MODULE 1

LEGAL ASPECTS OF BUSINESS AND CONTRACTS

CONCEPT of Law

Law is a system of rules that are created and enforced through social or governmental institutions to regulate behavior. It has been defined both as "the Science of Justice" and "the Art of Justice". Law is a system that regulates and ensures that individuals or a community adhere to the will of the state.

Laws are rules that may forbid individuals to perform various kinds of actions or that may impose various obligations on individuals. Laws may require individuals to undergo punishment for injuring other individuals. They may also specify how contracts are to be arranged and how official documents are to be created. They may also specify how legislatures are to be assembled and how courts are to function. They may specify how new laws are to be enacted and how old laws are to be changed. They may exert coercive power over individuals by imposing penalties on those individuals who do not comply with various kinds of duties or obligations. However, not all laws may be regarded as coercive orders, because some laws may confer powers or privileges on individuals without imposing duties or obligations on them.

TYPES of law

1. **Criminal law: -** Criminal law concerns itself with finding and punishing people who have broken the law by committing crimes. The goal of criminal law is to uncover the true perpetrator of a crime and exact justice. Criminal law includes a wide range of crimes, from homicides to pirating copyrighted material.
2. **Corporate law: -** Corporate law is the system of criminal justice that makes sure businesses adhere to local and federal regulations for conducting business legally. Paralegals in this specialty might work for a single corporation as part of their in-house legal team, or they might work for a firm that works with many corporate clients.
3. **International law: -** International law governs the interactions between different countries. These laws are designed to promote trade and to keep all citizens safe. International law often deals with issues related to preserving the environment, establishing basic human rights and regulating trade. International law is about the rules made by customs or treaty, recognized by the nations for trading and building relations with each other.
4. **Commercial law: -** sometimes called trade law or business law—deals with commerce, trade and consumer transactions. This broad legal field includes areas like bankruptcy, contracts, mortgages and real estate, consumer credit and banking. Paralegals in this legal specialty might find themselves reviewing contracts, filing bankruptcy documents, guiding debtors through the legal process or coordinating a real estate transaction.
5. **Family law: -** This type of law handles cases related to family relationships, such as divorce and child custody, adoption and termination of parental rights. These cases often involve children, and some surround difficult circumstances, such as child abuse or domestic violence.
6. **Constitutional law: -** This area of law includes any legal proceedings related to upholding or interpreting the U.S. Constitution. Court cases might surround issues like due process, civil rights or freedom of speech. Constitutional law paralegals often work for nonprofit or public interest groups. It
   helps if they have an eye for detail and a love of history because much of their work will involve reading the Constitution itself, as well as researching the outcomes of past constitutional law cases.

7. **Labor law: -** Labor laws oversee the relationship between employers and employees. Their goal is to ensure that employees aren't taken advantage of by corporations, which typically have more bargaining power or resources than an individual employee. Labor laws govern issues like collective bargaining, unionization, benefits disputes and more.
8. **Intellectual property law: -** Intellectual property (IP) refers to intangible creative works or inventions that are protected by copyrights, trademarks or patents. These laws work to protect creators from copyright infringement.

NATURE of Contract

Practically every personal business activity involves a contract; the purchase of a color TV, the renting of an apartment, buying a property. In each transaction relating to the acquisition of raw materials, their manufacture, and the distribution of the finished product by business, there are contracts that define the relationships and the rights and obligations of the parties.

DEFINITION

A contract is a binding agreement. By one definition a contract is "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty; Contracts arise out of agreements; hence a contract may be defined as an agreement creating an obligation.

The substance of the definition of a contract is that by mutual agreement or assent the parties create enforceable duties or obligations that are legally binding. That is each party is obligated to do or to refrain from doing certain acts. The substance of the definition of a contract is that by mutual agreement or assent the parties create enforceable duties or obligations that are legally binding.

According to Section 2(h) of the Act, the term contract is defined as *"an agreement enforceable by law"*. On analyzing the definition we find that, the contract consists of **two essential elements**: -an agreement, and-enforceability by law.

1. The **term 'agreement'** given in Section 2(e) of the Act is defined as "every promise and every set of promises, forming the consideration for each other". Again Section 2(b) defines promise as "when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. Proposal when accepted becomes a promise".

Thus we say that, an agreement is the result of the proposal made by one party to the other party and that other party gives his acceptance thereto.

