Chapter-2
General Principles of Contract

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Contract law is founded on the principle that individuals are the bearers of rights, and they bargain with each other to get into contract to exchange goods and services. If abiding these agreements becomes a matter of individual discretion, the entire social and economic order founded on contracts would fall down. Therefore, the State stepped in to recognize the agreements, and to enforce them or give remedy to the aggrieved party. Contracts, in all systems of law, are founded on this premise.

People know a fair amount about contract and contract law. People enter into contracts everyday without even being conscious of it. Day-to-day facilities, like taking a bus, buying a newspaper, and using a mobile phone, come to us through contracts. In the case of people engaged in trade, commerce and industry, they do business by entering into contracts. Thus, getting into contracts is essential to our society, which is based on transactions of goods and services. Contract law governs diverse aspects of contracts, such as, formation, validity, discharge, and remedies in the event of breach.

2.1 HISTORICAL EVOLUTION OF MODERN CONTRACT LAW

The law of contracts has developed over centuries and has had to transform so as to keep pace with economic, political and technological developments. The form in which the contract law is known today emerged in England in the nineteenth century with the ‘industrial revolution’. As a result of the industrial revolution, England got transformed from an agrarian society to a commercial, industrial society. This brought about some basic changes—mines, mills and factories sprang up for the manufacture and sale of goods. The agrarian order was to be substituted by a world order based on exchange. The courts were also called upon to settle on a much larger number of cases. The courts reworked some of the older ways of looking at contracts and founded the field of contract law as a well-integrated, coherent body of principles. Judges decided cases on the basis of reason, commonsense and the prevailing notions of justice; and started relying on prior judgments. Following similar judgments on similar types of matters, general reasoning and principles came to be formulated. The courts, subsequently, followed these principles as the law. Through this process of precedence, a corpus of judge-made law came to develop. The judiciary-made law, as it was developed from the experiences and practices of
the common people, was called 'common law'. This was contrary to the Acts made by Parliament, which were imposed by the legislature, and were called statutory laws.

The earliest common law to develop in the field of trade and commerce was the contract law. This was to be the basis of business law. As trade and commerce grew and expanded, business practices became specialized. Proportionate to this, the principles formulated by the courts could also be grouped into different areas. For instance, other specific forms of contract and business relation to emerge were: sale of goods, carriage, finance, banking, and insurance. The courts developed the law on these areas on the foundation of contract law. Hence, contract law became the foundation for all business laws.

By the late 1800s, the decisions of the courts were vastly expanded and became unwieldy; and, at times, this led to uncertainty as to what the law on a given point was.\(^1\) It was decided that the principles developed by the courts be written down as the law, to be enacted by Parliament. This writing down of the common law was called 'codification'. The endeavour of codifying the common law was successful in leading to the enactments in several fields. Nevertheless, contract law was considered too foundational to be codified in England. Notwithstanding attempts at it, it was considered best to not disturb the status quo. Thus, contract law was never codified in England.\(^2\)

Different parts of the world, including India, had their own peculiar sorts of law. The divergences, nevertheless, came to attain a degree of uniformity with British colonial expansion. The English colonized the world, moving to America, Canada, Australia, New Zealand, India and other parts of Asia and Africa. Wherever they went, there had to be law and legal system for settlement of disputes. For this reason, they brought in features and characteristics of their own legal system. Consequently, India has come to share features of the British system, like many other countries.

The 'law' formulated by the courts of England was adopted by many countries through colonialism. These countries were not constrained by the weight of tradition

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2 Ibid, at 4.
in codifying contract law. Australia and some States of America, after borrowing the common law from England, codified it. India also got the Indian Contract Act 1872. The countries under England came to share contract law with England include Ireland, Australia, New Zealand, Canada, Singapore, and British India (which then comprised India, Pakistan, and Bangladesh).

2.2 JURISTIC CONCEPT OF CONTRACT

Contract law creates rights in *personam* as distinguished from rights in *rem*. Rights in *rem* are available against the whole world, whereas rights in *personam* are available against or in respect of a particular person or persons or group of persons and not against the world at large.

The juristic concept of contract comprises two constituent elements—‘obligation’ and ‘agreement’. Obligation means a legal tie, which imposes upon a determinate person or persons, the necessity of doing, or abstaining from doing, a definite act or acts. The sources of obligations are many. They may have their origin in ‘torts’ or ‘delicts’; they may also result from ‘judgment of courts’ and ‘recognizance’ (also called as ‘contracts of records’); they may also arise from quasi-contracts (under the Indian law, these obligations are called ‘certain relations resembling those created by contracts’); and, obligations may also have their source in ‘agreements’.

A contract is a civil obligation. However, all obligations are not contracts. Contract law does not cover whole range of civil obligations; it confines itself to the enforcement of voluntarily created civil obligations. There are many obligations of civil nature, like those created by the acceptance of a trust or imposed by law, whose

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5 ‘Contracts of Record’ are not contracts in the true sense as the *consensus-ad-idem* is lacking. They are simply obligations imposed by the court upon a party to do or refrain from doing something. A contract of record may be either (i) a judgement of a court or (ii) recognizance. An obligation imposed by the judgement of a court and entered upon its records is often called a ‘Contract of Record’. For instance, P is indebted to Q for Rs. 500 under a contract, P fails to pay. Q sues P and gets a judgement in his favour. The previous right of Q to obtain Rs. 500 from P is replaced by the judgement in his favour and execution may be levied upon P to enforce payment, if needed.
6 A ‘recognizance’ is a written acknowledgement to the crown (or State) by a criminal that on default by him to appear in the court or to keep peace or to be of good conduct, he is bound to pay to the crown (State) a certain amount of money. This is too an obligation imposed upon him by the court.
violation may be actionable under the law of trust or law of torts, or under a statute; but, they are outside the purview of contract.

Similarly, the contract law does not deal with whole range of agreements. Many agreements remain beyond the scope of contract law, as they do not fulfil the requirements of a contract. Moreover, there are some agreements which, in literal sense, appear to satisfy the requirements of a contract (such as, offer, acceptance, etc), but still (they) are not enforced as contracts because they do not catch the spirit of a contract. They are excluded under the legal contrivance that the parties must not have intended legal consequences to follow. For example, X makes a promise to his son to buy a motor bike for him if he (the son) scores highest marks in his class. In case X fails or refuses to give his son the promised award, his son has no remedy against X, i.e. the promise made by X cannot be enforced. In this example, the promise is not enforceable at law as there is no intention to create legal obligations. Such agreement is social agreement which does not give rise to legal consequences. This illustrates that an agreement is a broader term than a contract. And, therefore, a contract is an agreement, but every agreement is not essentially a contract.

A question, then, may be asked: How does a contract stand in relation to agreements and obligations? John Salmond says, 'The Law of Contracts is not the whole law of agreements nor is it the whole law of obligations; it is the law of those agreements which create obligations and of those obligations which have their source in agreements.'

2.3 THE INDIAN CONTRACT ACT 1872—LAW OF CONTRACTS IN MODERN INDIA

There has been incredible development of trade and commerce in the twentieth century. However, the contract law and its fundamental principles remain the same. Yet, as trade and commerce developed, several principles have been used together by contracting parties to set up their rights and obligations. The contract law occupies the most important place in the commercial law. Without contract law, it would have been impossible to carry on trade smoothly and productively. It is not only the

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6 Salmond on Contracts, p.1.
business community which is concerned with the contract law, but it affects all and sundry.

In India, the law pertaining to contracts is to be found in the Indian Contract Act 1872. The object of the Contract law is to ensure that the rights and obligations arising out of a contract are honoured and that legal remedies are made available to an aggrieved party against the party failing to honour his part of agreement. The Indian Contract Act makes it mandatory that this is done and compels the defaulters to honour their commitments.

Prior to the enactment of the Indian Contract Act, the English Law was applied into the Presidency Towns of Madras, Bombay and Calcutta by the Charter granted in 1726 by King George I to the East India Company. In 1781, the Act of Settlement was passed by the British Government which provided that in the matters of inheritance and succession, and contracts dealing with parties in the case of Mohammedans and Hindus, their respective laws would be applied. In cases where only one of the parties is a Mohammedan or Hindu, the laws and usages of the defendant were to be considered. This rule was applied in the Presidency Towns. In places outside the Presidency Towns, cases were decided according to the justice, equity and good conscience.

Sections 1-75 of the Indian Contract Act 1872 (hereinafter referred to as the ‘ICA’) deal with the general principles of contracts, which are applicable to all types of contracts. Over here, it would be pertinent to describe, in brief, the general principles of contracts, as a sound understanding of these principles is a must for understanding the nuances of electronic contracts. The general principles part of the ICA provides for a number of limiting principles, subject to which the parties may create rights and duties for themselves, and the law will uphold those rights and duties. Thus, it can be said that the parties to a contract, in a sense, make the law for themselves. As long as they do not transgress some legal prohibition, they can frame any rules they like in regard to the subject matter of their contract and the law will give effect to their contract. Thus, the ICA governs the way in which contracts are made and executed in India. It governs the manner in which the provisions in a contract are implemented, and (it) codifies the effect of a breach of contractual provisions. Within the framework of the Act, parties are free to enter into contract on any terms they wish.
The ICA also, as stated earlier, comprises some limiting factors, subject to which contract may be entered into, executed and breach enforced. The general principles part of the ICA only provides a framework of rules and regulations which govern formation and discharge of contracts. The rights and duties of parties and terms of agreement are determined by the contracting parties themselves.

2.4 GENERAL PRINCIPLES OF CONTRACTS

The general principles of contracts can be studied under the following three broad heads:

- Formation of Contracts
- Discharge of Contracts
- Remedies in the Event of Breach of Contracts

2.4.1 Formation of Contracts

S. 2(h) of the ICA says that 'an agreement enforceable by law is a contract'. S. 2(e), ICA provides the definition of agreement as 'every promise and every set of promises forming consideration for each other'. S. 2(b), ICA defines promise as, 'when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise.' From these definitions, it is obvious that a contract is an agreement; an agreement is a promise; and, a promise is an accepted proposal. Hence, every contract, in its ultimate analysis, is the result of a proposal from one side, and its acceptance by the other.

As per S. 2 (h) of the ICA, a contract consists of two elements:

i. an agreement; and

ii. the agreement should be enforceable by law.

2.4.1.1 Essentials of a Contract (S. 10)

S. 10 of the ICA provides for the elements which are essential in order to constitute a valid contract. It reads as follows:
All agreements are contracts if they are made by free consent of parties, competent to contract, for a lawful consideration and with a lawful object and are not hereby expressly declared to be void.

Thus, the essential elements of a valid contract can be summarized as under:

1. An agreement [S. 2 (e)];
2. The agreement should be made by free consent of the parties (Ss 13-22);
3. The agreement should be entered into between parties competent to contract (Ss 11-12);
4. It should be for a lawful consideration [Ss 2 (d), 23, 25];
5. It should be with a lawful object (Ss 23-30);
6. It should not have been expressly declared to be void (S. 10);
7. Formalities under different laws: Nothing herein contained shall affect any law in force in India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents (S. 10); and
8. Intention to create legal relationship.

1. An agreement [S. 2 (e), ICA];

As mentioned above, to constitute a contract there must be an agreement. An agreement comprises two elements—‘offer’ and ‘acceptance’. The party making the offer is called the proposor (offeror), and the party to whom the offer is made is called the proposee (offeree). Thus, there are fundamentally two parties to an agreement. There must be consensus-ad-idem (meeting of minds), i.e. they must be thinking of the same thing in the same sense. Thus, where ‘X’ who owns 2 houses, H-1 and H-2, wishes to sell house H-1 for Rs. 10 lakh; and, ‘Y’, who does not know that ‘X’ owns house H-1 also, and he thinks that ‘X’ owns only House H-2 and makes an offer to buy the same for the stated price. In this case, there will be no contract because the contracting parties have not agreed on the same thing at the same time and same sense (X is offering to sell his house H-1, whereas Y is agreeing to buy house H-2). There is, therefore, no meeting of minds.
After acceptance of a proposal, the proposal becomes a promise; and the person making the proposal is called the 'promisor' and the person accepting the proposal is called the 'promisee'.

