MCM-503

BUSINESS AND ECONOMIC LAWS

Department of Commerce

School of Management Studies and Commerce

MCM-503

BUSINESS AND ECONOMIC LAWS

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MCM-503 BUSINESS AND ECONOMIC LAWS

Block-1	**The Companies Act**
Unit-1	Company Act – Rules, Regulation and Fundamental Matter)
Unit-2	Audit and Accounts
Unit-3	Corporate Governance
Unit -4	Company Management
Block-2	**IRDA and Consumer Protection Act**
Unit -5	IRDA Act- Duties Powers and Function
Unit -6	IRDA Act Regulations and Provision
Unit -7	Consumer Protection Act Need Scope Features
Unit -8	Consumer Protection Councils and Machinery for Redressal
Block-3	**MRTP Act, 1969 and Competition Act**
Unit -9	An overview of MRTP Act, 1969
Unit -10	Introduction to Competition Act, Improvements over MRTP Act, 1969
Unit -11	Authorities under Competition Act (Competition Commission, Director General, Appellate Tribunal)
Unit -12	Penalties and other provisions of Compensation Act
Block-4	**SEBI Act 1992 and FEMA**
Unit -13	SEBI Act 1992- Functions and Powers
Unit -14	Guidelines for Securities Market
Unit -15	FERA
Unit -16	FEMA
Block-5	**Cyber Law and Environment Laws**
Unit -17	Encryption and Cyber Crimes
Unit -18	E-Governance and IT Act, 2000
Unit -19	Constitutional and Administrative Underpinnings of Environmental Law
Unit -20	Prevention & Control of Pollution Laws
Block-6	**IPRs and Patent Laws**
Unit -21	Basic Principles and Acquisition of IPRs
Unit -22	Ownership and Enforcement of IPRs
Unit -23	Patents and Trademarks

Unit-1 The Company Act: Rules, Regulation and Fundamental matters

1.1 Introduction

1.2 Genesis of Company Legislation

- 1.2.1 Company Act in independent India

1.3 Meaning of a Company

- 1.3.1 Chief characteristics of company
- 1.3.2 Doctrine of lifting corporate veil

1.4 Kinds of Company

- 1.4.1 On the basis of Formation
- 1.4.2 On the basis of Number of Members
- 1.4.3 On the basis of Liability of Members
- 1.4.4 On the basis Of Management and Control
- 1.4.5 Other Forms of Companies
- 1.4.6 Comparison of Private and Public Companies

1.5 Formation Of Company

- 1.5.1 Promotion
- 1.5.2 Registration or Incorporation
- 1.5.3 Floatation
- 1.5.4 Commencement Certificate

1.6 Memorandum Of Association

- 1.6.1 Contents of Memorandum of Association
- 1.6.2 Doctrine of Ultra Vires

1.7 Articles Of Association

- 1.7.1 Contents of Articles of Association
- 1.7.2 Doctrine of Constructive Notice
- 1.7.3 Doctrine of Indoor Management
  - 1.7.3.1 Exceptions to the Doctrine

1.8 Prospectus

- 1.8.1 Contents of a Prospectus
- 1.8.2 Statement in lieu of Prospectus

1.9 Summary

1.10 Glossary

1.11 Check your progress

1.12 Answers to check your progress

1.13 Terminal Questions

1.14 Reference Books

Objectives

The particular unit gives learner an opportunity to understand about the

(i) Indian Company Act in vogue.

(ii) History and development of Company Legislation.

(iii) Meaning of Company and its different forms.

(iv) Process of establishment of a Company.

(v) Memorandum of Association, Articles of Association.

(vi) Other issues regarding formation of company.

1.1 Introduction

We know that business activities are performed through different business forms i.e. Sole Business, Partnership business, Private Ltd. Companies and Public Ltd. Companies, cooperatives etc. The unit deals with the provisions of company Act which covers the gamut of company form of business. The Company Act of any of the countries across the globe comprises set of rules and regulations admissible upon a company, set up under the Act within the geographical limits of the nation. The Act guides and facilitates all functional matters of the company right from beginning till end and ensures smooth functioning.

1.2 Genesis of Company Legislation

Earlier we were following The Company Act, 1956 but with a phenomenal change in the domestic and international economic landscape, the Government of India decided to replace the Company Act 1956 with a new legislation of Companies Act 2013. The Companies act 2013 is an act of the Parliament of India which is the primary source of Indian company law. It received presidential assent on 29 August 2013, and superseded the Companies Act 1956.
It is also worthwhile for the learners to know that how could we reach here from beginning as far as Company Legislation is concerned. What happened worldwide during this edge?

The joint stock companies originated for the first time in their history at Italy around 12^{th} century AD without a proper legislation in this regard. It took a number of years in the past to come into this shape as we witness today. English Company legislation has been the role model to the Indian law. Indian Company Act has always been inspired by English Company Legislation. The first enactment of Indian company's legislation regarding joint stock companies was formed in 1850 imitating U.K Joint Stock Company Act 1844.

In England, the process of the growth and development of the Company legislation started way back in the past. The 'Merchant Guilds' were the earliest business associations which came up during the 11th to 13th centuries. Charters were granted to the members of the guilds by the Crown which provided them a monopoly in the respective trade. These associations were either formed as 'Commenda' or 'Societas',. Commendas were suppose to carry on its operation in the form of partnership where the financier was a sleeping partner and had limited liability, the liability was expected to be borne by the working partners. In 'societas' all the members took active part in the management of the trade and had unlimited liability.

During the 14th century some merchants adopted the word 'Company' for their overseas ventures. This 'Company was an extension of the merchant guilds in foreign trade. By the end of the 16th century, England witnessed Royal charters which were issued to grant monopoly of trade to the members of the Company over a certain territory. These Companies were recognised as regulated Companies. East India Company was established by the charter in around 1600 A.D and is a good example of above mentioned company of concurrent time.

The Indian Company Act 1850 registered number of companies to function but forgo the concept of limited liability. Companies of unlimited liability were allowed only for getting themselves registered under the Act. The concept of limited liability was introduced for the very first time in India by a way of Indian Company Act, 1857(Leaving Banking and Insurance Companies). This particular Act was designed on the lines of British Company Act, 1856. Limited liability concept was fully extended in India in the year 1858 when Banking and Insurance Companies were also allowed to get themselves registered in this form.

The Indian Company Act, 1866 was developed on the basis of English Company Act, 1862. Indian Act was reacted again in 1882 with number of subsequent amendments in the year 1887, 1891, 1895, 1900 & 1910 respectively. Indian Company Act, 1913 replaced previous version of the Act and this time English Company Act, 1908 was considered as a base model for preparation. This Act existed in this form till 1956 with several amendments in the years 1914, 1915, 1920,1926,1930,1932 &1936. But now the Companies Act 2013 replaces the Company Act 1956.