Agreement=Offer/Proposal+ Acceptance

2. **Enforceability by law**-An agreement to become a contract must give rise to a legal obligation which means a duty enforceable by law. Thus from above definitions it can be concluded that –

Contract=Accepted proposal + Enforceability by law

Example: A agrees with B to sell car for ` Rs. 2 lacs to B. Here A is under an obligation to give car to B and B has the right to receive the car on payment of `Rs. 2 lacs and also B is under an obligation to pay ` Rs. 2 lacs to A and A has a right to receive `Rs. 2 lacs.

TYPES of Contract

On the basis of Enforceability

1. **Valid Contract**: An agreement, which is enforceable at law, is said to be a valid contract. When all the essentials of a valid contract that are laid down in Sec. 10 of the Act are fulfilled, an agreement becomes a contract.

2. **Voidable Contract:** An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract. A contract is voidable when one of the parties to the contract has not exercised his free consent. One of the essential elements of a formation of a contract for example, free consent, is absent. All voidable contracts are those which are induced by coercion fraud or misrepresentation. The person whose consent is not freely given may avoid a contract.
3. **Void Contract:** A contract which ceases to be enforceable by law becomes void. It should be noted that there cannot be a void contract because when the contract is void, it is no contract at all. The right expression therefore is void agreement and not void contract. A void contract differs from a voidable contract because, while a void contract is one that was never legally valid to begin with (and will never be enforceable at any future point in time), voidable contracts may be legally enforceable once underlying contractual defects are corrected. At the same time, void contracts and voidable contracts can be nullified for similar reasons.
4. **Unenforceable Contract:** A contract which cannot be enforced is a valid contract in law, but is incapable of proof, and therefore cannot be enforced in the Court of Law.
5. **Illegal Contract**: An illegal contract is one which breaks some rule of basic public policy or which is criminal in nature or immoral. It is void ab initio. Thus a contract to commit dacoity is an illegal contract and cannot be enforced at law.
6. **Void Agreement:** According to Section 2(g), an agreement not enforceable by law is said to be void. Such agreements are void- ab- initio which means that they are unenforceable right from the time they are made. E.g. in agreement with a minor or a person of unsound mind is void –ab-initio because a minor or a person of unsound mind is incompetent to contract.

On the basis Performance

1. **Executed Contract:** Where both the parties have performed their obligation, it is an executed contract. Even when one party to the contract has performed his share of the obligation, the contract is executed though to the other party is still under an outstanding obligation to perform his part of the promise.
2. **Executory Contract:** Here neither party to the contract has performed his share of the obligation, for example, both the parties have yet to perform their promises, the contract is executor. In an executory contract both the parties have to perform their mutual promises and the fact that they have to perform their parts of the contract does not affect the validity of the contract.

On the basis Formation

1. **Express Contract:** When the terms of a contract are reduced in writing or are agreed upon by spoken words at the time of its formation, the contract is express.
2. **Implied Contract:** When the proposal or acceptance of any promise is made otherwise than in words, the promise is said to be implied. Such an implied promise leads to an implied contract. **For example,** A boards a bus. It is implied from his conduct that A has entered onto an implied promise to purchase a ticket.
3. **Quasi-Contract:** Certain obligations which are not contracts in fact but are so in the contemplation of law. These are called Quasi-Contracts. **Illustration: -** 'A' supplies necessities to 'B' who is not capable of contracting and reimbursing to 'A'. A is entitled to be reimbursed from B's property.

On the basis Obligation

1. **Bilateral and Unilateral Contracts:** Where the obligation or promise in a contract is outstanding on the part of both the parties, it is known as bilateral contract.
2. **A Unilateral Contract:** It is a one sided contract in which only one party has to perform his promise or obligation to do or forbear. **E.g.** A makes payment for bus fare for his journey from Jaipur to Kanpur. He has performed his promise. It is now for the transport company to perform the promise.

