a counter offer which is only a qualified acceptance and cannot be treated as valid acceptance.

**Free Consent** : Consent is said to be free when it is not caused by coercion or undue influence or fraud or misrepresentation.

**Illegal and Immoral Agreements** : An agreement whose object or consideration is to commit a crime or tort like an agreement to assault or to commit a theft etc. is illegal. An agreement whose object or consideration is to promote prostitution or sexual immorality, or concubinage is an immoral agreement.

**Wagering Agreement** : Wagering agreement is an agreement to pay money or money's worth on the happening or non-happening of a specified future uncertain event.

**Contingent Contracts** : Contingent contract is a contract to do or not to do something if some future uncertain event collateral to such contract does or does not happen.

**Quasi Contracts** : Quasi contracts represent certain relations resembling those created by contracts. It is a non-contractual obligation created by law.

**Buyer and Seller** : Buyer is a person who buys or agrees to buy goods and seller is a person who sells or agrees to sell goods.

**Goods** : Goods means every kind of movable property other than actionable claims and money and includes stocks and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be served before sale or under the contract of sale. Water, electricity gas, old coins are goods.

**Actionable Claims** : Actionable claims means any unsecured debt, claim for arrears of rent, claim in respect of salary or a claim for prize on a lottery ticket, claim on an insurance policy which can be enforced by an action in a court of Law.

**Document of title to goods** : It is a document which entitles the holder to receive, possess or have control over goods. The document also authorises its possessor to transfer the title to goods by either endorsement or delivery of both.

**Sale** : Sale (an actual or out right sale) is a contract where the transfer of property in goods (ownership) takes place immediately when the contract is made. It is an absolute and executed contract where there is a contract plus a conveyance (delivery of goods).

**Agreement to Sell :** Agreement to sell is a contract where the transfer of property in goods takes place at a future date or on fulfilment of certain conditions. Agreement to sell is a conditional and executory contract which is only a contract pure and simple.

**Conditions :** Condition in a contract of sale is a stipulation which forms the very basis of the contract or is essential to the main purpose of the contract.

**Warranty :** Warranty is a stipulation which is not so essential but only subsidiary or collateral to the main purpose of the contract.

**Caveat Emptor :** It means buyer beware. According to this rule the buyer while purchasing goods should be careful and ascertain that goods shall suit his purpose. If subsequently goods are found to be unsuitable for his purpose he cannot blame or hold the seller responsible.

**Merchantable Quality :** Goods to be merchantable means that goods must have use value and exchange value.

**Nemo dat quod non-habet:** This Latin maxim means that nobody can give what he himself has not got. This otherwise, means that the seller cannot convey a better title than that of his own.

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## 14.8 ANSWERS TO CHECK YOUR PROGRESS

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A4 i) True ii) True iii) False iv) False v) True

B5 i) False ii) False iii) True iv) True v) False

C5 i) True ii) True iii) False iv) False v) True

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## 14.9 TERMINAL QUESTIONS

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1. What are the various other contracts the exporter has to conclude while executing the export contract?
2. State briefly the various laws the exporter has to take into account before conclusion of the export contract.
3. "All contracts are agreements but all agreements are not contracts" Discuss.
4. State the circumstances under which an agreement is void ab initio.
5. State the difference between void and illegal agreements and void agreement and void contract.
6. What do you understand by Nudum Pactum? State the circumstances under which an agreement without consideration is valid.
7. What is the Doctrine of Privity of Contract? State the exceptions to this doctrine.
8. What is the Doctrine of Frustration of Contract? State the circumstances under which this doctrine operates in full force and this doctrine does not operate.
9. What is wagering agreement? State the various circumstances under which an agreement is not a wager.
10. The law of contract is not the whole law of agreements nor is it the whole law of obligations. Discuss.
11. What are the bilateral and unilateral mistakes of fact which render an agreement void ab initio.
12. Define a contract of sale and explain its essential elements.

13. What are conditions and warranties? State the implied warranties in a contract of sale.
14. Risk follows property. Explain this concept and state the exceptions.
15. Explain the concept of Nemo dat quod non habet and state the various exceptions to the general rule established by this concept.