2. The agreement should be made by free consent of the parties (Ss 13-22):
Two or more persons are said to consent when they agree upon the same thing in the same sense. The consent of the parties to the agreement should be free and genuine. Consent is said to be free when it is not caused by—coercion (as defined in section 15, ICA), or undue influence (as defined in section 16, ICA), or fraud (as defined in section 17, ICA), or misrepresentation (as defined in section 18, ICA), or mistake (subject to the provisions of sections 20, 21 and 22, ICA). Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

3. The agreement should be entered into between parties competent to contract (Ss 11-12):
The parties to a contract must be competent to enter into a contract. As stated in S.11 of the ICA, every person is competent to contract if he (i) is of the age of majority, (ii) is of sound mind, and (iii) is not disqualified from contracting by any law to which he is subject. Accordingly, there may be a flaw in capacity of parties to the contract, and the flaw in capacity may be because of minority, lunacy, idiocy, drunkenness or status. If a party to a contract suffers from any of these flaws, the agreement is, as per the general rule, void.

4. It should be for a lawful consideration [Ss 2 (d), 10, 23, 25]:
Every agreement must be supported by consideration from both sides, if it is to be enforceable by law. Consideration is the price for which the promise of the other contracting party is bought. Nevertheless, this price need not be in terms of money. If the promise is not supported by consideration, the promise will be nudum pactum (a bare promise) and is not enforceable at law. Furthermore, the consideration must be real and lawful.

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8 S. 14, ICA.
5. **It should be with a lawful object (Ss 23-24):**

Similarly, the object of the agreement must also be legal and not one which the law disapproves. Any act forbidden by law will not be valid and such agreements cannot be treated as contracts. For instance, if X rents out his house to Y for the business of prostitution or for making bomb, the agreement is unenforceable, as the object of it is unlawful. Consequently, such agreement cannot be treated as a valid contract. Hence, the consideration as well as the object of the agreement must be lawful.

6. **It should not have been expressly declared to be void (Ss 25-30):**

Sections 24 to 30 of the ICA specifically provide that certain types of agreements are void. For instance, agreement in restraint of marriage has been expressly declared void under S. 26, ICA. Thus, if X promises to pay Rs 5,00,000 to Y if she does not marry throughout her life and Y, accordingly, promises not to marry at all, shall be a void agreement, for being contrary to S. 26. Similarly, agreement in restraint of trade, agreement in restraint of legal proceedings, uncertain agreement and agreement by way of wager—are expressly declared void.

7. **Formalities under different laws:**

Nothing in S. 10 of the ICA shall affect any law in force in India, and not hereby expressly repealed, by which *any contract is required to be made in writing or in the presence of witnesses*, or any law relating to the *registration of documents*. The ICA does not say that an agreement must necessarily be in writing; it can be oral also. Nor does it say that a contract must be made in presence of witness/es, or be necessarily registered. But, if there is a particular law providing for certain requirements in certain cases, then the ICA does not affect the operation of any such law/s. For instance, sale of immovable property

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9 S 27, ICA.
10 S 28, ICA.
11 S 29, ICA.
12 S 30, ICA.
must be in writing and should be registered under the Transfer of Property Act 1882.

8. **Intention to create legal relationship:**

There must be an intention on the part of the parties to the agreement to create a legal relationship. Although there is no express provision in the ICA requiring that a proposal or its acceptance must be made with the intention of creating a legal relationship, yet, in the English law it is well settled principle that ‘to create a contract there must be a common intention of the parties to enter into legal obligations’\(^\text{13}\). In *Darlymple v Darlymple*\(^\text{14}\), it was observed that ‘contracts must not be the sports of an idle hour, mere matters of pleasantry and badinage, never intended by the parties to have any serious effect whatsoever’.

The requirement of intention to create legal relations in contract law is aimed at sifting out cases which are not, in actuality, appropriate for court action. It is not that every agreement leads to a binding agreement which can be enforced through the courts. For example, X may have an agreement to meet his friend Y at a club. Over here, X may have a moral duty to honour that agreement, but certainly not a legal obligation to do so. This is because, in general, the parties to such agreements do not have it in mind to be legally bound. So as to determine which agreements are legally binding and have an intention to create legal relations, the law draws a distinction between ‘social and domestic agreements’ and ‘agreements made in a commercial context’.

Whether or not an agreement is intended to have legal consequences is ascertained by the court with reference to the terms of the agreement, and facts and surrounding circumstances of the case. In commercial and business agreements, it is the presumption of law that the parties entering into agreement intend those agreements to have legal consequences. Nonetheless, this presumption may be negatived by express terms to the contrary. For instance, in *Rose and Frank Co. v JR Crompton and Bros. Ltd.*\(^\text{15}\), there was an agreement

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\(^{13}\) Atkin J, in *Rose & Frank Co v JR Crompton & Bros* (1925) AC 445: (1923) 2 KB 261, at 293.

\(^{14}\) (1811) 161 ER 665, *Per* Lord Stowell.

\(^{15}\) (1925) A.C. 445.
entered into between one American and two English firms for their dealings in paper tissues. One of the clauses included in the agreement read: ‘This arrangement is not entered into as a formal legal agreement and shall not be subject to legal jurisdiction in the law courts either in the US or in England’. It was held that this agreement was not a legally binding contract, for the parties intended not to have legal consequences. Lord Atkin said, ‘Intention to contract may be negatived impliedly by the nature of the promise...If the intention may be negatived impliedly, it may be negatived expressly...I have never seen such a clause before, but I see nothing necessary absurd in businessmen seeking to regulate their business relations by mutual promises which fall short of legal obligations, and rest on obligations of either honour or self-interest or perhaps both.’\(^\text{16}\) Similarly, in \textit{Jones v Vernon’s Pools Ltd.}\(^\text{17}\), there was an agreement which contained a clause that it ‘shall not give rise to any legal relationships, or be legally enforceable, but binding in honour only’. It was held that the agreement did not give rise to legal relations and, thus, was not a contract.

In the same way, in the case of agreements of purely domestic, family and social nature, the presumption of law is that the parties do not intend to give rise to legal consequences. In \textit{Balfour v Balfour}\(^\text{18}\), a husband agreed to pay £30 to his wife every month while he was abroad. Since he failed to pay the promised amount, his wife sued him for the recovery of the amount. However, it was held that she could not recover as it was a social agreement and the parties did not intend to create any legal relations. However, this does not mean that in family or social matters there cannot be contracts. The general presumption may be rebutted by adducing evidence to the contrary, i.e., by showing that the intention of the parties was to create legal obligations. Therefore, even in the case of agreements of purely social or domestic nature, there may be intention of the parties to create legal obligations. In such cases, the social agreement is intended to have legal consequences and, therefore, such agreements become contracts. All that the law calls for is that the parties must intend legal consequences.

\(^\text{16}\) \textit{Rose and Frank Co v JR Crompton and Bros Ltd} (1925) A.C. 445, at 293
\(^\text{17}\) (1938) 2 AUER 626.
\(^\text{18}\) (1919) 2 KB 571
In *Parker v Clark*\(^1\), an aged couple (C and his wife) held out a promise by correspondence to their niece and her husband (Mrs and Mr P) that C would leave them a portion of his estate in his will, provided Mrs and Mr P would sell their cottage and come to live with the aged couple and to share the household and other expenses. The young couple disposed of their cottage and started living with the aged couple. However, the two couples subsequently squabbled, and the aged couple repudiated the agreement by requiring the young couple to stay somewhere else. The young couple, therefore, sued the aged couple for the breach of promise. It was held that there was intention to create legal relations and the young couple could recover damages. In judgments, like *Merritt v Merrit*\(^2\), *McGregor v McGregor*\(^3\) and *Pearce v Merriman*\(^4\) also, the court found the intention to create legal relations.

The test of contractual intention is objectivity, not subjectivity. The deciding factor is not what the parties had in mind, but what a reasonable man would think, in the circumstances, their intention to be.

### 2.4.1.2 Proposal/ Offer

According to S. 2 (a), when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal. The expression ‘offer’ is synonymous with ‘proposal’. The person making the proposal is called the ‘promisor’ and the person accepting the proposal is called the ‘promisee’ [S. 2 (c)]. Thus, there may be ‘positive’ or ‘negative’ acts which the proposer may be willing to do. For example, X offers to sell his house to Y. In this case, X is making an offer to do something, i.e., to sell his house. It is an affirmative (positive) act on the part of the offerer. Similarly, where X proposes not to file a suit against Y, if the latter (Y) pays him (X) a sum of Rs. 10,000 outstanding, the act of X is a negative one, i.e., he is offering to abstain from filing a suit.

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\(^1\) (1960) 1 WLR 286.
\(^3\) (1882) 21 QBD 424.
\(^4\) (1904) 1 KB 80.
Essentials and Characteristics of a Valid Offer: Following are the essentials of a valid offer:

1. Plurality of persons: A valid offer contemplates at least two persons, i.e. one who makes the offer (offeror) and the other to whom the offer is made (offeree).

2. Communication of the proposal to the offeree: An offer is effectual only if it is communicated to the offeree.

How is the communication of an offer made? The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal or acceptance or revocation, or which has the effect of communicating it (S. 3). The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made (S. 4).

3. Object of making the proposal: The offer must be made with a view to obtain acceptance.

4. Terms of the proposal should be certain and clear: The terms of offer should be definite, unambiguous and certain or capable of being made certain (S. 29). The terms of the offer should not be loose, vague or ambiguous.

5. Intention to create legal relationship: The offer should be made with the intention of creating legal relations. A proposal should be capable of creating legal consequences. For this reason, social or moral offers are not valid offers so as to create any contract.

6. Offer should not include the term non-compliance of which would amount to acceptance: The offer should not say that if acceptance is not communicated by a specified date the offer would be supposed to have been accepted. If the offeree does not respond, there is no contract.
7. Offer can be subject to any terms or conditions: A proposer can prescribe the mode of acceptance to the offer. He may also make any number of terms or conditions in the offer.

Kinds of Offer:

Express Offer and Implied Offer:

An offer can be made by any act or omission of the party proposing by which he intends to communicate such proposal or which has the effect of communicating it to the other (Section 3). An offer may be made by an act in the following ways:

1. **By words** (written or oral): A written offer can be made by letters, telegrams, telex messages, advertisements, etc; whereas, an oral offer can be made either in person or over telephone, etc.

2. **By conduct**: An offer may be made by positive acts or signs so that the person acting or making such signs means to say or convey, or such acts or signs have the effect of communicating/ conveying his offer.

An offer may also be made by a party by omission (to do something). This takes in such conduct or forbearance on one’s part that the other person takes it as his willingness or assent. An offer made by words is known as ‘express offer’, while an offer which is implied from the conduct of the parties or from the circumstances of the case is called as ‘implied offer’.

Illustrations:

i. X offers, by letter, to sell his car to Y at a certain price. Since this is a proposal by an act (by written words), therefore, it is an express offer.

ii. X offers, over telephone, to sell his car to Y at a certain price. Since this is a proposal by an act (by oral words), therefore, it is also an express offer.

iii. Where X proposes not to file a suit against Y, if the latter (Y) pays him (X) a sum of Rs. 10,000 outstanding, the act of X is a negative one, i.e., he is offering to abstain from filing a suit. Therefore, it is an offer by abstinence or omission to do something.
General Offer and Specific Offer:

When an offer is made to a definite person or a group of persons, it is called a ‘specific offer’. And, when an offer is made to the public at large, it is called as a ‘general offer’. In case of the specific offer, it can be accepted by that person or group of persons to whom the same has been made. That is to say, no other person or group of persons can accept that offer. For instance, if X proposes to sell his house to Y at a certain price; then it is only Y who can accept it, for the offer has been made to a definite person, i.e., Y. On the other hand, a general offer may be accepted by any one by complying with the terms of the offer. The celebrated case of Carlill v Carbolic Smoke Ball Co.\textsuperscript{23} is a first-rate example of a general offer.