ESSENTIAL of Valid Contract

1. **Offer and acceptance: -** In a contract there must be at least two parties one of them making the offer and the other accepting it. There must thus be an offer by one party and its acceptance by the other. The offer when accepted becomes agreement.
2. **Legal relationship: -** Parties to a contract must intend to constitute legal relationship. It arises when the parties know that if any one of them fails to fulfill his part of the promise, he would be liable for the failure of the contract. If there is no intention to create legal relationship, there is no contract between parties. Agreements of a social or domestic nature which do not contemplate a legal relationship are not contracts.
3. **Consensus-ad-idem: -** The parties to an agreement must have the mutual consent i.e. they must agree upon the same thing and in the same sense. This means that there must be consensus ad idem (i.e. meeting of minds).
4. **Competency of parties: -** The parties to an agreement must be competent to contract. In other words, they must be capable of entering into a contract.
   According to Sec 11 of the Act, "Every person is competent to contract who is of the age of majority according to the law to which he is subject to and who is of sound mind and is not disqualified from contracting by any law to which he is subject."
5. **Free consent: -** Another essential of a valid contract is the consent of parties, which should be free. Under Sec. 13, "Two or more parties are said to consent, when they agree upon the same thing in the same sense." Under Sec. 14, the consent is said to be free, when it is not induced by any of the following:- (i) coercion, (ii) misrepresentation, (iii) fraud, (iv) undue influence, or (v) mistake.
6. **Lawful consideration: -** Consideration is known as 'something in return'. It is also essential for the validity of a contract. A promise to do something or to give something without anything in return would not be enforceable at law and, therefore, would not be valid.
   Consideration need not be in cash or in kind. A contract without consideration is a 'wagering contract' or 'betting'. Besides, the consideration must also be lawful.
7. **Lawful objects: -** According to Sec. 10, an agreement may become a valid-contract only, if it is for a lawful consideration and lawful object. According to Sec. 23, the following considerations and objects are not lawful:-
   (i) If it is forbidden by law;
   (ii) If it is against the provisions of any other law;
   (iii) If it is fraudulent;
   (iv) If it damages somebody's person or property; or
   (v) If it is in the opinion of court, immoral or against the public policy.
8. **Agreement not expressly declared void: -** An agreement to become a contract should not be an agreement which has been expressly declared void by any law in the country, as it would not be enforceable at law.
   Under different sections of the Contract Act, 1872, the following agreements have been said to be expressly void, viz :-
   (i) Agreements made with the parties having no contractual capacity, e.g. minor and person of unsound mind (Sec. 11).
   (ii) Agreements made under a mutual mistake of fact (Sec. 20).
   (iii) Agreements with unlawful consideration or object (Sec. 23).
   (iv) Agreements, whose consideration or object is unlawful in part (Sec. 24).
   (v) Agreements having no consideration (Sec 25).
   (vi) Agreements in restraint of marriage (Sec. 26).

(vii) Agreements in restraint of trade (Sec. 27).
(viii) Agreements in restraint of legal proceedings (Sec. 28).
(ix) Agreements, the meaning of which is uncertain (Sec. 29).
(x) Agreements by way of wager (Sec. 30). and
(xi) Agreements to do impossible acts (Sec. 56).

9. **Certainty and possibility of performance: -** Agreements to form valid contracts must be certain, possible and they should not be uncertain, vague or impossible. An agreement to do something impossible is void under Sec. 56.
10. **Legal formalities: -** The agreement may be oral or in writing. When the agreement is in writing it must comply with all legal formalities as to attestation, registration. If the agreement does not comply with the necessary legal formalities, it cannot be enforced by law.

CONSIDERATION

Consideration is necessary for the formation of contract. Consideration is necessary for the one formation of a contract. It means "something returns". It is the price paid for contract. It must be Lawful. A contract without consideration is void.

Section 2(d) of the Indian Contract Act, 1872 defines consideration –

When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;

Anything of value promised by one party to the other when making a contract can be treated as "consideration": **for example,** if A signs a contract to buy a car from B for Rs.5, 000, A's consideration is the Rs.5, 000, and B's consideration is the car. Consideration is an essential element for the formation of a contract.

The ESSENTIALS or legal rules of a valid Consideration are as under:-

- **It must move at the desire of the promisor: -** In order to constitute legal consideration the act or abstinence forming the consideration for the promise must be done at the desire or request of the promisor.
  Example: - A saves B's house from the fire without being asked to do so. A cannot demand payment for his services because A performed this act voluntarily and not at the desire of B.
- **It may move from the Promisee or any other person: -** The second essential of a valid consideration is that consideration may move from the promisee or from a third person on his behalf. In other words the act which is to constitute consideration may be done by the promise or any other person.
  Example: - A, an old lady, gifted her property to her daughter R on the condition that she should pay certain amount annually to A's brother C. On the same day R, entered into an agreement with her Uncle C to pay the amount. Afterwards she refused to fulfill her promise. C filed a suit. It was held that C was entitled to recover the amo0unt as the consideration on his behalf had moved from her sister A.
- **It may be past, present or future: -** It is clear from the definition of consideration that it may be past present or future. It means that the consideration is an act, which has already been done at the desire of the promisor, or in progress or is promised to be done in future.
  - **Past Consideration: -** When the consideration for a present promise was given before the date of the promise it is called a past consideration. It is not a valid consideration.
    Example: - A has lost his purse and B a finder delivers it to him. B cannot demand payment for his services because of past consideration.