1.2.1 Company Act in Independent India

Independent India was desperate to have a more powerful Company Legislation than ever before during slavery. Moreover Second World War had also alarmed for industrial growth. Independent India foresightedly appointed a high level committee under the chairmanship of

Shri Bhaba in 1950 so as to revise the current Company Act particularly in the wake of Indian industrial demand in future.

Bhaba committee submitted its report in March 1952 with major changes in the following areas:

(i) The promotion and formation of companies.
(ii) Capital structure of companies.
(iii) Company Meetings and Procedures.
(iv) Presentation of accounts, Audit and powers of Auditors.
(v) The inspection and investigation of companies.
(vi) BODs, MDs and their powers.
(vii) The administration of company law

As a result of Bhaba Committee recommendation The Company Act, 1956 came into existence incorporating new guidelines. Even this Act of 1956 was closely aligned with English Company Act, 1948. Indian Company Act, 1956 amended several times so far in the years 1960, 1962, 1964, 1965, 1966, 1967 1969, 1974, 1977, 1985, 1988, 1991, 2000, 2002, &2006.

The amendments took place in last two times are being mentioned in brief for learners perusal point of view. Companies (Amendments) Act, 2002 made the arrangements for the Producer Companies by setting up regulation of co-operatives as body corporate under the Companies Act, 1956 and to be known as producer Companies. The Act also come up with certain regulation regarding Sick Companies. The ACT attempted to rationalize the winding up process and facilitated rehabilitation of sick Companies. It recommended establishing a National Company Law Tribunal (NCLT) with powers for expediting the winding up process so that the Company's resources may be utilized more efficiently rather than blocking them into sick undertakings.

Companies (Amendment) Act 2006 has introduced various provisions regarding Directors Identification number (DIN) and emphasised that no fresh appointment or re-appointment of any individual as director shall take place unless such an individual has been allotted DIN. The Companies (Amendment) Act 2006 made some provisions of Governance and E-filing. Central government has notified the Companies (Electronic Filing and Authentication of Documents) Rules 2006, providing for electronic forms, applications, documents and Declarations in Portable Document Format (PDF) and authentication using digital signature.

1.3 Meaning of a Company

Dear learner, as a layman we can understand the word 'Company' as an association of a group of persons engaged to work out for common legal purposes. But technically speaking Section 2 (20) of the companies Act, 2013 defines a company as "a company formed and registered under this Act or an existing company." This Section further defines that an existing company means a company formed and registered under any of the previous company law. It means any company which had already been registered with any previous law of the same status can never deemed to be unfit and if it happens by virtue amendment after new provisions, certain companies shall be given sufficient time for the compliance of the same.

A company is considered as an artificial person created under law. It has got its separate legal entity, perpetual succession and common seal. A company is regarded as a person with certain rights and duties to be performed but a company is not a human being indeed. The shares of public companies are freely transferable and the members enjoy limited liability to the extent of the value of the shares or guarantee held by them. You must have understood the company by now.

In order to have more precise picture in our mind let us examine some definitions of the prominent persons.

"A company is an artificial person created by law, having separate entity, with perpetual succession and common seal."

Prof. Haney

"A corporation is an artificial being, invisible, intangible, existing only in contemplation of the law. Being a mere creation of law, it possesses only the properties which the charter of its creation confers upon it either expressly or as incidental to its very existence".

Chief Justice Marshall

"A company is an association of many persons who contribute money or monies worth to a common stock and employed in some trade or business and who share the profit and loss arising there from. The common stock so contributed is denoted in money and is the capital of the company. The persons who contribute to it or to whom it pertains are members. The proportion of capital to which each member is entitled is his share. The shares are always transferable although the right to transfer is often more or less restricted."

Lord Justice Lindley

1.3.1 Chief Characteristics of a Company

The characteristics of a joint stock company may be understood as follows:

(i) Incorporated Entity

(ii) Separate Legal Entity

(iii) An Artificial Person

(iv) Limited Liability

(v) Perpetual Succession

(vi) Common Seal

(vii) Transferability of shares

1.3.2 Doctrine of Lifting Corporate Veil

You must have understood by now that a company has its separate legal entity apart from its members or human beings associated to it. In contrast to this characteristic, the company and its members are treated as one, ignoring separate legal entity in the event of misconduct or fraudulency. As per the Doctrine of lifting corporate veil sometimes it becomes necessary to overlook separate legal entity concept.

Ordinarily, Separate Legal Entity concept of a company is honoured provided that the statutory privileges of separate personality are being used for legitimate business purposes. When this privilege is misused in any manner against public policy, the court lifts corporate veil ignoring separate entity.

The circumstances under which corporate veil may be lifted are categorised into two major heads i.e.

(i) Statutory Provisions

(ii) Judicial Interpretation

Under statutory Provisions The veil of corporate personality may be lifted in the following cases as per The companies Act, 1956.

1. Reduction of membership below statutory minimum (Section 45)
2. Misrepresentation in Prospectus. (Section 62 & 63)
3. Failure to return application money. (Sec. 69)
4. Failure to deliver share certificate etc. Within time period (Sec.113)
5. Mis-description of name of the company (Sec. 147)
6. Failure in disclosing accounts of Subsidiary Company. (Sec. 212)

7. For facilitating the task of an inspector appointed under section 235/237/239

8. Investigation of ownership of company (Sec. 247)

9. Fraudulent Conduct (Sec. 542)

10. Liability for ultra-vires Acts

11. Liability under other statutes

Under Judicial Interpretations there can be the endless circumstances when the court may feel to lift the corporate veil in its judicial powers. The main aim stands good which is to prevent the fraud and to identify misconduct.

1.4 Kind Of Companies

Dear learner, this segment will let you know about the types of companies existing around us in the corporate world. You may identify different kind of companies even by now without knowing their status as per company act. Just think and answer could you name a few companies? Yes you can. And if not then start thinking on the machines and appliances you have at your residence like Videocon, Onida LG, Samsung, Whirlpool, Bajaj etc. Then start thinking about the company's manufacturing medicines like cadila, Indus Pvt. Ltd., Glaxo etc. Some more can easily be identified like LIC, ONGC, FCI etc. Now see, you are so comfortable that you can name ten twenty more by this time.

It is important to understand that all these companies fall under different categories or say kinds. Now we will study on what basis these companies are differentiated and what are the provisions regarding them?

1.4.1 On the basis of Formation

There exists two different ways of recognising a body corporate on the basis of formation of a company i.e.