In this case, a company advertised that it would give a reward of £100 to anyone who contracted influenza after using the smoke balls of the company for a certain period in accordance with the printed directions. Mrs Carlill purchased the advertised smoke ball and contracted influenza despite using the smoke ball according to the printed instructions. She made a claim for the reward of £100. The claim was opposed by the company on the ground that offer was not made to her; and that, in any case, she had not communicated her acceptance of the offer. It was held that she could recover the reward, for she had accepted the offer by complying with the terms of the offer. A general offer creates for the offeror a liability in support of any person who happens to fulfil the conditions of the offer. It is not at all essential for the offeree to be known to the offeror at the time when the offer is made. He may be a stranger, but by fulfilling the conditions of the offer, he is deemed to have accepted the offer.

Offer and Invitation to Treat:

A proposal confers a power on the offeree to bind the offeror in contract. Unquestionably, the offeror also has some control over this power because he can withdraw his offer so long as it has not been accepted. An offer is the penultimate act leading to formation of contract. However, an offer must be definite, not tentative or qualified in some way. In other words, it must be capable, in law, of giving rise to an agreement—once accepted by the offeree. So the fundamental test is: ‘Is it complete so that merely saying I accept is sufficient to constitute a contract?’ An

\textsuperscript{23} (1813) 1 QB 256
offer is, thus, an expression of willingness (to contract) on certain terms made with
the intention that a binding agreement will exist once the offer is accepted. If an
individual is not willing to implement terms, but merely seeking to initiate
negotiations, this is not an offer, but an ‘invitation to treat’.

In *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd*\(^2^4\),
there was a self-service departmental store, and the customers were to pick up
articles and to take them to the cashier’s desk to pay. It was held that the customer’s
action in picking up particular goods was an offer to buy. As soon as the cashier
accepted the payment, a contract was entered into.

Likewise, prospectus issued by a company for subscription of its shares by the
members of the public, the price lists, catalogues and quotations are mere invitations
to offer.

On the basis of the above discussion, it may be said that an offer is the final
expression of willingness by the offeror to be bound by his offer should the other
party choose to accept it. Where a party, without expressing his final willingness,
puts forward certain terms on which he is willing to negotiate, he does not make an
offer; he only invites the other party to make an offer on those terms. This is
conceivably the fundamental distinction between an offer and an invitation to make
offer.

In *Harvey v Facie*\(^2^5\), the plaintiffs telegraphed to the defendants, stating: ‘Will you
sell us Bumper Hall Pen? Telegraph lowest cash price.’ The defendants also
responded by a telegram, ‘Lowest price for Bumper Hall Pen £900’. The plaintiffs
immediately sent their last telegram saying: ‘We agree to buy Bumper Hall Pen for
£900 asked by you’. The defendants, however, rebuffed to sell the plot of land
(Bumper Hall Pen) at that price. The plaintiffs’ argument that by quoting their
minimum price in response to the inquiry, the defendants had made an offer to sell at
that price, was turned down by the Judicial Committee. Their Lordships pointed out
that in their first telegram, the plaintiffs had asked two questions: *first*, as to the

\(^2^4\) (1953) 1 QB 401.
\(^2^5\) (1893) AC 552.
willingness to sell; and second, as to the lowest price. They reserved their answer as to the willingness to sell. Thus, they had made no offer. The last telegram of the plaintiffs was an offer to buy, but that was never accepted by the defendants.

Advertisements are by and large regarded as invitations to treat. The same is true with catalogues and price lists. They are corresponding to displaying goods in a shop with a price tag on them. However, just as there may be exceptional cases in which a court is prepared to find that a shop display is an offer, so, too, an advertisement could also be seen as an offer.

Some everyday situations which people might think are offers are, in fact, 'invitations to treat':

- Goods displayed in a shop window or on a shelf: When a book is placed in a shop window priced at Rs x, the bookshop owner has made an invitation to treat. When a customer picks up that book and takes it to the cash counter, he makes the offer to buy the book for Rs x. When the person at the counter takes the money, the shop accepts the customer’s offer, and a contract comes into being.
- Adverts basically work in the same way as the scenario above. Advertising something is like putting it in a shop window.
- Invitation to tender for work.
- Auctions: In auctions, the original advertising of the auction is just an invitation to treat; and when a bidder makes a bid, he is making an offer. And, when the hammer falls, the winning ‘offer’ has been accepted. The seller now has a legally binding contract with the winning bidder (so long as there is no reserve price that has not been reached).

To conclude, it may be said that for an offer to be capable of becoming binding on acceptance, the offer should be definite, clear, and final. If it is a shear preliminary move into negotiation which may lead to a contract, it is not an offer but an invitation to treat. The significant point to note is that since an invitation to treat is not an offer, but rather a phenomenal preliminary to an offer, an invitation to treat is not capable of an acceptance which will result in a contract.
Tender: A tender generally is an offer as it is in response to an invitation to treat. Tenders are commonly invited where, for example, an educational institute invites offers to supply stationery, furniture, etc. The persons filling up the tenders make offers. Nevertheless, a tender may be either:

i. **Specific or Definite**: where the offer is to supply a definite quantity of merchandise, or

ii. **Standing**: where the offer is to supply commodities periodically or in accordance with the requirements of the offeree.

In the first case (definite tender), the suppliers submit their offers for the supply of specified quantity of goods or services. The offeree may accept any tender (usually the lowest one; however, he is not bound to accept the lowest one). The acceptance of tender in this case results in a contract. For instance, R invites tenders for the supply of a fixed number of ACs, fans, and LCD projectors. X, Y, and Z submit their tenders. Y’s tender is accepted. The contract is formed when the tender is validly accepted.

In the second case (standing offers), the suppliers (offerors) give an open offer whereby he offers to supply goods or services as required by the offeree. A separate acceptance is made every time an order is placed. Therefore, there are as many contracts as are the acts of acceptance.

In *Chatturbhuj Vithaldas v Moreshover Parashram*\(^{26}\), the Supreme Court of India observed that as soon as an order was placed, a contract arose and until then there was no contract. Also each separate order and acceptance constituted a different and distinct contract. It is to be noted that if the offeree gives no order or fails to place order for the full quantity of goods set out in a tender, there is no breach of contract.

Revocation or Withdrawal of a Tender: A tenderer can pull out his tender before its final acceptance by a work or supply order made by the offeree (acceptor). This right of withdrawal shall not be affected even though there is a clause in the tender

\(^{26}\) AIR 1954 SC 326.
restricting his right to withdraw. A tender will, nonetheless, be irrevocable where the tenderer has, on some consideration, promised not to withdraw it or where there is a statutory prohibition against withdrawal.  

**Expression of Interest (EoI)**
Expression of interest is a call to potential providers of goods and/or services to register interest in supplying them. It is commonly a document describing requirements or specifications and seeking information from potential providers that demonstrate their ability to meet those requirements. Expression of Interest (EoI) provides a starting point in the overall procurement process. Government agencies may publish an EoI to attract potential bidders and to short-list potential bidders. The EoI is an optional early phase in the tendering process. Prospective tenderers express interest as described in the advertisement, resulting in the tender documents being sent to the prospective tenderer.

**Purpose of Expression of Interest:** Following are some important purposes which an EoI serves:

- To invite prospective consultants or contractors to make submissions;
- To enable contractors and vendors to state their ability to meet specific project requirements, either individually or by combining their abilities; and
- To enable contractors and vendors to be assessed for inclusion or otherwise in a short list for invitation to submit a consultancy proposal or a tender.

**Cross Offers:**
Where two parties make identical offers to each other without the knowledge of each other’s offer, the offers are known as cross-offers. In such a situation, neither of the two can be called an acceptance of the other and, therefore, there will be no contract. In *Tinn v Hoffman & Co.*, the defendant wrote to the plaintiff offering to sell him 800 tons of iron at 69 sh. per ton. On the same day, the plaintiff wrote to the

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27 The Secretary of State for India v Bhaskar Krishnaji Samani AIR 1925 Bom 485
28 (1873) 29 LT Exa. 271.
defendant offering to buy 800 tons at 69 sh. Their letters crossed each other in the course of transmission. The plaintiff contended that there was a good contract. However, the Court held that there was no contract.

2.4.1.3 Acceptance

An acceptance is an apparent and understandable indication of the offeree’s unqualified agreement to the terms of the offer in the manner set out in the offer. Acceptance determines when a contract is formed. It is also necessary to determine where a contract comes into being. The place of acceptance answers this. An acceptance must be in response to an offer. In other words, one cannot accept if one does not know of the offer. In determining whether or not an acceptance has been made, the principle of ‘objective intention’ is applied; so, the questioned to be asked is: whether it would have appeared to a reasonable person in the offeror’s shoes that the offeree was accepting the offer. One more important point to be borne in the mind is that a person can only accept an offer that (on an objective interpretation of the offeror’s intention) has been made to him.

Effect of Acceptance:

Anson says, ‘Acceptance is to an offer what a lighted match is to a train of gunpowder. It produces something which cannot be recalled or undone. But the powder may have lain till it has become damp or the man who laid the train may remove it before the match is applied. So an offer may lapse for want of acceptance or be revoked before acceptance. Acceptance converts the offer into a promise and then it is too late to remove it.’

Section 2 (b) of the ICA reads as follows: ‘When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted.’ So, acceptance is the act of giving consent to the proposal. An offer (proposal) when accepted becomes a promise.

Who can accept the offer: Following are some general rules as to who can accept an offer:

- An offer can be accepted only by the person or persons for (and to) whom the offer is made.
• An offer made to a particular person can only be accepted by him, for he is the only person intended to accept.

• An offer made to a class of persons can be accepted by any person of that class.

• An offer made to the world at large may be accepted by any person whosoever.

**Essentials:** Following are the essentials of a valid acceptance:

• Acceptance should be communicated;

• Acceptance should be absolute and unqualified;

• Acceptance should be made in the prescribed manner or in some usual and reasonable manner; and

• Acceptance should be made while the offer is still subsisting.

**Communication of Acceptance:**

Acceptance must, as a general rule, be communicated. Acceptance should be made (communicated) by doing some overt act, either by words or conduct. This is a matter of common sense, yet communication is not absolutely indispensable. It is not necessary in the case of unilateral promises. No contract is concluded if the offeree remains silent and does nothing to demonstrate that he has accepted the offer. Mental acceptance or uncommunicated assent does not give rise to any contract. The Indian law requires the offeree to know of the offer in order to validly accept it. So if X offers a reward of Rs1000 to anyone who returns his lost dog, and, without knowing of the offer, if Y returns the dog, Y cannot claim the Rs1000. The offeree must not be able to claim that there is a contract if he did not have knowledge of the offer at the time when he did the act said to constitute an acceptance of the offer. Communication of acceptance is the general rule. This general rule, however, can be overcome by proving that the person who makes the offer may expressly or impliedly dispense with the need for notification of acceptance. It is understandable that in the case of a reward-type offer, it is not necessary for all those people who intend to respond to notify that they are responding. Instead, performance of the requested act amounts both to acceptance and to notification of acceptance, namely,
the person who offered the reward finds out about acceptance when the claimant arrives with the performance of the offer.

Through cases, a rule has developed that a person cannot get the benefit of a contract if he or she accepts in ignorance of the offer. The classic case which demonstrates this is *R v Clarke*[^29^], which was a reward case. In this case, Clarke claimed a reward of £1000 for providing information which resulted in the conviction of two murderers. Clarke had known of a reward offer; however, it was alleged, he gave the information to get himself off the hook after he was arrested for the murder. Therefore, this case does not illustrate the proposition that one cannot accept an offer if one does not know about it. Instead, the High Court was prepared to surmise from the circumstances what Clarke’s state of mind was, and came to the conclusion that, he did not have the reward offer in his mind when he provided the essential information. He was responding to something reasonably different, to be precise, fear for his own fate. In the old case of *Williams v Cawardine*[^30^], a woman gave some information which led to the conviction of a murderer, and (she) was able to claim the reward. She furnished the information ‘to ease her conscience and in hopes of forgiveness hereafter’.

Even though *R v Clarke* has its unsatisfactory aspects, it is undeniably regarded as good authority for the proposition that an acceptance must be made in response to and because of the offer. In a case where it is shown that the person who supposedly accepted did not know of the offer, the application of this principle is quite understandable.