A teaches the son of B at B's request in the month of January and in February B promises to pay a sum of Rs.2, 000 for his services. The services of A will be past consideration.

- **Present Consideration: -** When consideration is given simultaneously by one party to another at the time of contract, it is called Present Consideration. The act constituting the consideration is wholly or completely performed.
  Example: - A sells a book to B and B pay its price immediately it is a case of present consideration.
- **Future Consideration: -** When the consideration on both sides is to be given at a future date, it's called future consideration or executory consideration. It consists of promises and each promise is a consideration for the other.
  Example: - X promises to deliver certain goods to Y for Rs.1500 after a week upon Y's promise to pay the agreed price at the time of delivery. The promise of X is supported by promise of Y and the consideration is executory on both sides.

- **It need not be Adequate: -** It is not necessary that consideration should be adequate to the value of the promise. The law only insists on the presence of consideration and not on its adequacy. It is for the parties to the contract to consider the adequacy of consideration and the courts are not concerned about it.
  Example: - A agrees to sell his car worth Rs.2, 00,000 for Rs.50, 000 only and his consent is free. The agreement is valid contract.
- **It must be Real: -** It is necessary that consideration must be real and competent. Where consideration is physically impossible illegal uncertain or unreal it is not real and therefore shall not be a valid consideration.
  - **Physically Impossible: -** A promise to do something which is physically impossible.
    Example: - A, promise to put life in B's dead brother on B's promise to pay him Rs.1 Lac.
  - **Legally Impossible: -** A promise to do something which is illegal.
    Example: - A promise to pay Rs.1 Lac to B on his promise to beat C.
  - **Uncertain Consideration: -** A promise to do something, which is too unclear and uncertain.
    Example: - An employs B for a certain work and B promises to pay A.

FREE CONSENT

As per Section 13 of the Indian Contract Act 1872, 'Two or more persons are said to consent when they agree upon the same thing in the same sense'. When the concept of free consent cannot be established a contract can become void.

It is one of the essential elements of a valid contract as it is evidenced by section 10 which provides that all agreements are contracts if they are made by the free consent of the parties... according to section 14, consent is said to be free when it is not caused by (a) Coercion, or (b) Undue influence, or (c) Fraud, or (d) Misrepresentation, or (e) Mistake.

An agreement is said to have been consented if it does not involve the following:

(a) Coercion
(b) Undue influence
(c) Fraud
(d) Misrepresentation
(e) Mistake

1. **Coercion: -** 'Coercion is the act of committing or threatening to commit any act forbidden by the Indian Penal Code (45 of 1860), or the unlawful detaining, or threatening to detain, any property to the prejudice of any person, with the intention of causing any person to enter into an agreement'. However, it is

insignificant if the Indian Penal Code is or is not in force where coercion is employed. This can be committed by an individual, not particularly by a party to the contract and would be directed against any person.