(i) Statutory Corporation

(ii) Registered Companies

i) **Statutory Corporation:** Statutory companies or corporation are incorporated by the special act of parliament or state legislation. Reserve Bank of India (RBI), State Bank of India (SBI), Life Insurance Corporation (LIC), Food Corporation of India (FCI), Unit Trust of India (UTI) etc. are some examples of statutory companies.

The Act itself includes rules and regulation for functioning of a statutory corporation and therefore statutory companies are not required to have a memorandum of association.

The audit of such companies is conducted under the supervision of the auditor General of India. These statutory bodies are created for public utility services basically.

ii) **Registered Companies**: As the name itself implies, a registered company is a company which is registered under company act, 2013 or registered under any previous contemporary equivalent law.

1.4.2 On the basis of number of members

On the basis of number of members associated with it, companies can be bifurcated into three types i.e.

(i) Private Companies

(ii) Public Companies

(iii) One man company

Private Companies : Section 3(2) (iii) [as amended by the Companies (Amendment) Act,2000], a private company means a company which has a minimum paid up capital of one lakhs rupees or such higher paid up capital as may be prescribed, and by its articles of association. It :

(i) Restricts the right of the members to transfer shares,(if any)

(ii) Limits the number of its members to fifty maximum and two minimum, excluding members who are or were in the employment of the company)

(iii) Prohibits any invitation to the public to subscribe for any shares or Debentures of the company.

(iv) Prohibits any invitation or acceptance of deposits from persons other than its members, directors or relatives.

The Companies (Amendments) Act, 2000 laid that every private company, having a paid up capital of less than one lakh rupees shall, within a period of two years from such commencements, enhance its paid upto capital to one lakh rupees. If it fails to do so, such company shall be deemed to be a defunct company u/s 560 and its name shall be thrown out from the register of the companies. However, company' registered under section 25 has been exempted from complying with the requirement of minimum paid up capital.

Public Company: Public Company is a company which:

(i) Is not a private company.

(ii) Has a minimum paid up capital of five lakhs rupees or such higher paid up capital, as may be prescribed in documents of company.

(iii) Is a private company which is a subsidiary of a public company

There was a clear note for the existing companies not complying the minimum capital requirement at the time of amendment of the act that every public company existing on the commencement of the Amendment Act, 2000, with a paid up capital of less than five lakh rupees shall increase its paid up, capital to five lakh rupees within a period of two years, from the commencement of the Amendment Act, failing which the company shall be deemed to be a 'defunct company' u/s 560 and its name shall be out of the register of companies. Company registered under section 25 as non profit making company with approval of authorities shall not be required to have minimum paid up capital as stated above. The minimum number of members required to incorporate a public company is seven members.

One Man Company: It implies to a company in which one person holds the substantial shares and has controlling power of the company. However two members in case of private and seven members in case of public company are required minimum. Practically in these types of companies whole of the shares are held by a person and rest of the members are there only to fulfil the statutory requirement. These are also known as family company.

1.4.3 On the Basis of Liability of Members

Liability of the members of the company may be

(i) Limited or

(ii) Unlimited

Limited Liability Companies: In these types of companies liability of the members is limited to the value of the shares held by them, also called limited by share. If it is not limited by share, it can be limited to the extent of guarantee provided in memorandum; the liability of members in joint stock companies is limited generally to the extent of the value of shares held by them.

Unlimited Liability Companies: Unlimited liability of the members means the members are expected to bear full liability which may extend to the whole amount due to the company as debt.

1.4.4 On the basis of Management and Control

A company can have its own control over vital activities in the following first case but in the latter case control goes into the hands of the other.

(i) Holding Companies

(ii) Subsidiary Companies

Holding Companies: A company would be a holding company in relation to another company if it possesses control over the other company. Section 4(4) states that a company shall be deemed to be the holding company of another only if that other is subsidiary. A company holding majority share in another company (more than 50%) is known as holding company.

Subsidiary Company: Section 4 of the Act defines a company to be deemed to be a subsidiary of another, if –

(i) that other company controls the majority Constitution of its board of Directors.

or

(ii) the other company holds more than half of the nominal value of its equity share capital.

or

(iii) It is a subsidiary of a third company which itself is a subsidiary of the controlling company.

For instance, company Y is a subsidiary of company X and company Z is the subsidiary of company Y then company Z would be a subsidiary of company X by virtue of law.

1.4.5 Other Form of Companies

Non Profit Making Companies: These non profit making concerns may or may not be registered. If members wish to get the company registered, the Company Act facilitates their registration u/s 25.

The permission of central government shall have to be obtained regarding such kind of companies. These companies are privileged companies under the eye of the government

and may be relaxed sometimes for some clauses as happened in the past when they were exempted to certain clauses in maintenance of capital clause in the amendment of 2000.

Government Companies: A Government company has 51% or more paid up share capital held by Central Government or by any State Government or partially by both the Governments.

Foreign Companies: According to Act, Foreign companies are the companies incorporated outside India but having a place of business in India after the commencement of this act. A foreign company is required to furnish to the Registrar, documents specified in the section 592. Besides, it is subjected to follow obligations under section 594, 595, 600, 603-608.

It may be taken into account that according to section 591(2) where in a foreign company, fifty percent or more of the paid up share capital (of whatever type) is held by one or more citizens of India or by one or more bodies corporate incorporated in India, whatever single or in the aggregate, such company shall comply with the provisions of the act as may be prescribed with regard to the business carried on by it in India, as if it were a company incorporated in India.

1.5 Formation of Company

Up to now we could learn company legislation in India i.e. company act in vogue and its basic provisions for different types of companies. Company form of business is considered most important as compare to the other forms of business like sole proprietorship or partnership etc.

The entire process of forming a company may be understood through four distinct stages.

(i) Promotion
(ii) Registration or Incorporation
(iii) Floatation
(iv) Commencement Of Business

1.5.1 Promotion

Promotion is the primary phase during the formation process of a company. Actually a plan of establishing a new company needs certain steps to be performed in this direction. The promotion includes all those steps starting right from initiating idea of establishing a new company to the final establishment of company practically. The person engaged to perform the promotional primary activities are called promoters. Promotion begins when someone discovers an idea of having a company which can be profitable company and includes

preliminary investigation of the feasibility of the idea, assembling of business and making provision of the funds necessary to launch the company as a going concern. A promoter may be an individual, syndicate, association, partner or a company. These primary activities also include Filing up of Application Form with requisite fee, finalisation of company name, preparation of documents like Memorandum of Association, Articles of Association etc.

1.5.2 Registration or Incorporation

This is the second stage where a company is actually registered as a company by the registrar in the register of the companies after ensuring compliance as per the Company Act, 1956. Subsequently, a certificate of incorporation is issued by the registrar of the companies.