As a matter of common sense and well recognized legal principle, acceptance must generally be communicated. This is observably necessary—how else is the offeror to know that his offer has been accepted? This rule can, however, in appropriate circumstances, be displaced. For example, in reward type of cases, it would be silly for everyone who is looking for the lost property or missing person, etc, to send a message that he or she has accepted. More to the point, it would not be acceptance

[^29^]: (1927) 40 CLR 227.  
[^30^]: (1833) 2 LJKB 101.
Communication of acceptance of the offer must be made to the offeror or his agent: One important point regarding the communication of acceptance of the offer is that the acceptance must be communicated to the offerer himself or his duly authorized agent. In *Felthouse v Bindley*\(^{31}\), an uncle (Felthouse) was negotiating with his nephew, John, for the sale of a horse. He wrote to his nephew (John): ‘If I hear no more about it, I consider the horse is mine at £30 15s.’ John did not send any response. However, subsequently, John instructed an auctioneer, Bindley, to sell his farming stock. He further instructed the auctioneer that the horse was already sold and so not to be included in the property to be auctioned. The auctioneer, however, by mistake sold the horse, and later acknowledged his mistake in doing so. Felthouse claimed that Bindley should restore the horse back to him because it was already sold to him and was his property. The Court ruled that although it was clear that the nephew in his own mind intended his uncle to have the horse, but he had not communicated such intention to his uncle, or done anything to bind himself. Nothing, consequently, had been done to vest the property in the horse in the plaintiff. Therefore, there had been no bargain to pass the property in the horse to the plaintiff, and therefore, that he had no right to complain of the sale.

Thus, there could not be a contract in circumstances where the offeror had purported to impose contract by saying ‘If I hear nothing, I shall assume that you have accepted.’ It seems pretty clear that the rule in *Felthouse v Bindley* is good enough when it is needed to protect someone from an attempt to impose a contract. It embodies an imperative basic notion about the institution of contract—freedom of contract should also include the idea of freedom from contract. As regards the difference between this case and the *Carbolic Smoke Ball* case, silence does not constitute acceptance in a unilateral contract, nevertheless it may be that acceptance does not have to be communicated.

\(^{31}\) (1862) 142 ER 1037.
Accordingly, silence does not amount to acceptance. Silence may include both express and implied communication. A person nodding his head may not have spoken, but is not ‘silent’, since he has communicated through other means. Section 2 of the ICA establishes that a communicative process is secured by the parties directing communication to one another. S. 2 (a) states that when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal. Similarly S. 2 (b) provides that when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted, and a proposal, when accepted, becomes a promise.

**Acceptance by postal and other modes of communication:**

In *Brinkbon Ltd v Stahag Stahl and Stahlwarengesellschaft mbH*, Lord Wilberforce said, ‘The general rule, it is hardly necessary to state, is that a contract is formed when acceptance of an offer is communicated by the offeree to the offeror.’ While this may seem uncomplicated, it begs the question of when an acceptance will be taken to have been ‘communicated’. For instance, X leaves a message on Y’s answer phone, but Y never listens to it. Has it been ‘communicated’ to Y and if so, when?

The offeror must be given some protection and certainty, so that he should come to know when his offer has been accepted in order that he knows if he has entered into a contract or not. The offeror can, however, enlarge his protection by stating in his offer that the acceptance must actually be brought to his attention, but if he does not, the law will take into account his interests by imposing the above requirement upon the offeree.

As per the English law (which has been, with a very slight modification, adopted by the Indian law), if the offeree accepts by post, the general rule is that the offer will be accepted when the letter is *posted*, not when it reaches the offeror. This is known as the ‘postal rule’ or ‘posting rule’ or the ‘mail-box rule’. Whatever the reasons for the

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32 This aspect has been dealt with in detail in the next chapter.
33 [1983] 2 AC 3
34 *Adams v Lindsell* [1818] EWHC KB J59.
emergence of the principle may be, this principle, in the first place, can be justified on the ground that if both parties contemplate that the post may be used, on posting the letter, the offeree has done all that he can be reasonably expected to do to bring the acceptance to the offeror’s attention. Once he puts the letter in the post box, the rest is beyond his hands. One of the consequences of the postal rule is that the offer may have been validly accepted, although the letter never reaches the offeror. Some may suggest that such consequences make the postal rule unfair and that it should be the responsibility of the offeree to ensure that the letter reaches its destination. Nevertheless, the offeror controls the terms of the offer; accordingly, he can stipulate that the acceptance must be communicated in a particular manner. If he does not do so, it can be argued that he only has himself to blame.

To answer the question as to when the postal rule applies, reference may be made to Henthorn v Fraser\(^\text{35}\) wherein Lord Herschell, in the Court of Appeal, laid down the following test for determining when the postal rule should apply:

Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.

\textit{Henthorn} suggests that even though an offer is made orally, where immediate acceptance is not contemplated and the parties live at a distance, the postal rule will apply.

The settled position of law is that if the postal acceptance is properly addressed and posted, the postal rule will apply even if the acceptance is delayed in the post or never reaches its destination.\(^\text{36}\) Although this appears hard on the offeror, who may well mistakenly believe that his offer has not been accepted so he is free to contract with others; yet, it can be strongly argued that the offeree has taken all reasonable steps to ensure that the letter reaches the offeror. On the other hand, if the letter does not reach its destination or is delayed because it is wrongly addressed or not properly

\(^{35}\) [1892] 2 Ch 27.

\(^{36}\) Household Fire Insurance Co Ltd v Grant (1878-79) LR 4 Ex D 216.
posted, the postal rule should not apply. This is because the offeree is at fault; he has not done all that he could do to communicate his acceptance to the offeror.

**Other means of communication**

However, with the evolution of modern, faster forms of communication, such as, e-mail and the telephone, it became less likely that the parties would contemplate a postal acceptance because these newer methods of communication would bring the acceptance to the offeror’s attention more speedily.

The postal rule does not apply to modern, instantaneous forms of communication. It is commonly said that where the means of communicating the offer is instantaneous, there will not be an acceptance unless and until it has communicated to the offeror. One reason for this standpoint can be found in *Brinkibon* from Lord Fraser in the context of telexes: ‘a party (the acceptor) who tries to send a message by telex can generally tell if his message has not been received on the other party’s (the offeror’s) machine, whereas the offeror, of course, will not know if an unsuccessful attempt has been made to send an acceptance to him’. Usually, a party who unsuccessfully attempts to bring his acceptance to the offeror’s attention will know instantly that he has been unsuccessful, so it is reasonable to expect him to try again until he succeeds.

Apropos the telephone acceptances, if the offeror and offeree are actually talking over the telephone, the offer will be accepted at the moment that it reasonably appears to the offeree that the offeror has heard and understood the acceptance. So, for instance, if the line goes dead in the middle of the acceptance, there will be no acceptance unless the acceptor telephones him again or inform him of his acceptance.

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37 *LJ Korbetis v Transgrain Shipping BV* [2005] EWHC 345 (QB). In this case, the shipowner’s agents, by sending a message to the wrong facsimile number, had failed to properly communicate acceptance of the charterer’s offer to appoint one of three nominated arbitrators. By the time the shipowner’s agents had realized the clerical error, having failed to follow up the matter for eight months, it was too late to then communicate acceptance to the charterer because a reasonable time in which to accept the offer had already expired. The court would not grant relief by allowing the late commencement of arbitration proceedings because the circumstances had not been within the reasonable contemplation of the parties at the time the contract was made as the kind of circumstance which might trigger an extension of time and it would be unjust to do so when the charterer had the benefit of a contractual time bar.

38 See, *Entores Ltd v Miles Far East Corp* (1955) in the context of telexes.
in another appropriate way. However, situations are different if the acceptor does not get through to the offeror, but reaches his answer phone. Here, provided the acceptance is patent, the acceptance will take effect when it would have been reasonable for the offeror to check his answer phone.

As regards faxes, it is submitted that the acceptance should be valid unless the offeree knows or should know that it has not got through properly. If the fax has not got through at all, the sender will know this at once, so can he reasonably be expected to resend. The time at which the offer should be taken to have been accepted should be determined in the same manner as in answer phone examples.

With regard to e-mails, yet again, the acceptance should be valid unless the offeree should realise that the e-mail has failed to be received properly by the offeror. If the e-mail is sent to a wrong address or the receiver’s server is not responding, the message will ‘bounce back’ to the sender, who will receive a notice that the message has not been delivered. In such situations, the offer is said not have been accepted and the offeree should resend the e-mail. As above, the acceptance will take effect at the time when the offeror could reasonably have been expected to check his inbox.

Like the postal rule, the offeror’s fault should not affect where there is a valid acceptance, and if so, the time at which it takes effect. Accordingly, if the offeror does not check his e-mails, or he spills tea on his computer so he is unable to receive e-mails, this has no effect (unless perhaps the offeree did or should have known of these facts). Similarly, if the telex is sent in ordinary business hours, the receipt is the same as the time of dispatch because it is not open to the offeror to contend that it did not in fact then come to his attention.

Acceptance should be absolute and unqualified: Acceptance should be ‘absolute and unqualified’ in all the terms of the offer. If there is any discrepancy between the terms of the offer and the terms of the acceptance, there will be no contract. For example, where X offered to sell a plot of land to Y at Rs 1,00,000 to be payable at

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39 See, Lord Denning in Entores.
the time of sale. Y replied accepting and enclosing a cheque for Rs 90,000, and promising to pay the balance by monthly instalments of Rs 2,000 after the contract of sale. There would be no contract, since there was no unqualified acceptance.

*Conditional Acceptance:* An acceptance of an offer with a variation in its terms, i.e. by changing the terms of the offer, is no acceptance, so as to result in any contract; it is simply a counter-proposal, which must be accepted by the original offeror before a contract is made. In that case too, it will be a contract with terms of the counter-proposal. For instance, X offered to Y to sell his house for Rs. 10,00,000. Y said, 'Accepted for Rs 90,000.' This is not a valid acceptance but a counter offer or counter proposal. However, an acceptance is not called 'conditional' if an immaterial term is added or if there occurs any misunderstanding between the parties for the interpretation of collateral terms. In the same way, seeking clarification or a mere inquiry into the terms of the offer neither amounts to the acceptance of the offer nor to the making of a counter offer.

*Counter offer:* A proposal terminates by a counter proposal (counter-offer) by the offeree. When instead of accepting the terms of an offer as they are, the offeree accepts the same subject to certain condition or qualification, he is said to have made a counter-offer. For example, where an offer to purchase a house with a condition that possession shall be given on a particular day was accepted varying the date for possession, it was held to be a counter-proposal, and not a valid acceptance.

In other words, acceptance has to correspond to the offer. The courts apply the mirror principle. If the acceptance does not reflect the offer, then it is said not to be a valid acceptance, but a counter-offer instead. It is afterwards possible for the original offeror to accept the counter-offer and, then, a contract would be made. In a long-drawn-out negotiation, it is sometimes difficult to untangle the offers, counter-offers and a possible final acceptance by one party. For sure, it is quite possible for the negotiations to remain ‘up in the air’ and never come to a resolution with the result that there is no contract.

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41 Kundan Lal v Secretary of State AIR 1939 Oudh 249; Hyde v Wrench [1840] EWHC Ch J90.
42 Routledge v Grant (1828) 130 ER 920.
One important principle which has stood for a long time is that once the original offer has been effectively rejected by the other person making a counter-offer, then it is said that the original offer is dead and cannot subsequently be accepted. It is, of course, feasible for the original offeror whose offer has been killed to revive it by saying that he or she is still prepared to do business on those terms.

**Acceptance should be made in the prescribed manner or in some usual and reasonable manner:** If there is a prescribed means of acceptance, then the person attempting to accept should do whatever is required. As per S. 7 (2), ICA, the acceptance must be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance.

The offeree may communicate his acceptance by word of mouth, telephone, telegram or by post. These are some usual and reasonable methods of communicating acceptance to the offeror. For instance, X offers to buy Y’s bike for Rs. 50,000. Y can accept this offer by stating so either orally or through telephone or by writing a letter or by sending a telegram to that effect. An offer can also be accepted by conduct. If the offeree does what the offeror wants him to do, there is a valid acceptance of the offer. S. 8 of the Contract Act states, ‘Performance of the conditions of a proposal or the acceptance of any consideration for reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.’ For instance, in Carlill case, a company offered £100, to anyone who contracted influenza after using their smoke ball 3 times daily for 2 weeks. One lady, Mrs Carlill, used the smoke ball, even so contracted influenza. She maintained an action for the reward. The company contended that she should have notified them for her acceptance of the offer. It was, however, held that the use of the smoke ball by Mrs Carlill constituted acceptance of the offer by conduct, and no formal notice of acceptance was necessary. Similarly, in a case, where a widow invited her niece to stay with her in her residence and promised to settle on her a particular immovable
property, and the niece stayed with her in residence till her death; it was held that the niece was entitled to the property because she had accepted the aunt's offer by going to her residence and staying with her as desired.