2. **Undue Influence : -** A contract would be induced by undue influence under the following circumstances:
   - ✓ If one of the parties is in a position to dominate the will of the other or where he stands in a fiduciary relation to the other.
   - ✓ If he makes a contract with a person whose mental capacity is temporarily or permanently affected due to age, illness or mental or bodily distress.
   - ✓ If an individual is in a position to dominate the will of another and hence makes a contract with him, and the transaction appears to be unconscionable.
3. **Misrepresentation: -** Misrepresentation is an untrue statement of fact or law that is made by one party to another, where the second party is instigated to make a contract to the former that results in causing loss to the second party. The following are the different types of misrepresentation.
   - ✓ **Fraudulent Misrepresentation:** This refers to a false representation that has been made intentionally.
   - ✓ **Negligent Misrepresentation:** This refers to a representation that is made carelessly.
   - ✓ **Innocent Misrepresentation:** This refers to a representation that is neither fraudulent nor negligent.
4. **Fraud: -** Fraud refers and includes the following acts that are committed by a party to deceive another party:
   - ✓ **False Statement:** A false statement intentionally made by one of the parties, which is considered to be a fraud.
   - ✓ **Active Concealment:** The active concealment of a fact by an individual who believes the fact is a fraud.
   - ✓ **Intentional non-performance:** A promise that is made without any intention to perform it is intentional non-performance.
   - ✓ **Deception:** Any other facts stated to deceive is called deception.
   - ✓ **Fraudulent act or omission:** The clause provided under certain acts makes it mandatory to disclose relevant facts. According to Section 55 of the Transfer of Property Act, the seller of immovable property has to reveal to the buyer all the material defects, and any failure in the same leads to fraud.
   - ✓ **Is silence a fraud:** A general rule is that silence is not a fraud until there is a duty to speak particularly in the fiduciary relationships.
   - ✓ **Where silence is a fraud:** Under certain circumstances, 'silence is in itself equivalent to speech'.
5. **Mistake of Fact: -** Consent cannot be free when an agreement is entered into under a mistake by either of the parties. When both the parties are under a genuine mistake, the particular contract is considered void and can, therefore, be avoided. On the other hand, if any mistake of fact is made by either of the parties and not by both, the defaulting party is prohibited from denying the formation of an agreement on the grounds that he/she was mistaken with respect to the subject matter.

LEGALITY AND VALIDITY of Contracts

Legal purpose. A contract must have a legal purpose to be enforceable. For example, Steve hires Paul to kill Susan. Steve drafts an agreement outlining Paul's responsibilities, namely to acquire a gun and shoot Susan in the head. The agreement also specifies the amount Steve will pay Paul once Susan is dead. A contract of murder for hire is illegal. If Paul fails to fulfill his obligations under the agreement, Steve will have no recourse against Paul. The agreement Steve has drafted is unenforceable.

i. **Mutual Agreement.** All parties to the contract must have reached a "meeting of the minds." That is, one party must have extended an offer to which the other parties have agreed. For example, Jim signs a contract

with Tom's Tree Trimming. The contract outlines the scope of the work Tom will perform on Jim's property. Jim and Tom have a mutual agreement regarding the work that will be done.

ii. **Consideration.** Each party to the contract must agree to give up something of value in exchange for a benefit. For example, you hire a contractor to repave your driveway. You and the paving contractor sign an agreement in which you promise to pay a sum of money in exchange for the paving work. Both you and the contractor have agreed to give up something of value. You have agreed to pay money, and the contractor has agreed to perform the paving work.

iii. **Competent Parties.** The parties to a contract must be competent. That is, they must be of sound mind, of legal age, and unencumbered by drugs or alcohol. If you enter into a contract with a minor or an insane person, the contract will not be enforced.

iv. **Genuine Assent.** All parties must engage in the agreement freely. A contract may not be enforced if mistakes have been made by one or more parties. Likewise, a contract may be voided if one party has committed fraud or exerted undue influence over another. For example, you sign a contract in which you agree to sell your house to your next-door neighbor for Rs.1 Lac. When you signed the contract, your neighbor was pointing a gun at your head. Clearly, you made the agreement under duress, so the contract is not valid.

Some types of contracts must be in writing. An example is a contract in which you agree to sell your property to someone else. Real estate sales contracts must be written in order to be enforceable.

DISCHARGE of Contract

A contract is said to be discharged by performance when both the parties perform all the primary obligations. The obligation is considered performed only if the performance complies with the standard of performance required. A failure to do so constitutes a breach.

When the parties to a contract perform their respective promises, the contract is said to have been performed. This is the normal and natural mode of discharging a contract. When performance is proper and complete on either side, the parties become free from any further liability. If only one party performs what he promised, he alone gets a valid discharge, and he acquires a right of action against the other for non-performance.

A Contract is deemed to be discharged in the following circumstances:

1. By agreement.
2. By performance of the contract.
3. By lapses of time.
4. By operation of law.
5. By material alteration.
6. By breach.

1. **By Agreement Sec. (62-64)** The parties may agree to terminate the existence of the contract by any of the following ways:-
   a) **By Novation** (Sec. 62): Substitution of a new contract in place of the old existing one is known as 'inovation of contract'. New contract may be either between the same parties or between different parties, the consideration being mutually the discharge of the old contract.
      (i) Substitution of a contract with new terms for an old contract between the same parties.
      (ii) Substitution of a new party for an old one, the contract remaining the same. Promisee will now look to the third party for the performance of the contract. Original promisor is released of the obligations under the old contract.
         - ✓ **E.g.:** A owes B Rs. 10,000. A enters into an arrangement with B, and gives B a mortgage

of his (A's) estate for Rs. 5,000 in place of the debt of Rs. 10,000. This is a new contract extinguishes the old.