Section 12 states in this regard that "Any seven or more persons or where the company to be formed will be a private company, any two or more persons, associated for any lawful purpose may by subscribing their names to Memorandum of Association and otherwise complying with the requirement of this act in respect of registration, form an incorporated company.".

1.5.3 Floatation

A public company, after getting certificate of Incorporation gets ready for floatation. Floatation is the process of raising sufficient capital to commence business and to run it on satisfactorily. Every company shall have to prove in front of the registrar that they can run their business with this capital in future successfully.

1.5.4 Commencement of Business

Obtaining certificate of commencement of business is the final stage in the formation process of a company. Let us see the provisions for private and public companies in this regard. A private company and public company without share capital can start their business immediately after obtaining certificate of incorporation. But a public company with share capital shall have to obtain certificate of commencement of business compulsorily. Section 149 (i0 deals in this regard if a public company has issued prospectus and Section149 (ii) deals with it if company does not have its prospectus.

1.6 Memorandum of Association

You have learnt by now that a company can be formed out after a long process as discussed earlier. Memorandum of Association is the most important document of a company, which is submitted to the registrar of companies by the promoters at the time of formation of

company. It is also known as company's charter. This is a basic document which works like a charter of the company.

Section 2(56) of the Companies Act, 2013 defines memorandum as "Memorandum means the memorandum of association of a company as originally framed or as altered from time to time in pursuance of any previous company laws or of this Act."

The Memorandum of Association contains basic but vital information and therefore is also known as constitution of a company. It is treated like a public document that any can obtain a copy of it. It enables shareholders, creditors and all those who deal with the company to know what are its powers and what is the range of its activities.

1.6.1 Contents of Memorandum of Association

Section 13 refers to the content part of Memorandum of Association. The contents of the MOA are as follows:

1. The Name Clause
2. The Registered Office Clause
3. The Objects Clause
4. The Liability Clause
5. The Capital Clause
6. The Subscription Clause.

1. **The Name Clause:** All the companies are required to opt their names carefully in this clause because the same is being furnished to the registrar of companies. In case of a limited liability company the word 'Limited' or 'Private Ltd." Should be suffixed with the name. Further it is to be taken care that the name should not be undesirable and identical to the existing companies. Central Government has the power to reject the proposed name of any company if it violates the provisions laid for this purposes (sec 20).

Alteration: A company may alter its name at any point of time as per the provisions of section 21 to23 of the company act:

(i) By passing a special resolution and

(ii) By obtaining the approval of the central govt. in writing.

If central govt. finds the name of the company identical to some existing company then

(i) By passing an ordinary resolution and

(ii) By obtaining the previous approval of the central government in writing.

Thus a change in name should be communicated to the registrar of companies within 30 days who will issue a new certificate accordingly.

2. The Registered Office Clause

The clause requires mentioning the state in which registered office of the company shall operate. As per the provisions, company shall have to have a registered office essentially. The clause does not demand a complete address in the beginning but the same shall be conveyed to the registrar within 30 days of the incorporation. All communication in future shall be directed at this address however the corporate head office of the company may be situated elsewhere from the registered office.

Alteration: In order to make a change in the registered office from one place to another within the same city resolution by board of company is enough but it should be communicated to the registrar with 30 days. Change of the office from one city to another in the same state can be done by passing a special resolution with the limitation that it is to be communicated to the registrar within thirty days.

Change of the registered office from one State to another involves an alteration in the memorandum of Association and may be made by passing a special resolution followed by confirmation of the central govt.

3. The Objects Clause

This is a main clause of the memorandum because it works out the objects and indicates the sphere of its activities. A company cannot legally perform any business going beyond to its objects specified under this clause. If somehow it is done beyond the limits of the aforesaid then it will be considered as Ultra-Vires and void. This rule is meant to protect the members of the company, the public and the creditors as well. The following points must be kept in mind at the time of preparing the object clause:

(i) The object must not be illegal.

(ii) The same must not be against the provisions of the Companies Act.

(iii) They must not be against the public policy;

(iv) They must be stated clearly and should not be ambiguous;

(v) They must be quite elaborate

Alteration: Alteration in the most vital part of memorandum i.e. objective clause is possible but it requires a great care. Section 17 (i) provides a list for which alteration may be permitted. Permitted purposes for making a change in this in clause are;

(i) To carry business more economically or efficiently.

(ii) To make use of new discoveries and technologies.

(iii) To facilitate geographical expansion of business.

(iv) To curtail some useless objects.

(v) To dispose the whole or a part of a company.

(vi) To amalgamate with the other company or body of persons.

The alteration is possible by passing a special resolution in the general meeting. This is to be communicated to the registrar within 30 days.

4. The Liability Clause

This clause requires a clarification about the nature of liability of the members of a company. The liability of a company may be limited or unlimited as discussed earlier. In the case of the company with limited liability, the liability clause must state that liability of members is limited by further stating whether limited by shares or by guarantee. In the case of unlimited liability company, this clause need not be given in the memorandum of association.

Alteration: The alteration in this clause is possible subject to the increase in liability only if the members give their consent in writing to increase the liability. In no case the decrease in liability shall be allowed.

5. The Capital Clause

This clause has to be included in the document only by the limited liability company having share capital. The capital clause specifies the maximum limit of the company beyond which the share capital cannot be raised. This capital may be known as registered capital, authorised capital or nominal capital.

Alteration: the company can change its capital if it is allowed to make a change as per article of association. Special resolution and ordinary resolutions are passed to get it done. Following case requires an ordinary resolution:

(i) Increase of share capital by issue of new shares.

(ii) Consolidation or division on existing shares into larger or smaller amount.

(iii) Conversion of fully paid shares into stock and vice versa.

(iv) Cancellation of unissued shares.

Alteration for reduction of capital can be made by passing special resolution and getting confirmation for the same.

6. The Subscription Clause

The last clause contains the declaration by the signatories of the memorandum about their desire to open a company. It also contains their commitment to hold the qualification share if any and the individual details of the subscribers with their signatures along with attested

witness. A public company should have at least 7 and a private company should have at least 2 subscribers for this purpose

1.6.2 Doctrine of Ultra –Vires

This is yet another important doctrine of company law. The word 'Ultra' stands for beyond the limit and 'vires' stands for power. Hence an Ultra-Vires act implies an act which is beyond the power.

Dear learner! It is to be noted that an act which is beyond the power of directors is known as an act ultra -vires to the directors. Ultra Vires of Article of Association means an act beyond article of association's power. Similarly an act beyond the purview of memorandum of association is considered as ultra- vires to the company.