Where the promisor prescribes a particular mode of acceptance, the offeree must follow that particular mode of acceptance. For example, if the offeror says, 'Acceptance must be sent by telegram', the offeree must send a telegram. If the offeree fails to follow the prescribed mode of acceptance, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that the proposal be accepted in the prescribed manner and not otherwise. However, if the proposer does not insist upon it, he accepts the acceptance as actually communicated. Hence, under the Indian law the proposer has the option of waiving compliance with the prescribed mode of acceptance. For example, X offers to buy a certain quantity of iron from Y at a certain price and asks Y to send a telegram if he accepts; Y writes a letter accepting the offer. X may insist on a telegram from Y; however, if X does not so insist, the acceptance is good.

Acceptance should be made while the offer is still subsisting: The offeror is at liberty to withdraw his offer, or the offer is revoked under diverse circumstances. Subsequent to the withdrawal or lapse of the offer, there is nothing which can be accepted. It is, consequently, necessary that the acceptance should be made while the offer is still alive and subsisting. Acceptance of any offer, after the same has been withdrawn or lapsed, cannot result in any contract. Similarly, an offer is deemed to have ended by its rejection or by making of a counter-offer (in response to the original offer). In such situations also, an attempt to accept the same would not result in any contract.

2.4.1.4 Revocation of Proposals and Acceptances

Once an offer is accepted, a binding contract arises. The acceptance of an offer becomes binding on the offeror the moment the acceptance is put in course of transmission (communication) to the offeror so as to be out of the power of the acceptor. However, any time before this happens, the offer may be revoked. Section 5, ICA, provides that a proposal may be revoked at any time before the
communication of its acceptance is complete as against the proposer, but not afterwards. To illustrate, say, X proposes, by a letter sent by post, to sell his house to Y. Y accepts the proposal by a letter sent by post. X may revoke his proposal at any time before or at the moment when Y posts his letter of acceptance, but not afterwards. Y may revoke his acceptance at any time before or at the moment when the letter communicating it reaches X, but not afterwards.

According to Section 3 of the Contract Act, the revocation of a proposal or an acceptance is deemed to be made by any act or omission of the party by which he intends to communicate such revocation, or which has the effect of communicating it. According to Section 4 of the Act, the communication of revocation is complete as against the person who makes it, when it is put into the course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it; and as against the person to whom it is made, when it comes to his knowledge. For example, X makes a proposal to Y. Y sends a letter of acceptance. Subsequently Y revokes his acceptance by telegram. Y’s revocation is complete, as against Y when the telegram is despatched, and as against X when it reaches him. Similarly, where X revokes his proposal by telegram, the revocation is complete, as against X, when the telegram is dispatched. The revocation is complete, as against Y, when Y receives it. Y revokes his acceptance through telegram. Y’s revocation is complete, as against Y, as soon as the telegram is dispatched; and, as against X, when it reaches him.

The English law on this aspect is different. Under the English law, an acceptance is irrevocable once it is put in course of transmission to the offeror. Thus, in the above example, Y could not have revoked the acceptance once he had posted the letter of acceptance.

**Modes of Termination/ Lapse/Revocation of a Proposal:**

A valid offer is made with a view to get assent thereto. As soon as the offer is accepted, it gives rise to a contract. However, before it is accepted, it may lapse; or may be revoked; or the offeree may well reject the offer. An offer may come to an end in a variety of ways. As long as this happens before acceptance, then, there cannot be a contract. In such a situation, the offer will come to an end. Evidently, if
someone tries to withdraw an offer after acceptance, this will simply be a breach. According to S. 6 of the ICA, a proposal is revoked:

1. by the communication of notice of revocation by the proposer to the other party; or
2. by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance; or
3. by the failure of the acceptor to fulfil a condition precedent to acceptance; or
4. by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

An offer terminates when revoked by the offeror before acceptance: The offeror may revoke or withdraw the offer. However this is not possible if the offeror has, for a consideration, promised not to withdraw the offer for a certain time. When the offeror gives notice of revocation to the other party, i.e., expressly withdraws the offer, the offer comes to an end. An offer may be revoked any time before acceptance, but not afterwards. For example, a proposal is sent by X to Y and is accepted by Y by letter. The proposal might have been revoked any time before the letter of acceptance was posted, but it could not be revoked after the letter is posted. The notice of revocation does not take effect until it comes to the knowledge of the offeree.

The offeror can withdraw the offer at any time before acceptance. This is so even if he or she has said that it would remain open for a certain time. In *Dickinson v Dodds*, Dickinson was offered a property by Dodds. Dodds made a promise to keep the offer open till Friday 9.00 am. On Thursday, Dodds sold the property to somebody else. Dickinson heard about this; nevertheless, tried to accept the offer before it expired on Friday at 9.00 am. The Court held that he could not do that. Certainly, the promise to keep the offer open was not binding because it was not embodied in an option (not supported by any consideration). In addition, the Court also held that an offeror does not necessarily have to communicate withdrawal of offer if the offeree has discovered by some other means that the offer is in fact not still open. However, in
India, by virtue of the clear language of section 6 (1) of the Contract Act, the communication of notice of revocation must be by the proposer to the other party; that is to say, if the communication of notice of revocation is by a person other than the offerer, then, that will not amount to valid revocation of offer.

*Options:* An 'option' is a form of offer which also includes a promise not to withdraw it for a certain time. The essential feature of an option is that the offeree must have provided a consideration for the benefit of being given the exclusive right to accept for a certain period. This consideration may consist of a nominal sum of money, for example, Rs 100. This was missing in *Dickinson v Dodds.*

Apparently, in one sense, every option is a contract because there is an exchange of consideration. In this sense, the promise to keep the offer open, as long as it is supported by a consideration, is itself a 'mini' contract prior to, and separate from, the 'main' contract. Therefore, in case of an option, there are two contracts: the 'mini' contract and then the 'main' contract.

**An offer lapses after the lapse of the stipulated or reasonable time:** The offer must be accepted by the offeree within the time prescribed in the offer and if no time is prescribed, then within a reasonable time. The offer lapses after the time stipulated in the offer terminates if, by that time, the offer has not been accepted. If no time is prescribed, then the offer lapses after the efflux of a reasonable time. ‘What is a reasonable time’ is a question of fact and would depend upon the circumstances of each case.

**A conditional offer terminates when the condition is not accepted by the offeree.** It is feasible to make a conditional offer. The consequence of this is that the offer cannot be accepted if the condition has not been satisfied. An offer lapses by the failure of the acceptor to fulfil a condition precedent to acceptance, where such a condition has been prescribed. For example, X says to Y, ‘I shall sell my house at Ahmedabad to you for Rs. 50,000 if you marry Z.’ The offer cannot be accepted until and unless Y is married to Z.
An offer lapses by the death or insanity of the offerer or the offeree before acceptance: An offer is revoked by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance. Therefore, if the acceptance is made in ignorance of the death, or insanity of offerer, there would be a valid contract. Similarly, in the case of the death of offeree before acceptance, the offer is terminated.

An offer terminates by not being accepted in the mode prescribed, or if no mode is prescribed, in some usual and reasonable manner: An offer terminates by not being accepted in the mode prescribed, or if no mode is prescribed, in some usual and reasonable manner.

An offer terminates when rejected by the offeree: An offer lapses once a counter-offer is made. The same, obviously, applies if the offer is simply rejected. So, if X makes an offer to Y which Y rejects, then X cannot subsequently accept it unless Y can persuade X to re-make the offer. If a counter offer is made, then, the original offer lapses. *Hyde v Wrench*[^33] is a leading English case on the issue of counter-offers and their relation to initial offers. In this case, Wrench (D) offered to sell his estate to Hyde for 1200 pounds, which Hyde (P) declined. Wrench subsequently made a final offer (on 6th June) to sell the farm for 1000 pounds. Hyde, in turn, wrote a letter (on 8th June) offering to purchase the property for 950 pounds and Wrench replied that he would consider the offer and give an answer within approximately two weeks. Wrench, finally, rejected the offer and the plaintiff (Hyde) immediately replied that he accepted Wrench’s earlier offer to sell the real estate for 1000 pounds. Wrench turned this down, and Hyde sued for breach of contract and sought specific performance, contending that Wench’s offer had not been withdrawn prior to acceptance. The issue before the court was: if one party makes an offer and the offeree makes a counter-offer, does the original offer remain open? Lord Langdale ruled that a counter-offer cancels the original offer in the following words:[^34]

Under the circumstances stated in this bill, I think there exists no valid binding contract between the parties for the purchase of this property. The

[^33]: [1840] EWHC Ch J90; [1840] 3 Bea 334; 49 ER 132.
[^34]: [1840] EWHC Ch J90; [1840] 3 Bea 334; 49 ER 132
defendant offered to sell it for £1000, and if that had been at once unconditionally accepted there would undoubtedly have been a perfect binding contract; instead of that, the plaintiff made an offer of his own, to purchase the property for £950, and he thereby rejected the offer previously made by the defendant. I think that it was not afterwards competent for him to revive the proposal of the defendant, by tendering an acceptance of it; and that, therefore, there exists no obligation of any sort between the parties.

Two important qualifications must be made to the afore-stated principle. It is important to note that the offeror makes a counter-offer if he actually puts forward terms that are different from those in the original offer. Therefore, if he merely enquires as to what the terms of the offer are, he will taken to be exploring what the terms of the original offer are rather than varying its terms, then, no counter-offer will said have been made. Additionally, in some situations, the original offeror, in replying to the counter-offer, might be taken to reaffirm the original offer. For instance, say that in Hyde v Wrench, if Wrench had responded to Hyde’s counter-offer in the following way: ‘I am prepared to sell to you for £1,000 but not a penny less.’ The effect of this would have been to make an offer on the same terms as the original offer.

2.4.1.5 Capacity to Contract

Sections 10-12 of the Contract Act provide for this aspect. According to S. 10 of the ICA, one of the essentials of a valid agreement is that the parties to the contract must be competent to contract. S. 11 provides that ‘every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject’. Accordingly, it is clear that incapacity to contract may arise from: (i) minority, (ii) mental incompetence, and (iii) status.

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45 Stephenson, Jacques & Co v McLean 5 QBD 346.
46 Gibson v Manchester (1979) 1 All ER 972.
Minority

According to S. 3 of the Indian Majority Act 1875, a minor is a person who has not completed 18 years of age. Thus, a minor (a person below 18 years of age) cannot contract. The position of a minor in the world of contract may be summarized as follows:

i. *A contract with or by a minor is void and a minor, therefore, cannot, bind himself by a contract.* A minor is not competent to contract. However, under the English Law, a minor’s contract, subject to certain exceptions, is only voidable at the option of the minor. The Privy Council in *Mohiri Bibi v Dharmadas Ghose*\(^{47}\) held that, in India, by virtue of Ss 10 and 11, minor’s agreements are absolutely void and not merely voidable.

ii. *A minor can be a promisee or a beneficiary.* During his minority, a minor cannot bind himself by a contract. Nevertheless, there is nothing in the Contract Act which prevents him from making the other party to the contract to be bound to the minor. He can get benefits under the contract.

iii. *A minor’s agreement cannot be ratified by the minor upon his attaining majority.* A minor cannot ratify the agreement upon attaining the age of majority, for the original agreement is void *ab initio* and, therefore, validity cannot be given to it afterwards.

iv. *A minor is always allowed to plead minority,* and is not estopped to do so even where he had procured a loan or entered into some other agreement by fallaciously representing, that he was of full age. Thus, doctrine of *estoppel* does not apply to such a minor. For instance, if a minor who has deceived the other party to the agreement by representing himself as of full age is not prevented from later asserting that he was a minor at the time he entered into agreement. However, in the case of a fraudulent misrepresentation of his age by the minor, inducing the other party to enter into a contract, the court may award compensation to that other party under sections 30 and 33 of the Specific Relief Act 1963.