- ✓ A owes B Rs. 1,000 under a contract. B owes C Rs. 1000. B orders A to credit C with Rs. 1,000 in his books but C does not assent to the arrangement. B still owes C Rs. 1,000, and no new contract has been entered into.

b) **By rescission (Sec. 64):** Rescission means cancellation of the contract. A contract can be rescinded by any of the following ways:-

- ✓ **By mutual consent: -** Parties may enter into a simple agreement to rescind the contract before its breach.
- ✓ **By the aggrieved party :-** Where a party has committed a breach of the contract, the aggrieved party can rescind the contract without in any way effecting his right of getting compensation for the breach of contract.
- ✓ **By the party whose consent is not free: -** In case of a voidable contract, the party whose consent is not free can, if so decides, rescind the contract.

c) **By alteration:** Alteration means change in one or more of the conditions of the contract. Alteration made by the mutual consent of the parties will be perfectly valid. But any material alteration in terms of a written contract by the one party without the consent of other party will discharge such party from its obligations under the contract.

d) **By remission** (Sec. 63): Remission means acceptance of a lesser performance than what was actually due under the contract. According to Sec. 63 a party may dispense with or remit, wholly or in part, the performance of the promise made to him. He can also extend the time of such performance. A promise to do so will be binding even though there is no consideration for it.

Example: A owes B Rs. 5,000. A pays to B and B accepts in satisfaction of whole debt Rs. 2,000 paid at the time and place where Rs. 5,000 were payable. The whole debt is discharged.

2. **By performance of the contract (Sec. 37)** When parties fulfill their obligations and promises under a contract the contract is said to have been performed and discharged. Performance should be complete and according to the real intentions of the agreement. Offer of performance shall have the same effect as performance.
3. **By Lapse of time** every contract must be performed either within the period fixed or within a reasonable time of the contract. Lapse of time may discharge the contract by barring the right to bring an action to enforce the contract under the Limitation Act.
4. **By operation of Law** A contract is discharged or terminated by operation of other laws in the following cases:
   i. **Merger.** Merger implies coinciding and meeting of an inferior and superior right on one and the same person. In such a case inferior right available to a party under an agreement will automatically vanish. **Examples:** A is holding a property under lease. He subsequently buys that property. A's right as a tenant is inferior to his right as an owner of the property. The right as a tenant and right as owner have coincided and met in one person i.e. A. Therefore, A's rights as a leases will terminate.
   ii. **Death:** In case a contract is of a personal nature, the death of the promisor will discharge the contract. In other case, the rights and liabilities of the deceased person shall pass to his legal representatives.
   iii. By complete loss of evidence of the existence of the contract.
   iv. **By insolvency.** An insolvent is released from performing his part of the contract by law. Order of discharge, however gives a new lease of life to the insolvent and he is discharged from all obligations arising from all his earlier contracts.

5. **By material alternation**: Any material alteration made intentionally in a written contract by the promisee or his agent without the consent of the promisor entitles the later to regard the contract as rescinded. An alternation will be taken to be material if it directly or indirectly affects the nature or operation of the contract or the identity, validity or effect of the document.
6. **By Breach:** Breach means failure of a party to perform his or her obligation under a contract Breach of contract may arise in two ways.
   a. Actual Breach.
   b. Anticipatory Breach.

   a) **Actual Breach:** Actual breach means breach committed either; (i) at the time when the performance of the contract is due; or (ii) during the performance of the contract.
   Example: (i) A agrees to supply to B on the 1st February, 1975, 1000 bags of sugar. On 1st February, 1975 he fails to supply. This is actual breach of contract at the time when the performance is due. The breach has been committed by A.
   If on 1st February, 1975 A is prepared to supply the required number of bags of sugar and B without any valid reasons refuses to accept them, B is guilty of breach a contract.
   b) **Anticipatory Breach:** Breach of a contract committed before the date of performance of the contract is called anticipatory breach of contract. (Sec. 39). The contract in this case is repudiated before the time fixed for its performance arrives and is so discharged.
   Example: A agrees to employ B from 1st of March. On 1st February, he writes to B that he need not join the service, the contract has been expressly repudiated by A before the date of its performance.