You could have learnt by now that what we mean by Ultra Vires act. But the question arises that if it happens then what will be the net impact? Let us learn the impact and remedies of Ultra -Vires acts in the following cases:

Ultra Vires to the directors: Act is not void altogether and can be ratified in shareholders general body.

Ultra -Vires to the Article of Association: Act is not void altogether and can be ratified by the company itself through making a change in Article of Association after passing a special resolution.

Ultra- Vires to the Company: Act is totally void and company is not liable to such acts at all.

1.7 Articles of Association

The Articles of Association is considered second most important document of the company which is submitted to the registrar at the time of formation of company. It contains bye-laws related to the company's internal management. This document is prepared satisfying broad objectives laid in the memorandum.

Section 2(2) of the Companies Act, 1956 defines articles as 'articles' mean the articles of association of a company as originally framed or as altered from time to time in pursuance of any previous companies laws or the present Act i.e., the Act of 1956.

The Article also creates a contract between the company and the members. They provide for the matters like the making of calls, forfeiture of shares, qualifications of directors, appointment of auditors, powers and duties of auditors, procedure for transfer and transmission of shares and debentures etc.

1.7.1 Contents of Articles of Association

Usually deal with the rules and matters like:

(1) The extent to which "Table A" is applicable.

(2) Various classes of shares and their rights.

(3) Procedure regarding issue of share capital and allotment.

(4) Procedure regarding issue of share certificates and share warrants.

(5) Forfeiture of shares and the procedure of re-issue.

(6) Transfer and transmission of shares.

(7) Calls on shares.

(8) Conversion of shares into stock.

(9) Lien on shares.

(10) Payment of commission on shares and debentures to underwriters.

(11) Rules for adoption for 'preliminary contracts', if any.

(12) Re-organisation and consolidation of share capital.

(13) Alteration of share capital.

(14) Borrowing powers of directors.

(15) General meetings, proxies and polls.

(16) Voting rights of members.

(17) Payment of dividends and creation of reserves.

(18) Appointment, powers, duties, qualifications and remuneration of directors.

(19) Use of the Common Seal of the company.

(20) Keeping of books of account and their audit.

(21) Appointment, powers, duties, remuneration, etc., of auditors.

(22) Capitalisation of profits.

(23) Board meetings and proceedings.

(24) Rules as to resolutions.

(25) Appointments, powers, duties, qualifications, remuneration, etc., of managing director, manager and secretary, if any.

(26) Arbitration provisions, if any.

(27) Provision for such powers which cannot be exercised without the authority of articles, for example, the issue of redeemable preference shares; issuing share warrants to bearer; refusing to register the transfer of shares; reducing share capital of the company; accepting payment of Calls in advance; the appointment of additional or alternate director(s).

(28) Winding up.

Alteration: Company Act extended the alteration power in the bye-laws of an Article provided that this alteration does not overrule the powers specified in memorandum. Section 31 states that a company may alter its articles of association by passing a special resolution. Alteration thus made by the company should be communicated to the registrar office within 30 days of its effect. There are certain alterations which require prior approval of the central government:

(i) Alteration of converting a public company into private company.

(ii) Alteration of increasing remuneration of any director.

1.7.2 Doctrine of Constructive Notice

Doctrine of constructive notice implies that the person dealing with company possesses the knowledge of memorandum and articles. It is the duty of the person concerned to inspect the aforesaid documents thoroughly as anyone can check them at a nominal fee.

Section 610 says any person may inspect any document kept by the registrar being documents filled or registered by him in pursuance of this act. Therefore if any person does contract with the company which is contrary to the provision of memorandum and articles, he will not get support for the same. Doctrine protects company against outsider for an ultra vires act.

1.7.3 Doctrine of Indoor Management

Doctrine of Indoor Management protects an outsider against company in contrast to the doctrine of constructive notice. According to this doctrine it is presumed that the person dealing with company is not well versed with the company's internal affairs. Rather he may not know where there is a fault in company's internal matters? It is the duty of the officer concerned of the company to look into the matter. The rule is that persons dealing with the company in good, faith have a right to assume that the' internal requirements prescribed in public documents have been observed. They are not bound to enquire into the regularity of the internal proceedings.

This rule is known as the "Doctrine of Indoor Management".

1.7.3.1 Exceptions to the Doctrine of Indoor Management

In the following cases protection under this doctrine cannot be claimed:

(1) If Outsider had knowledge of irregularity.

(2) Negligence on the part of the outsiders.

(3) Forgery

(4) No knowledge of Article & Memorandum.

(5) Oppression

1.8 Prospectus

Section 2(70) of the company act 2013 deals with the term Prospectus as " A prospectus means any document described or issued as prospectus and includes any notice or circular advertisement or other document inviting deposits from the public or inviting offers from the public for the subscription or purchase of any shares in, of debenture of , a body corporate."

Prospectus is considered as an invitation to the public for subscribing share capital or debenture. A public company may go for issuing a prospectus to the public while private companies are restricted**.**

1.8.1 Contents of a Prospectus

The prospectus contains comprehensive information about the company and the coming issue like

(1) The main objects of the company, its history and business.

(2) Company's name, address of its registered office.

(3) The date of opening and closing of the issue.

(4) The name and address of the trustee in case of debenture issue.

(5) The names and addresses of company promoters with details.

(6) Consent of directors, auditors, solicitors, managers to the issue.

(7) The names, addresses and occupation of manager, managing director and other directors.

(8) The amount payable on application and allotment of each share, along with details about availability of forms, prospectus and mode of payment.

(9) The names and, addresses of the company secretary, legal advisor, auditors, lead managers, bankers and brokers to the issue.

(10) The details of option to subscribe for securities in the depository mode [Inserted by the Depositories Act, 1996) for details of the 'Depository System'

(11) The procedure for allotment and issue of share certificates.

(12) The size of present issue giving separately reservation for preferential allotment to promoters and others.

(13) The rights, privileges and restrictions of shares if any.

(14) Contents of the articles relating to the appointment of managing directors or managers and the remuneration payable to them.

(15) Minimum Subscription Clause.

(16) The names of Regional Stock Exchange and other stock exchanges where application has been made for listing of present issue.

(17) The names and addresses of the underwriters, underwritten amount, underwriting commission and declaration by Board of Directors that the underwriters have sufficient resources to discharge their respective obligations.

(18) The project details:, Plant machineries and technology, process, raw material infrastructure facilities water, electricity etc..

(19) The nature of the product. Future prospects regarding capacity utilisation during the first three years from the date of commencement of production, and the expected cash profits and net profits.

(20) Stock Exchange Position.

(21) The particulars of public issues in the last three years & other listed companies of the same management.