\(^{47}\) LR (1903) AC 6.
v. A minor cannot become a partner in a partnership firm. Nonetheless, a minor may, with the consent of all the partners for the time being, be admitted to the benefits of partnership.\textsuperscript{48}

vi. A minor’s estate is liable to a person who supplies necessaries of life to a minor, or to anyone whom the minor is legally bound to support. This obligation is cast on the minor not on the basis of any contract, but on the basis of quasi-contractual obligations.\textsuperscript{49} Nevertheless, there is no personal liability on a minor for the necessaries of life supplied.

vii. Minor’s parents/guardians are not liable to a minor’s creditor for the breach of contract (agreement) by the minor, notwithstanding whether the contract is for necessaries or not. But, the parents are liable where the minor is acting as an agent of the parents or the guardian.

viii. A minor may act as an agent and bind his principal by his acts without incurring any personal liability. However, a minor can never become the principal.

**Mental Incompetence**

A person must be of sound mind so as to be competent to contract (Ss 10–11, ICA). S. 12, Indian Contract Act\textsuperscript{50} provides a test of soundness of mind for the purpose of making a contract.

\textsuperscript{48} S. 30 of the Indian Partnership Act 1932.
\textsuperscript{49} S. 68, Indian Contract Act.
\textsuperscript{50} S. 12 reads as:

'A person is said to be of unsound mind for the purpose of making a contract, if at the time when he makes it, he is incapable of understanding it, and of forming a rational judgement as to its effect upon his interests.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.'

**Illustrations**

(1) A patient, in a lunatic asylum, who is at intervals, of sound mind, may contract during those intervals.

(2) A sane man, who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgement as to its effect on his interest, cannot contract whilst such delirium or drunkenness lasts.
Accordingly, the *soundness of mind of a person depends* on two factors:

1. his capacity to understand the terms of the contract, and
2. his ability to form a rational judgement as to its effect upon his interests.

If a person is incapable of any of the above, he is said to be of unsound mind. Idiots, lunatics, etc are examples of those having an unsound mind. However, whether a party to a contract, at the time of entering into the contract, is of sound mind or not is a question of fact to be decided by the court. The person interested in proving the unsoundness of a person has to convince the court. The liability for necessaries of life supplied to persons of unsound mind is the similar to that of minors.\(^{51}\)

**Incompetence through Status**

In addition to minors and persons of unsound mind, there are some other persons who are incompetent to contract, partially or wholly, so that the agreements of such persons are void, or agreements of such persons cannot be enforced against them. Incompetency to contract may arise from political status, corporate status, legal status, etc. Examples are: alien enemy (*political status*), foreign sovereigns and ambassadors (*political status*)\(^{52}\), company under the Companies Act 1956 or statutory corporation by passing special Act of Parliament (*corporate status*)\(^{53}\), and insolvent persons (*legal status*)\(^{54}\).

### 2.4.1.6 Free Consent

Sections 10, 13–22 of the ICA deal with consent and free consent. It is indispensable for the creation of a contract that both parties agree to the same thing in the same sense. When two or more persons agree upon the same thing in the same sense, they

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\(^{51}\) S. 68, ICA.

\(^{52}\) Foreign sovereigns and accredited representatives of a foreign State or Ambassadors are entitled to some special privileges. They cannot be sued in Indian courts unless they choose to submit themselves to the jurisdiction of Indian courts. They can enter into contracts and enforce those contracts in the Indian courts; nonetheless, they cannot be proceeded against in Indian courts without the sanction of the Central Government.

\(^{53}\) A company cannot get into a contract which is *ultra vires* its Memorandum of Association. A statutory corporation cannot go outside the objects mentioned in the Act, passed by Parliament. Likewise, Municipal Corporations (Local bodies) are disqualified from entering into contracts which are not within their statutory powers.

\(^{54}\) Insolvent persons are not competent to get into contract until they obtain a certificate of discharge.
are said to have consented. For a contract to be valid, it is not only essential that parties must consent, but also that they must consent freely. Where there is a consent, but no free consent, there is, in general (excluding mistake), a contract voidable at the option of the party whose consent was not free. Section 14, ICA defines ‘free consent’ as under:

Consent is said to be free when it is not caused by-

1. coercion, as defined in section 15, or
2. undue influence, as defined in section 16, or
3. fraud, as defined in section 17, or
4. misrepresentation, as defined in section 18, or

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55 S. 13, ICA.
56 S. 15, ICA reads as under:

Coercion is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

57 S. 16 reads as under:

(1) A contract is said to be induced by ‘undue influence’ where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(a) where he holds a real or apparent authority over the other or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

58 S. 17 reads as under:

Fraud means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto of his agent, or to induce him to enter into the contract:-

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

Explanation—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

59 Section 18 reads as under:

‘Misrepresentation’ means and includes—

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(2) any breach, of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him,
Consequences of the Presence of Coercion, Undue Influence, Fraud and Misrepresentation (Sections 19 and 19 A)

According to Ss. 19 and 19 A, when consent to an agreement is caused by coercion, undue influence, fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so obtained. That is to say, the aggrieved party can have the contract set aside or if he so desires to insist on its performance by the other party. However, in case of undue influence, any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as the court deems fit (S. 19A).

In the case of fraud or misrepresentation, the party defrauded has the following remedies (S. 19):

1. He can avoid the performance of the contract; or
2. He can insist that the contract shall be performed and that he shall be put in the position in which he would have been if the representation made had been true.

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

(3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

60 S. 20 reads as under:
Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.
Explanation.-An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

61 S. 21 reads as under:
A contract is not voidable because it was caused by a mistake as to any law in force in India; but a mistake as to a law not in force in India has the same effect as a mistake of fact.

62 S. 22 reads as under:
A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.
Furthermore, a fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

**Mistake and its Consequences:**

Mistake may be explained as an erroneous belief concerning something. Mistake may be of two kinds: (a) Mistake of fact and (b) Mistake of law. A mistake of fact may further be either: (i) bilateral or (ii) unilateral.

**Bilateral Mistake:** Where both the parties to the agreement are under a mistake of fact essential to the agreement, the mistake is called a bilateral mistake of fact and such an agreement is void. For example, X agrees to buy from Y a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

Mistake, in order to render the agreement void, must relate to some essential matter. Some typical cases of mistake invalidating the agreement are as follows:

1. Mistake as to the existence of subject-matter
2. Mistake as to identity of the subject-matter
3. Mistake as to title to the subject-matter
4. Mistake as to quantity of subject-matter
5. Mistake as to price of the subject-matter

**Unilateral Mistake:** In the case of unilateral mistake, only one party to a contract is under a mistake of fact, and the contract, generally speaking, is not voidable or invalid. S. 22 of the ICA states, 'A contact is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.'

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63 See, *Scott v Coulson* (1903) 2 Ch. 249; *Courturer v Hastie* (1856) 10 E.R. 1065.  
65 See, *Cooper v Phibbs* (1867) 159 E.R. 375.  
66 See, *Henkel v Pape* (1870) 6 Ex. 7.
However, there are the some exceptions, and accordingly, even a unilateral mistake of fact may result in void agreement:

1. Where the unilateral mistake is as to the nature of the contract;\(^{67}\)
2. Mistake as to quality of the promise;\(^{68}\)
3. Mistake as to the identity of the person contracted with. Where X intends to contract with Y but by mistake enters into an agreement with Z believing him to be Y, the agreement is void on the ground of mistake.\(^{69}\)

**Mistake of Law** (S. 21, ICA): Mistake of law may further be of two kinds: (a) Mistake of Law of the Land, and (b) Mistake of Foreign Law.

**Mistake of Law of the Land:** In this kind of mistake, the rule is *'ignorantia juris non excusat'*; i.e. ignorance of law is no excuse. In accordance with this principle, S. 21 declares that ‘A contract is not voidable because it was caused by a mistake as to any law in force in India.’

**Mistake of Foreign Law:** The maxim that ‘ignorance of law is no excuse’ is applicable only to the law of the country and not to foreign law. The mistake of foreign law is to be treated at par with a mistake of fact. S. 21 reads, ‘A mistake as to a law not in force in India has the same effect as a mistake of fact.’

2.4.1.7 **Consideration**

A promise made without consideration is merely gratuitous and, however sacred and binding in honour it may be, it cannot create a legal obligation. An analysis of any contract shows that it consists of two parts: (i) promise and (ii) consideration for the promise. A person makes a promise to do or abstain from doing something as a return or equivalent of some loss, damage, or inconvenience that may have been occasioned to the other party in respect of the promise. The benefit so received and the loss, damage or inconvenience so caused is considered in law as the consideration for the promise. Hence, generally speaking, a contract cannot be

\(^{67}\) See, *Foster v Mackinnon* (1869) LR 4 CP 704; *Bay v Polla and Morris* (1930) 1 KB 628.

\(^{68}\) See, *Scriven v Hindley* (1913) 3 KB 564.

\(^{69}\) See, *Cundy v Lindsay & Co.*, (1878) 3 App. Cas. 459, *Lake v Simmons* (1927) A.C. 487; *Philips v Brooks* (1919) 2 KB 243;
thought of without consideration; however, there are some exceptions to this general rule. There are a number of provisions concerning consideration in the Indian Contract Act, such as, sections 2(d), 10, 23, 24, 25, 148, and 185.

In Currie v Misa\textsuperscript{70}, consideration was termed as 'a valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.'

In India, the definition of consideration is contained in S. 2 (d) of the ICA, which reads: ‘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 abstain from doing something, such act or abstinence or promise is called a consideration for the promise.’

Following are some general rules regarding consideration:

1. Consideration must move at the desire of the promisor.
2. Consideration may move from the promisee or any other person, i.e., a stranger to consideration may maintain a suit.
3. A stranger to the contract cannot maintain a suit.
4. Consideration need not be adequate.
5. Consideration must be real and substantial.
6. Consideration must be legal.

Further, consideration may be ‘past’, ‘present/ executed’ or ‘future/ executory’

Exceptions to the rule ‘agreement without consideration is void’: The general rule of law is that an agreement made without consideration is void. Nevertheless, there are a few exceptional cases where a contract, even though without consideration, is enforceable. They are as follows:

1. Where an agreement is expressed in writing and registered under the law for the time being in force for the registration of

\textsuperscript{70} (1875) LR 10 Ex. 162.
documents, and is made on account of natural love and affection between parties standing in a near relation to each other [S. 25 (1)];

2. Where an agreement is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do [S. 25 (2)];

3. Where an agreement is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits [S. 25 (3)];

4. Cases of gift (Explanation to S. 25);

5. Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit. (S. 63, ICA);

6. Consideration is not necessary to effect bailment (S. 148, ICA).

7. No consideration is required to create an agency (S. 185, ICA).

2.4.1.8 Legality of Object and Consideration
An agreement will not be enforceable if its object or the consideration is unlawful. According to S. 23 of the Contract Act, the consideration or object of an agreement is lawful, unless it

is forbidden by law; or

is of such a nature that, if permitted, it would defeat the provisions of any law; or

is fraudulent; or

involves or implies injury to the person or property of another; or

the Court regards it as immoral, or opposed to public policy.
According to S. 24 of the ICA, if any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

Void Agreements: There are certain agreements which the Indian Contract Act specifically declares void. Some of those important provisions are:

1. Agreement void, where both the parties are under a mistake as to a matter of fact essential to the agreement (S. 20).
2. Every agreement of which the object or consideration is unlawful is void (S. 23).
3. Agreements void, if considerations or objects unlawful in part (S. 24).
4. Agreements without consideration, void (S. 25).
5. Agreements in restraint of marriage\(^{71}\) (S. 26).
6. Agreements in restraint of trade\(^{72}\) (S. 27).
7. Agreements in restrain of legal proceedings\(^{73}\) (S. 28).
8. Agreements void for uncertainty\(^{74}\) (S. 29).

\(^{71}\) S. 26 reads as:
Every agreement in restraint of the marriage of any person, other than a minor, is void.