ARBITRATION

A form of alternative dispute resolution (ADR), is a way to resolve disputes outside the courts. Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court.
Arbitration is a proceeding in which a dispute is resolved by an impartial adjudicator whose decision the parties to the dispute have agreed, or legislation has decreed, will be final and binding.

General principles of arbitration are as follows:

a. The object of arbitration is to obtain a fair resolution of disputes by an impartial third party without unnecessary expense or delay.
b. Parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.
c. Courts should not interfere.

ESSENTIAL features of an "arbitral agreement"

The essential features of an arbitration agreement are as follows

1. **Validity: -** An arbitration agreement, including an arbitration clause in an agreement, is a contract. It must be legally valid under the Indian Contract Act, 1872. A contract, to be legally valid under said act, must have the following:
   - Parties must be legally competent to enter into contract.
   - Consent of parties must not be influenced by fraud.
   - The object of the contract must be lawful.
   - The contract must be capable of being carried into effect. Therefore, it should not be uncertain.

2. **Dispute: -** The arbitration agreement can be in respect of present or future dispute. Such dispute must arise out of the defined legal relationship. A dispute not arising from the legal relationship is beyond the scope of arbitration. The legal relationship can be contractual or non-contractual, arising out of a breach of statutory obligation.
3. **Writing & Intent: -** An arbitration agreement is only valid if it is in writing. Both parties should be completely intent on referring the matter to arbitration.
4. An arbitration agreement is in writing if it is contained in—
    - a document signed by the parties;
    - an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
    - an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
5. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

EFFECTS of Arbitration

Pros: -

- **Cost**: Historically, arbitration has often been seen as a cheaper way to resolve disputes, on average, than litigating in court. However, this is not always the case, as described in the Cons section below.
- **Speed**: With some exceptions, arbitrations tend to follow more specific and defined timelines toward resolving a dispute, and arbitrators do not always face crowded work and caseloads, resulting in quicker final decisions.
- **Fairness**: Often arbitrators are selected by agreement of both parties, by a third party arbitration service, or via an outlined method where input is allowed from both parties. This means that in many cases, no single party controls who the arbitrator (or abitrators) will be.
- **Finality**: For the most part, it is very difficult to appeal arbitration rulings, even if glaring mistakes have been made by an arbitrator. This finality can be a positive factor in relation to ending a dispute, one way or the other, and allowing the parties to move on.
- **Simplified procedures**: Litigation can involve mounds of paperwork, multiple hearings, depositions, subpoenas, and similar processes. An arbitration may eliminate some or many of those time-consuming and expensive tools of litigation.
- **Confidential**: Arbitration hearings do not take place in open court and transcripts are not part of the public record. This can be very valuable for parties in some cases.

Cons: -

- **Cost**: Surprisingly, the cost factor can also appear on this list as a "con" because arbitration does not always reduce the costs of resolving a legal problem. This is because arbitration can vary in complexity and can take many forms, some of which may actually be more likely to increase the costs versus litigation. As one example, arbitrations can be binding or non-binding. In non-binding arbitrations, the final decision or award in the case is not "binding" and the parties are free to take their issue back to court, essentially adding the cost of litigation to that of the prior arbitration.
- **Fairness**: Consumers may have legitimate concerns about the fairness of being dragged into arbitration over what might otherwise be a minor issue that could be resolved in small claims court. Also,

companies favoring arbitration may be more familiar with specific arbitrators, as well as the process in general.

- **Speed**: Just like they aren't always cheaper, arbitrations are not necessarily always faster than litigation. This is particulary possible in cases with multiple parties, multiple arbitrators, and complicated legal disputes.
- **Location**: Within the same small print in a contract that can require consumers to arbitrate their issues, there can also be language specifying exactly where arbitration will take place. This location can sometimes be very inconvenient to the average consumer, as it could even be in another state, raising the cost and requiring time off from work.
- **Finality**: As noted above, it is very difficult to appeal arbitration rulings, even if an arbitrator has made a blatant mistake. Although not common, this can sometimes result in what may be seen as an unfair result (certainly from the losing party's perspective!), with only a small chance that a court can step in to correct it.
- **No jury**: From most consumers' and individuals' points of view, having a jury of their peers is an important right not easily given up. Arbitration does away with juries entirely, leaving matters in the hands of an arbitrator, who essentially plays the role of both judge and jury.