(22) The particulars of outstanding suits filed against the company if any.

(23) The particulars of default, if any.

(24) Management perception regarding risk, factors.

(25) Credit rating by CRISIL (Credit Rating and Information Services of India Limited) or any recognised rating agency.

(26) Expenses of the issue.

(27) Particulars of any property to be acquired by the company.

(28) Amount of benefit paid or given within two preceding years to any promoter or officer of the company.

(29) Particulars of any property acquired within two preceding years in which any director or promoter was interested.

(30) The company's profit & loss and balance sheet for the last five years.

(31) Particulars of any revaluation of the assets of the company during the last five years.

(32) Any special tax .benefits for company and its shareholders. (33) A declaration that all the relevant provisions of the Companies Act, 1956, and the guidelines issued by the Government or the guidelines issued by the Securities and Exchange Board of India, as the case may be, have been. Compiled with and no statement made in prospectus is contrary to the provisions.

If the issue is subscribed successfully then the holders of equity share becomes real owners of the company and plays important role in business in subsequent years. But on the

contrary if subscription fails (less than 90% of the issue) then the amount is refunded back to the person who has applied earlier for the same. A delay in payment levy penalty of 15% interest to the person after a stipulated time.

1.8.2 Statement in Lieu of Prospectus (Section 70)

A public company having share capital shall file a statement in lieu of prospectus if does not issue a prospectus. It means company shall manage funds without offering to the public.

Or

Where company issued a prospectus but has not proceeded to allot shares to the public for failing in minimum subscription. Let us not forget that a private company is free from filing either a prospectus or a statement in lieu of prospectus with the Registrar.

1.9 Summary

The unit dealt with the development of company legislation and company act in vogue in India. Act deals with the company form of business and company means an artificial person which is created under an act, which has a perpetual succession, separate legal entity and common seal. Different kinds of company operate in the corporate world like Statutory companies, Registered companies, Limited liability companies, unlimited liability companies, Private companies, Public companies, Govt. companies, Holding companies, Subsidiary companies etc.

New Companies are formed by the promoters of the company concerned. They fulfil all the requirements of the formation process starting from promotion till issue of commencement of business certificate at last. A public company with public share capital can start its business only after getting certificate for commencement of business. Two important documents i.e. Memorandum of Association and Articles of Association are prepared during this process which ascertains company's broad objects and internal management procedures respectively. A prospectus is issued so as to mobilise funds from public openly. Shares and Debentures are popular forms of raising funds. Doctrine of Ultra –Vires, Constructive Notice and Indoor Management are inevitable and play their significant role.

1.10 Glossary

Company: Company is an association of person having the common objectives.

Promoters: Promoter is a person or entity that initiates the creation of a business or corporation.

Articles of Association: Articles of Association is a legal document that outlines the rules and regulations that govern a company's operations.

1.11 Check your progress

1. The Indian Company Act, 1866 was developed on the basis of English.....
2. People who put their money in the company are called it's.....
3. Liability of the members is limited to the value of the shares held by them, also called.....
4. .....is considered as an invitation to the public for subscribing share capital or debenture.

1.12 Answer to check your progress

1. 1862
2. Members
3. Limited by shares
4. Prospectus

1.13 Terminal Questions

1. Do write a detailed note on Company legislation and its development in India.
2. What do you mean by a company? Identify and explain different types of companies?
3. Discuss distinct stages of Formation of a company?
4. "Memorandum of Association and Articles of Association are two most important documents of a company". Elucidate the statement
5. What do you mean by a Prospectus? What are its contents?

1.14 Reference Books

1. N.D.Kapoor, Company Law, Sultan Chander and Sons, New Delhi
2. S.C.Agarwal, Company Law, Dhanpat Rai Publication, New Delhi
3. S.K.Agarwal, Business Law, Galgotia Publishing Company, New Delhi

4. K.R.Balchandri, Business Law for Management, Himalaya Publishing House, New Delhi
5. S.S.Gulshan and G.K Kapoor, Business Law, New Age International Publishers, New Delhi
6. S.C.Puchal , Mercantile Law, Vikas Publishing House, New Delhi .

Unit – 2 Accounts and Audit

2.1 Introduction
2.2 Meaning of Accounts
2.3 Legal provisions regarding books of accounts
- 2.3.1 Responsible person for keeping books
- 2.3.2 Place or records
- 2.3.3 Inspection of books
- 2.3.4 Preservation of records
- 2.3.5 Annual Accounts and Authentication
- 2.3.6 Circulation Of accounts
- 2.3.7 Filling of Records
- 2.3.8 Other Books of accounts
  - 2.3.8.1 Statutory Books
  - 2.3.8.2 Optional Books

2.4 Meaning of an Audit
- 2.4.1 Objective of conducting an audit
- 2.4.2 Appointment of an Auditor
  - 2.4.2.1 Qualification and Disqualification of Auditor
  - 2.4.2.2 First Auditor
  - 2.4.2.3 Subsequent Auditors
  - 2.4.2.4 Casual Vacancy
  - 2.4.2.5 Tenure of Appointment
  - 2.4.2.6 Reappointment of an Auditor
  - 2.4.2.7 Appointment By Special Resolution
  - 2.4.2.8 Appointment By Central Government
  - 2.4.2.9 Ceiling limit on Audit
  - 2.4.2.10 Rights and Duties of an Auditor
  - 2.4.2.11 Remuneration and Removal

2.5 Summary
2.6 Glossary
2.7 Check your progress
2.8 Answers to Check your progress
2.9 Terminal Questions
2.10 Reference Books

Objectives

Objective of this unit is to make learners aware about

(i) Meaning of accounts

(ii) Books of accounts

(iii) Preservation of accounts

(v) Meaning of audit

(vi) Auditors and their role

(vii) Provisions of company act regarding accounting and auditing.

2.1 Introduction

Accounting is a business language of recording transactions. Day to day business transactions are recorded in significant manner by a way of maintaining different books of accounts. These records are kept safe at company's end and can be retrieved easily on demand.

These accounts are further examined by internal auditor and external auditor to make it accurate and error free. The unit deals with various provisions in this regard.

2.2 Meaning of Accounts

The term accounts refer to the books of accounts maintained by the company. Section 209 of the company Act makes it mandatory to have proper books of accounts in relation to:

(i) All sums of money received and expended by the company and the matters in respect of which receipts and expenditure take place.

(ii) All the sales and purchases of goods by the company.

(iii) In the case of company pertaining to any class of companies engaged in production, processing, manufacturing or mining activities, such particulars relating to utilisation of material or labour or to other items of cost as may be prescribed, if such class of companies are required by the central government to include such particulars in the books of account.