\(^{72}\) S. 27 reads as:
Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Exception 1-One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

\(^{73}\) S. 28 reads as:
Every agreement,-
(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or
(b) which extinguishes the rights of any party thereto, or discharges any party thereto from liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.

Saving of contract of refer to arbitration dispute that may arise-
Exception 1-This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Exception 2-Nor shall this section render, illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

\(^{74}\) S. 29 reads as:
Agreements, the meaning of which is not certain, or capable of being made certain, are void.
2.4.2 Discharge of Contracts

Discharge of a contract means termination of the contractual relationship between the parties. A contract is said to be discharged when it ceases to operate, i.e. when rights and obligations created by it come to an end. Following are the important modes by which a contract is discharged:

- By Performance (Ss 37-38, 40-55, 57-61)
- By Impossibility/ Unlawfulness of Performance (S. 56)
- Consensual Discharge (by Agreement and consent) (Ss 62, 63)
- By Breach (Ss 39, 73, 74, 75)
- By Operation of Law
- By Lapse of Time

2.4.2.1 Performance of a Contract

Performance means doing of that which is required by the contract. Discharge by performance takes place when the parties to the contract fulfill their obligations arising under the contract within the stipulated/ reasonable time and in the manner prescribed by the contract. However, if only one party performs his obligations, he

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75 S. 30 reads as:
Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.
Exception in favour of certain prizes for horse-racing-This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race.
Section 294A of the Indian Penal Code not affected-Nothing in this section shall be deemed to legalize any transaction connected with horse-racing, to which the provisions of section 294A of the Indian Penal Code apply.

76 S. 36 reads as:
Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

77 S. 56, para-1, reads as:
An agreement to do an act impossible in itself is void.
alone is discharged and not the other party. The party so discharged can bring an action against the other, who is guilty of breach. Performance can be either: (i) actual or (ii) attempted. It may happen that the promisor offers performance of his obligation under the contract at the proper time and place; however, the promisee refuses to accept the performance. This is known as ‘tender’ or ‘attempted performance’. According to S. 38, if a valid tender is made and is not accepted by the promisee, the promisor shall not be responsible for non-performance, nor shall he lose his rights under the contract. A tender or offer of performance to be valid should satisfy the following conditions:

1. It must be unconditional;
2. It must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do;
3. It must be made to the proper person;
4. It must be in relation to whole of the obligations as contained under the contract; and
5. If the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

Chapter-IV of the Indian Contract Act provides for the general rules governing different aspects of ‘performance of contract’:

1. Contracts which must be performed (Ss 37-38);
2. By whom contracts must be performed (Ss 40-45);
3. Time and place for performance (Ss 46-50);
4. Performance of reciprocal promises (Ss 51-58);
5. Appropriation of payments (Ss 59-61); and
6. Contracts which need not be performed (Ss 62-63).
7. Ss 64-67 deal with communication and consequences of voidable contracts; consequences of void contracts or
agreements discovered to be void; and effect of neglect of promisee to afford promisor reasonable facilities for performance.

2.4.2.2 Discharge by Impossibility or Unlawfulness of Contract

Impossibility may be of two kinds: (i) initial impossibility, and (ii) subsequent impossibility.

Initial Impossibility: If an agreement consists of an undertaking to perform some impossibility, it is void **ab initio**. This rule is based upon two maxims:

1. *Lexicon cogit ad impossibilia*, i.e. the law does not recognize that which is impossible.
2. *Impossibilium nulla obligato est*, i.e. that which is impossible does not create any obligation.

Subsequent/ Supervening Impossibility: Where a contract originates as one capable of performance; however, later due to change of circumstances its performance becomes impossible, it is, then, known to have become void by subsequent or supervening impossibility. Doctrine of subsequent/ supervening impossibility in England is referred to as ‘doctrine of frustration’. There are different theories of frustration that has developed under the English law, such as, ‘Implied-Term Theory’, ‘Disappearance of Foundation Theory’, ‘Just and Reasonable Solution Theory’, etc.

The above theories are not applicable in India. The differences in the way of formulating legal theories really do not concern Indian courts so long as India has a statutory provision in the Contract Act. In deciding cases in India, the only doctrine that the court has to go by is that of supervening impossibility or illegality as laid down in S. 5678 of the Contract Act taking the word ‘impossible’ in its practical and

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78 S. 56, ICA, reads:

An agreement to do an act impossible in itself is void.
Contract to do act afterwards becoming impossible or unlawful.—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
not literal sense. It must be borne in mind, however, that S. 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties.

**Essentials of Frustration:** Following are the essentials for the applicability of the doctrine of frustration (S. 56):

1. That the untoward/supervening event occurred after the formation of the contract;
2. That the performance of the contract has become impossible/unlawful owing to the said untoward/supervening event;
3. That the impossibility/unlawfulness is not on account of any event which the promisor could not prevent or anticipate;
4. That the impossibility/unlawfulness is not self-induced by the promisor or due to his negligence, i.e. the event is due to no fault of either party.

Over the years, on the basis of judicial pronouncements, some questions (tests) may be asked for applying the doctrine of frustration to a contract, and depending upon the answer to those questions, it may be said that the contract has/hasn't become frustrated. The questions are:

- **Firstly:** What, having regard to all the circumstances, was the foundation of the contract?
- **Secondly:** Was the performance of the contract prevented?
- **Thirdly:** Was the event, which prevented the performance of the contract, of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract?

If all these questions are answered in affirmative, it can be said that the parties are discharged from further performance of the contract.

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Compensation for loss through non-performance of act known to be impossible or unlawful—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.
A contract is deemed to have become impossible of performance and, thus, void under the following situations: 79

1. Destruction of subject-matter 80
2. Change of circumstances 81
3. Non-occurrence/ non-existence of contemplated event (or particular state of things) 82
4. Death or incapacity of a party 83
5. Intervention by government (legislative or administrative intervention): 84
6. Outbreak/ intervention of war 85
7. Act of God (Vis Major), like natural calamities, etc.
8. Application to agreement to lease cases 86

However, there cannot be any frustration in following cases:

- Difficulty of performance.
- Commercial impossibility.
- Impossibility due to failure of a third person.
- Strikes, lock outs, civil disturbance.
- Failure of one of the objects.

Effects of subsequent/ supervening impossibility:

1. A contract to do an act which, after the contract is made becomes impossible, or by reason of some event which the promisor could not

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79 The list of such situations is not exhaustive, and therefore, there may be other circumstances as well where a contract may well be said to have become void on account of impossibility.
80 See, Taylor v Caldwell Queen's Bench (1863) 3 B&S 826: 122 ER 309.
82 See, Krell v Henry (1903) 2 KB 740 CA.
83 See, Robinson v Davison (1871) LR 6 Exch 269.
85 Tsakiorglou & Co Ltd v Noble & Thorpe (1961) 2 All ER 179.
prevent, unlawful, becomes void when the act becomes impossible or unlawful. (Section 56, para 2).

2. Where a person has promised to do something which he knew, or with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise. (S. 56, para 3)

3. When a contract becomes void, any person who has received any advantage under such contract is bound to restore it, or to make compensation for it to the person from whom he received it. (S. 65).

**Force-Majeure Clause**: *Force Majeure* is a contractual clause allocating the risk if performance becomes impossible or impracticable as a result of an event which the parties could not have anticipated or controlled. The expression 'force majeure' is the intention to save the performing party from the consequences of anything of the nature stated above or over which the party has no control. However, *force majeure* being a contractual term, its implication will depend on the agreement between the parties. The *force majeure* clause should be construed with a close attention to words which precede or follow it, and with regard to the nature and the general terms of the contract.

**The Requirements of Force-Majeure**: The requirements of *force-majeure* are:

- It must proceed from a cause not brought about by the defaulting party.
- The cause must be inevitable, irresistible and unforeseeable.
- The cause must make execution of the contract wholly or substantially impossible or impractical.

2.4.2.3 **Discharge by Agreement and Consent** (*Consensual Discharge*)

Since it is the agreement of the parties that binds them, therefore, by their further agreement or consent, the contract may be terminated. The rule in this regard is
contained in the following maxim: *Eodem modo quo quid constituitur, eodem modo destruitur.* It means ‘a thing may be destroyed in the same manner in which it is constituted/created’. Discharge by agreement and consent may be ‘either expressed or implied’. Further, consensual discharge may take place in following manner:

- **Novation (S. 62) (substituting a new contract for the old):** Novation takes place when:
  
  1. A new contract is substituted for an existing one between the same parties, or
  2. When a contract between two parties is rescinded in consideration of a new contract being entered into on the same terms between one of the parties and a third party.

  The consideration for the new contract may be the discharge of the old contract. It is essential for the principle of novation that there must be consent of all the concerned parties. Novation should take place before the expiry of the time of performance of the original contract. Else, that would be a case of the breach of contract.

- **Rescission (S. 62) (cancelling or annulling the entire contract):** Rescission may be taken to mean cancellation of all or some of the terms of the contract. Where parties mutually decide to cancel the terms of the contract, the obligations of the parties thereunder come to an end. The agreement to mutually rescind a contract may take place either before its breach by a party or after its breach. Rescission of a contract takes place when the parties to a contract decide that they will forget the contract and will not bring a new contract into existence to replace the old one. A promise not to demand performance from each other becomes the mutual consideration for the discharge of contract. However, if the parties do not take any step towards the performance of their contract for a very long time, then, that may amount to abandonment of that contract and will bring about its implied rescission.
• **Alteration** (S. 62) *changing the existing terms*: If the parties jointly agree to change certain terms of the contract, it has the effect of terminating the original contract. In other words, alteration may take place when one or more of the terms of the contract is/ are altered by the mutual consent of the parties to the contract. In such a case, the old contract is discharged. There is, yet, no change in the parties.

• **Distinction between Novation and Alteration**: In novation, the change in the existing contract is substantial, whereas in alteration it is less than that. In novation, parties may change, but in alteration, the parties remain the same.

The parties are free to adopt any of the above three (i.e. novation, or rescission, or alteration) modes. It must be consensual. The effect is that the parties are discharged of their obligations under the original contract.

• **Remission** (S. 63): Remission means acceptance of a lesser fulfilment of the promise made, e.g., acceptance of a lesser sum than what was contracted for, in discharge of the whole debt. It is, however, not necessary to have some consideration for the remission of the part of the debt. S. 63 allows the promisee to dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit. It is a case of one-sided concession of remission under a mutual agreement between the parties.

**Accord and Satisfaction**: These two expressions are used in English Law. Under the English law, remission must be supported by a fresh consideration. The ‘accord’ is the agreement to accept less than what is outstanding under the contract. The ‘satisfaction’ is the consideration which makes the agreement effective. That is to say, satisfaction means the payment or fulfilment of the lesser obligation. An accord accompanied by satisfaction is valid and thus discharges the obligation
under the old contract. For example, X owes Y Rs. 5,000. X pays to Y who accepts in satisfaction of the whole debt Rs. 2,000 paid at the time and place at which the Rs. 5,000 was payable. This discharges the whole debt.

- **Waiver**: Where one-sided concession is given by a unilateral declaration of renunciation, it is called ‘waiver’. Strictly speaking, waiver is not a mode of discharge by way of consensual/mutual agreement. Waiver may be taken to mean relinquishment or abandonment of a right. When a party waives his rights under the contract, the other party is released of his obligations. For example, X promises to paint a picture for Y. Y afterwards forbids him to do so. X is no longer bound to perform the promise.

- **Merger**: It takes place when an inferior right accruing to a party under a contract gets merged into a superior right accruing to the same party under the same or some other contract. For example, where a person who is holding certain property under a lease, buys it; his rights as a lessee disappears. His rights are merged into the rights of ownership which he has now acquired—the rights associated with lease being inferior to the rights associated with the ownership.

### 2.4.2.4 Discharge by Lapse of Time

If a contract is not performed within certain time (period of limitation) and no action is taken by the promisee within the period of limitation, then, as per the Limitation Act 1963, he is deprived of his remedy at law. In general, the Limitation Act lays down a period of three years for the enforcement of most of the rights arising under contracts.

### 2.4.2.5 Discharge by Operation of Law

A contract may as well discharge independently of the wishes of the parties, i.e. by operation of law. Some important instances that fall in this category include discharge by:
• Death (in case of contracts of personal service)
• Insolvency
• Rights and liabilities becoming vested in the same person.