CONCILIATION

Conciliation is an alternative out-of-court dispute resolution instrument. Conciliation is a voluntary, flexible, confidential, and interest based process. The parties seek to reach an amicable dispute settlement with the assistance of the conciliator, who acts as a neutral third party.

Conciliation is a voluntary proceeding, where the parties involved are free to agree and attempt to resolve their dispute by conciliation. The process is flexible, allowing parties to define the time, structure and content of the conciliation proceedings. These proceedings are rarely public. They are interest-based, as the conciliator will when proposing a settlement, not only take into account the parties' legal positions, but also their; commercial, financial and / or personal interests. The ultimate decision to agree on the settlement remains with the parties.

Main benefits

a. **Conciliation ensures party autonomy: -** The parties can choose the timing, language, place, structure and content of the conciliation proceedings.
b. **Conciliation ensures the expertise of the decision maker: -** The parties are free to select their conciliator. A conciliator does not have to have a specific professional background. The parties may base their selection on criteria such as; experience, professional and / or personal expertise, availability, language and cultural skills. A conciliator should be impartial and independent.
c. **Conciliation is time and cost efficient: -** Due to the informal and flexible nature of conciliation proceedings, they can be conducted in a time and cost-efficient manner.
d. **Conciliation ensures confidentiality: -** The parties usually agree on confidentiality. Thus, disputes can be settled discretely and business secrets will remain confidential.

PRINCIPLES of Procedure

a) **Independence and impartiality [Section 67(1)]: -** The conciliator should be independent and impartial. He should assist the parties in an independent and impartial manner while he is attempting to reach an amicable settlement of their dispute.
b) **Fairness and justice [Section 67(2)]: -** The conciliator should be guided by the principles of fairness and justice. He should take into consideration, among other things, the rights and obligations of the parties, the

usages of the trade concerned, and the circumstances surrounding the dispute, including any previous business practices between the parties.

c) **Confidentiality [Section 70]: -** The conciliator and the parties are duly bound to keep confidential all matters relating to conciliation proceedings. Similarly when a party gives a information to the conciliator on the condition that it be kept confidential, the conciliator should not disclose that information to the other party.

d) **Disclosure of the information [Section 70]: -** When the conciliator receives a information about any fact relating to the dispute from a party, he should disclose the substance of that information to the other party. The purpose of this provision is to enable the other party to present an explanation which he might consider appropriate.

e) **Co-operation of the parties with Conciliator [S. 71]: -** The parties should in good faith cooperate with the conciliator. They should submit the written materials, provide evidence and attend meetings when the conciliator requests them for this purpose.

PROCEDURE & EFFECTS of Conciliation

1. **Commencement of the conciliation proceedings [Section 62]: -** The conciliation proceeding are initiated by one party sending a written invitation to the other party to conciliate. The invitation should identify the subject of the dispute. Conciliation proceedings are commenced when the other party accepts the invitation to conciliate in writing. If the other party rejects the invitation, there will be no conciliation proceedings. If the party inviting conciliation does not receive a reply within thirty days of the date he sends the invitation or within such period of time as is specified in the invitation, he may elect to treat this as rejection of the invitation to conciliate. If he so elects he should inform the other party in writing accordingly.
2. **Submission of Statement to Conciliator [Section 65]: -** The conciliator may request each party to submit to him a brief written statement. The statement should describe the general nature of the dispute and the points at issue. Each party should send a copy of such statement to the other party. The conciliator may require each party to submit to him further written statement of his position and the facts and grounds in its support. It may be supplemented by appropriate documents and evidence. The party should send the copy of such statements, documents and evidence to the other party. At any stage of the conciliation proceedings, the conciliator may request a party to submit to him any additional information which he may deem appropriate.
3. **Conduct of Conciliation Proceedings [Section 69(1), 67(3)]: -** The conciliator may invite the parties to meet him. He may communicate with the parties orally or in writing. He may meet or communicate with the parties together or separately. In the conduct of the conciliation proceedings, the conciliator has some freedom. He may conduct them in such manner as he may consider appropriate. But he should take in account the circumstances of the case, the express wishes of the parties, a party's request to beheard orally and the need of speedy settlement of the dispute.
4. **Administrative assistance [S. 68]: -** Section 68 facilitates administrative assistance for the conduct of conciliation proceedings. Accordingly, the parties and the conciliator may seek administrative assistance by a suitable institution or the person with the consent of the parties.

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