The company Act 1956 makes it compulsory for every company to keep the books of accounts at their office. Act does not the names of books of accounts but it states that a company should keep all such books of accounts which are necessary to give a true and fair view of the state of affair of the company, explaining its transactions.

2.3 Legal Provisions Regarding Books of Accounts

Legal provisions stand for the statutory requirements to be followed regarding books of accounts. These legal aspects are being discussed from learner's point of view.

2.3.1 Responsible persons for keeping books of accounts

The persons mentioned below are held responsible for maintaining proper books of accounts of a company:

2.2 Managing director or a Manager of a company if any.

2.3 Where the company has neither a Managing Director nor a Manager then every director of a company.

2.4 In addition to it every officer, employee and agent as defined in section 240 (6) of the act excluding bankers, auditors and legal advisors of the company.

2.3.2 Place of records

Generally the books of accounts are kept at registered office of the company. But section 209 deals in this matter and provides that the books of accounts are to be kept at registered office with the exception of section 209(i) that allows the company to keep its record at any other place in India at the will of the board of directors. Such other place shall be approved by a special resolution passed in general meeting of the company. If it happens, it should be intimated to the registrar of the companies within 7 days about the Board's decision.

2.3.3 Inspection of books

The books of accounts along with some other important documents can be inspected by any of the directors at any time during business hours. Section 209 (A) emphasises that these books of accounts shall remain open to inspection during business hours to:

1. The registrar
2. Such officer of the government as may be authorised by central government of India in its behalf.
3. Such officer of the Security an d Exchange Board Of India as may be authorised by SEBI.

Section 209 (A) provides the power of inspecting documents without giving notice to the person concerned.

2.3.4 Preservation of records

Proper books of accounts are to be preserved safely for at least 8 consecutive years for every company. Not only should the books of accounts but relevant vouchers also be made available for the above purposes.

2.3.5 Annual Accounts and Authentication

The term 'Annual Accounts' stands for the accounting statements which are to be prepared compulsorily. Annual accounts of all the companies shall consists of the-

1. Balance Sheet

and

2. Profit & Loss Account / Income & Expenditure Accounts

The Balance Sheet consists of assets and liabilities as on date to which it is prepared i.e. last date of the year concerned. Profit and Loss accounts represents recurring income and expenses to the trading companies while non profit making companies prepare Income & Expenditure account instead of P&L a/c.

Authentication refers to the acknowledgement of the above mentioned accounts. Section 215 provides that Balance sheet and Profit & Loss accounts of every company except banking company shall be signed by the manager or secretary on behalf of the board of directors. This is to be signed by at least two directors of the company one of whom should be a managing director, if any.

The Board of Directors shall have the following documents before annual general meeting:

1. A Balance Sheet
2. A Profit & Loss Account
3. A Report of Board of directors

2.3.6 Circulation Of accounts

A Copy of Balance Sheet, Profit and Loss account, Auditor's Report and Directors Report which is to be presented in the annual general meeting of the company, should be circulated to the every member of the company not less than 21 days before the annual general meeting. The same is to be circulated to the debenture holders trustee too.(Section 219 (i)).

2.3.7 Filling of Records

The books of accounts thus prepared and followed by authentication, are required to be submitted to the registrar of the companies in three copies. Section 220 requires every

company to file with the registrar, three copies each of the Balance Sheet and Profit & Loss accounts, together with three copies of all documents to be annexed or attached there to:

1. Within thirty days from the date on which the Balance Sheet and Profit & Loss Accounts were laid before the company at an annual general meeting or
2. Where the annual general meeting has not been held within 30 days from the latest date on or before which that meeting should have been held.

These copies are to be signed by the managing director, Manager of secretary, or by the director in the absence of them.

A penalty of Rs 50 per day may be imposed upon the officer concerned in case of default in filling of the records as indicated in the provision.

2.3.8 Other Books of accounts

Besides annual accounts some other books also maintained in the form of registers and books.

2.3.8.1 Statutory Books

Statutory books are prepared in the form of registers and others books which are of great importance. It is the legal obligation of the company to maintain and keep these statutory books at their end. These statutory books are

1. Register of Members (Section 150)
2. Register Of Debenture Holders (Section 152)
3. Register Of Directors and Managers (Section 303)
4. Register Of Directors Shareholdings (Section 307)
5. Register Of Charges (Section 143)
6. Register Of Contract Of Directors are Interest (Section 301)
7. Register Of Investments not held in company's name (section 49(i))
8. Register Of Loans to Companies under the same management (section 370)
9. Register Of Investment in shares Of Other Companies (Section372)
10. Minute Books (Section 193)
11. Register Of Fixed Deposits (Section 58A)
12. Foreign Register Of Members and Debentures Holders (Section 158)
13. Books of Accounts (section 209)
14. Cost Accounts Records Of Specified Companies (Section 209 (i) (d))
15. Register Of Renewed and Duplicate Certificate

2.3.8.2 Optional Books

Dear learner, you must have understood by now that which books are statutory books and compulsory to maintain? The following books are optional in nature but it is suggested that they can be useful at times and their vitality and indispensability cannot be ignored:

1. Share Application and Allotment Book
2. Shares Call Book
3. Debentures Call Book
4. Debenture Application and Allotment Book
5. Register Of Share Transfer
6. Share Holders Dividend Book
7. Debenture Interest Book
8. Debenture Transfer register
9. Register of Certification and Balance tickets.
10. Register Of Share Certificates
11. Register Of Share warrants
12. Register Of Dividend
13. Book of Agenda
14. Register Of Proxies
15. Register Of Power Of Attorney
16. Register of Lost Share Certificates.

2.4 Meaning of an Audit

Audit ensures compliance of rules and regulation while preparing accounts and various books of importance. An audit is conducted by an auditor to identify the errors for rectification and detecting frauds, malpractices, if any. As far as auditing in joint companies are concerned, it gives protection to the share holders and facilitates the true and fair state of affairs. Let we understand the type of auditing:

1. Statutory Auditing
2. Optional Auditing
3. Special Auditing

Dear learner, in certain cases, it is obligatory to conduct an audit compulsorily, it is called statutory audit. The company Act makes auditing mandatory to all the companies whether private or public. Their accounts are to be audited by a qualified auditor.

Optional auditing means an auditing by your own choice. If somehow your form of business does not come under the purview of statutory audit and you yourself conduct an audit for the sake of your efficiency and satisfaction, it comes under optional auditing.

Special audit as the name itself refers to the audit which is conducted in special cases. The central government may call for special audit in the following cases, when it is of the opinion that (section 233 A)

(i) The affairs of the company are not being managed in accordance with the sound business principles or prudent commercial practices.