2.4.2.6 Discharge by Breach of Contract

Discharge by breach occurs in any of the following situations:

• When a party thereto renounces his liability under the contract, or
• When a party, without lawful excuse, does not fulfill his obligation, or
• When a party thereto makes it impossible that he should perform his obligations under the contract, or
• When a party thereto totally or partially (if partial failure is in relation to essential and integral part of his obligation, so as to go to the root of the contract) fails to perform his liability (obligations) under the contract.

Kinds of Breach: Breach is of two kinds:

1. Anticipatory Breach or Constructive Breach (S. 39, ICA)
2. Actual (Present) Breach

Anticipatory Breach: Anticipatory breach of contract takes place when a party repudiates it before the time fixed for performance has arrived or when a party by his own act disables himself from performing the contract. Anticipatory breach occurs when a party to a contract has either refused to perform his promise in its entirety, or has disabled himself from performing his promise in its entirety.

Effect/ consequences of anticipatory breach: Where a party to a contract refuses to perform his part of the contractual obligations before the actual time arrives, then:

• the promisee can treat the contract as discharged, so that he is absolved of the performance of his part of the promise, and he can

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87 See, West Bengal Financial Corporation v Glurco Series Pvt Ltd AIR 1973 Cal 268; Sooltan Chand v Schiller (1878) 4 Cal 252
88 Frost v Knight (1872) L R 7 Ex 111; Avery v Bowden (1855) 5 E&B 714.
immediately take a legal action for the breach of contract, unless he has signified, by words or conduct, his acquiescence in its continuance; or

- the promisee can, without putting an end to the contract, treat it (contract) as still subsisting and alive, and wait for the performance of the contract on the appointed date.

**Actual Breach:** Actual breach takes place either at the time when the performance is due and one party fails or refuses to perform his part, or during the performance when one party fails or refuses to perform his part. The refusal to perform may be by: express repudiation (by word or act), or implied repudiation (impossibility created by the act of the party himself.

### 2.4.3 Remedies for the Breach of Contract

Once a party commits a breach of the contract, the other party becomes entitled to the following reliefs:

1. Rescission and damages
2. Damages
3. Specific performance
4. Injunction
5. *Quantum Meruit*

#### 2.4.3.1 Rescission and Damages

When a breach of contract is committed by one party, the other party may sue to treat the contract as rescinded. In such a case, the aggrieved party is freed from all his obligations under the contract. For example, X promises Y to supply 100 bags of sugar on a certain date and Y promises to pay the price on receipt of the goods. X does not deliver the goods on the appointed day; Y need not pay the price, and can repudiate the contract and claim the damages for the loss suffered.

According to S. 75 of the ICA, a person who rightfully rescinds the contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.
2.4.3.2 Damages

The most common remedy claimed by the party suffering from the breach of contract is ‘damages’. There are mainly four kinds of damages:

1. **General/Ordinary Damages:** Ordinary damages are awarded for such losses which naturally arise in the usual course of things from such breach.

2. **Special Damages:** Where there are certain special or extraordinary circumstances present and their existence is communicated to the promisor, then, the non-performance of the promise entitles the promisee to not only claim the ordinary damages, but also damages that may result therefrom (like, loss of profits, etc).

3. **Nominal Damages:** Nominal damages are awarded in such case of breach of contract where there is only a technical violation of the legal right, but no considerable loss is caused thereby. The damages granted in such cases are called nominal, for they (such damages) are very less in value.

4. **Vindictive/Exemplary/Punitive Damages:** Vindictive damages are awarded with the object of punishing the defendant, and not solely with the idea of awarding compensation to the plaintiff. This type of damages is not common in contracts. However, these have been awarded in following cases:

   (i) for a breach of promise to marry—the measure of damages is dependent upon the severity of the shock to the sentiments of the promisee; and

   (ii) for wrongful dishonour of a cheque by a banker possessing adequate funds of the customer—for determining the measure of damages, the general rule is ‘smaller the amount of the cheque dishonoured’, ‘the larger will be the amount of damages’ awarded.

**Liquidated Damages and Penalty:**
Sometimes parties themselves at the time of getting into the contract agree that a particular sum will be payable by a party in case of breach of the contract by him. Such a sum may either be 'a genuine covenanted pre-estimate of damages' or 'in terrorem', that is to say, highly disproportionate with that of the actual loss which might occasion. If the sum so named is 'a genuine covenanted pre-estimate of damages', it is called as liquidated damages. On the other hand, if it is 'in terrorem', then it is called as 'penalty'. Thus, the stipulated sum payable in case of breach is to be regarded as liquidated damages, provided it be found that parties to the contract conscientiously tried to make a pre-estimate of the loss which might happen to them in case the contract was broken by any of them. Alternatively, if it is found that the parties made no attempt to estimate the loss that might happen to them on breach of the contract, but still stipulated a sum to be paid in case of a breach of it with the object of coercing the offending party to perform the contract, it is a case of penalty.

English law recognises the distinction between liquidated damages and penalty. Liquidated damages are enforceable, but penalty cannot be claimed. The most important judgment on this point is: *Dunlop Pneumatic Tyre Co v New Garage and Motor Co Ltd*[^89^]. In India, as per S. 74, the law on this point is: 'When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract, *reasonable compensation not exceeding the amount so named* or, as the case may be, the penalty stipulated for.' Consequently, in India, where the amount payable in case of breach is fixed in advance whether by way of liquidated damages or penalty, the party may claim only a reasonable compensation for the breach, subject to the amount so fixed.

In *Oil and Natural Gas Corporation Ltd v Saw Pipes Ltd*[^90^], the Supreme Court of India has summarized the relationship between S. 73 (which deals with 'unliquidated damages') and S. 74 (which deals with 'liquidated damages') of the Indian Contract Act and the actual legal position in the following words:

[^89^] (1915) AC 79
[^90^] AIR 2003 SC 2629.
1. Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.

2. If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/ compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in S. 73 of the Contract Act.

3. S. 74 is to be read along with S. 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

4. In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.

2.4.3.3 Specific Performance of Contracts

It is a discretionary and equitable relief granted by a court in case of breach of contract in the form of a judgment that the defendant is to actually perform the contract in accordance with its terms and conditions.

S. 10 of the Specific Relief Act 1963 (hereinafter referred to as the 'SRA') provides that the specific performance of any contract may, in the discretion of the court, be enforced—

(a) when there exists no standard for ascertaining actual damage caused by the non-performance of the act agreed to be done; or

(b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.
In the explanation appended to S. 10 of the SRA, it is provided that unless and until the contrary is proved, the court shall presume—

(i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and

(ii) that the breach of a contract to transfer movable property can be so relieved except in the following cases:—

(a) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;
(b) where the property is held by the defendant as the agent or trustee of the plaintiff.

It is pertinent to refer S. 14 of the SRA\(^9\), which deals with the contracts which cannot be specifically enforced.

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\(^9\) S. 14 of the SRA reads as:

14. (1) The following contracts cannot be specifically enforced, namely:—

(a) a contract for the non-performance of which compensation in money is an adequate relief;
(b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;
(c) a contract which is in its nature determinable;
(d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise.

(3) Notwithstanding anything contained in clause (a) or clause (c) or clause (d) of sub-section (1), the court may enforce specific performance in the following cases:—

(a) where the suit is for the enforcement of a contract,—

(i) to execute a mortgage or furnish any other security for securing the repayment of any loan which the borrower is not willing to repay at once: Provided that where only a part of the loan has been advanced the lender is willing to advance the remaining part of the loan in terms of the contract; or
(ii) to take up and pay for any debentures of a company;

(b) where the suit is for,—

(i) the execution of a formal deed of partnership, the parties having commenced to carry on the business of the partnership; or
(ii) the purchase of a share of a partner in a firm;

(c) where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land: Provided that the following conditions are fulfilled, namely:—

(i) the building or other work is described in the contract in terms sufficiently precise to enable the court to determine the exact nature of the building or work,
2.4.3.4 Injunction

An injunction is a judicial process whereby a party is ordered to do or to abstain from doing a particular act or thing. As per one kind of classification, injunction can be of following two kinds: Temporary and Perpetual Injunctions (S. 37, SRA)

- **Temporary Injunctions** [S. 37 (1)]: Temporary injunctions are such as are to continue until as specified time, or until the further order of the court, and they may be granted at any stage of a suit, and are regulated by the Code of Civil Procedure 1908 (5 of 1908).

- **Perpetual Injunction** [S. 37 (2)]: A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff. Perpetual injunctions are governed by the SRA.

Further, as per another kind of classification, injunction can be of further two kinds: Preventive/Prohibitive/Restrictive and Mandatory.

Ss. 36-42 of the SRA provide for different facets of injunction (such as, 'perpetual injunction when granted', 'mandatory injunctions', 'injunction when refused', 'injunction to perform negative agreement', etc). Similarly, the procedure for granting temporary injunction is governed by the rules laid down in Order XXXIX, Rules 1 and 2 of the Civil Procedure Code 1908.

(ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and

(iii) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.
2.4.3.5 Quantum Meruit

The expression *quantum meruit* means 'as much as earned' or 'as much as deserved' or 'according to the quantity of work done' or 'the amount he deserves' or 'what the job is worth'.

The general rule of law is that unless a party has performed his promise in its entirety, he cannot claim performance from the other. To this rule, however, there are certain exceptions on the basis of 'quantum meruit'. A right to sue on a 'quantum meruit' arises where a contract, partly performed by one party, has become discharged by the breach of the other party. *Quantum meruit* claims are based on the law of restitution and flow from the principles of unjust enrichment. *Quantum Meruit* claims can be made in certain circumstances, such as:

- Where there is a contract but no price has been fixed by that contract;
- Quasi-contract, such as work carried out prior to contractual terms being settled;
- Work done outside the scope of a contract; and,
- Work under a void, unenforceable, or terminated contract.

Repudiation of the contract by the principal—that is, the principal renounces liability under the contract, or shows an intention to no longer be bound by the contract, or shows an intention only to perform the contract in a particular way that is at odds with the contractual terms—does not, in and of itself, bring a contract to an end. If, in fact, the principal indicates that he is no longer ready, willing and able to perform the contract in accordance with its terms, the contractor must elect to terminate the contract. The contractor has to elect between continuing the performance of his contractual obligations or accepting the principal’s repudiation and bringing the contract to an end. Only if the contractor chooses the latter, he may then sue and—if the suit is successful—he must also elect between damages assessed on *quantum meruit* or contractual damages.

2.4.4 Quasi Contracts (Certain relations resembling those created by contracts)
Chapter V (Ss. 68–72) of the ICA deals with those situations in which law imposes upon one person, on grounds of natural justice, an obligation similar to that which arises from a true contract, although no contract, express or implied, has in fact been entered into by them. These are called ‘quasi contracts’ or ‘quasi-contractual obligations’ because the obligations associated with such transactions could neither be referred to as tortious nor contractual, but are still recognized as enforceable, like contracts, in courts. A quasi contract, therefore, is a fictitious contract created by court/law. These contracts are also known as implied-in-law contracts. The parties involved do not intend to create a contract. There is no actual offer or acceptance or an agreement between the parties.

**Essentials of Quasi Contractual Obligations**

Besides other legal justifications, quasi contractual obligations are based upon the theory of ‘unjust enrichment’. For there to have been unjust enrichment, following three essentials must be established:

1. Firstly, the principal (defendant) must have been enriched by the receipt of a ‘benefit’;
2. Secondly, that benefit must have been gained ‘at the contractor’s (plaintiff’s) expense’; and
3. Thirdly, it would be ‘unjust’ in the circumstances to allow the principal (defendant) to retain the benefit.

Following are the instances of quasi contracts which are specifically recognized under the ICA:

- Claim for necessaries supplied to person incapable of contracting, or on his account (S. 68)
- Reimbursement of person paying money due by another, in payment of which he is interested (S. 69).
- Obligation of person enjoying benefit of non-gratuitous act (S. 70).
- Responsibility of a finder of goods (S. 71).
- Liability of person to whom money is paid, or thing delivered by mistake or under coercion (S. 72).