(ii) The company is being managed in a manner which is likely to cause serious injury or damage to the interest of the trade, industry or business to which it pertains.

(iii) The financial position of any company is such as to endanger its solvency.

The central government may appoint any qualified auditor for conducting a special audit and if it is so, the auditor thus appointed shall be known as the special auditor. The special auditor shall have the same powers and duties as those of an auditor a company in general case. However in this case, special auditor shall submit its report to the central government instead of the members of company. It is to be noted that expenses of conducting a special audit shall be determined by central government and the same shall be paid by the company concerned.

On the basis of the nature of auditing, it can be segregated into two parts i.e.

1. Financial Audit
2. Cost Audit

Financial audit stands for the audit of books of accounts specified aforesaid whereas cost audit refers to the audit conducted by a qualified Cost Accountant (Now known as CMA) within the meaning of Cost and Works Accountants Act 1959. Cost audit is the process of verifying the cost of manufacturing, production of an article with regard to utilisation of material labour and other expenses. The cost auditor shall be appointed by the board of directors of the company.

The act makes it mandatory to conduct cost auditing for some of the companies engaged in production, processing, manufacturing and mining. However those which are not coming under compulsory cost auditing may conduct optional cost auditing on their wish. Similarly as discussed above a special cost audit may also be conducted if central government realises the same.

The department of company affairs has made it clear that the cost auditor should not be the internal auditor of the same company for the same period as the cost auditor is required to

comment on the scope and performance of internal audit. It is to be noted that a cost accounting is conducted by a cost accountant within the meaning of Cost and works accountant act 1959. A cost accountant or a firm of cost accountants may also be appointed as cost auditors.

The following have been considered disqualified to be appointed as a cost auditor:

1. A body corporate
2. An officer or employee of the company.
3. A person who is indebted of the company for an amount exceeding Rs 1000.
4. A person who is a partner or who is in the employment of an officer or employee of the company.
5. A person who is disqualified to be a cost auditor of its subsidiary or holding company or of another subsidiary of its holding company.
6. A person who is appointed cost auditor but subsequently becomes disqualified.

2.4.1 Objective of conducting an audit

Objectives of conducting an audit are as follows:

1. To meet the requirements of an act of conducting statutory audit.
2. To make a check on books of accounts.
3. To ensure compliance of rules and regulation as per the act.
4. To protect shareholder's and outsider's interest in the company.
5. To enhance faith of all associated persons to the company.
6. To detect fraud and malpractices if any.
7. To rectify unintended errors.
8. To develop satisfaction of all the directors & members.
9. To maintain accuracy and consistency in records.
10. To manage comprehensive annual analysis.
11. To suggest corrective measures to the company if any.
12. To show true and fair position of the company as on date.

2.4.2 Appointment of an Auditor

Dear learner, as we know that an audit is conducted by an auditor and hence appointment of an auditor is essential. The appointment of auditors is done by the Board of directors, Share Holders and Central Government depending upon the case.

2.4.2.1 Qualification and Disqualification of Auditor

Qualification means the statutory requirement needed to be an auditor of company and disqualification is just opposite of the above. Section 226 of the company act defines the qualification and disqualification of a company auditor. Section 226 (i) says that A person shall not be qualified as an auditor of company unless he is a chartered accountant within the meaning of Chartered Accountant Act, 1949 as far as financial auditing is concerned. (It is to be noted that a cost accounting is conducted by a cost accountant within the meaning of Cost and works accountant act 1959). A firm of chartered Accountants may also be appointed as auditors.

The following have been considered disqualified to be appointed as an auditor:

1. A body corporate
2. An officer or employee of the company.
3. A person who is indebted of the company for an amount exceeding Rs 1000.
4. A person who has given any guarantee or provided any security for the indebtedness of any third party to the company for an amount exceeding Rs 1000.
5. A person as a director or a member of a private company.
6. A person who is holding an instrument which carries voting rights of the Company.
7. If after an appointment auditor becomes disqualified then he or she shall deemed to have vacated his/her office immediately general meeting as per section 224 (5). These auditors may be removed too.

2.4.2.2 First Auditor

The first auditors are appointed by the board of directors within the stipulated time frame of one month from the date of registration of a company. These auditors remain there until the conclusion of first annual prior to that, if any general meeting is conducted before annual general meeting. If the board of directors fail to appoint first auditors, company may appoint the auditors in its general meeting.

2.4.2.3 Subsequent Auditors

Subsequent auditors shall be appointed in each annual general meeting by passing an ordinary resolution. Subsequent auditors' means auditors appointed after first auditor. The company shall have to give intimation to all the auditors appointed within 7 days compulsorily. Section 224(IA) requires the auditor so appointed to communicate his acceptance or refusal to the registrar within a period of 30 days. When auditors are not

appointed in annual general meeting for some reason, the company shall intimate to the government with 7 days of appointment failure. The central government may appoint auditors then to fill up the gap.

2.4.2.4 Casual Vacancy

If a gap arises out of casual vacancy, board of directors may fill the vacancy. In the case of resignation of auditors the vacancy shall be filled by the company only in general meeting.

2.4.2.5 Tenure of Appointment

An auditor is appointed from the conclusion of one annual general meeting and until the conclusion of next annual general meeting. If an annual general meeting is adjourned then the tenure of auditor shall deemed to be extended till the conclusion of the adjourned meeting (Section 224 (i)).

2.4.2.6 Reappointment of an Auditor

Reappointment stands for giving tenure to a retiring auditor. Section 224 (ii) provides that a retiring auditor by what so ever authority appointed shall be reappointed again except in the following circumstances:

1. When auditor is not qualified for reappointment.
2. When auditor has given company a notice about his unwillingness to be reappointed.
3. When a resolution has been passed at the meeting appointing somebody else instead of previous auditor.
4. When a notice has been given of an intended resolution to appoint some person or persons in the place of retiring auditor, and by reason of death, incapacity or disqualification.
5. When auditor holds the audit of more than specified limit of companies on the day appointment.
6. When 25% or more of the subscribed capital of the company is held by public financial institution/ Government Company or a combination of both, unless retiring auditor is through special resolution of the company.

2.4.2.7 Appointment by Special Resolution

The appointment of auditor shall be made be a special resolution only if 25% or more of its share capital is held by jointly or solely by the following:

1. A public financial institution or a central govt. company or a state government company or combination of both, or
2. An institution established by any state act in which a state government holds not less than51% of the subscribed share capital. or
3. A nationalised bank or an insurance company carrying on general insurance business.

2.4.2.8 Appointment by Central Government

Where at an annual general meeting no auditor is appointed or reappointed, the central govt. may appoint a person to fill the vacancy. The company is responsible to intimate the above fact to the central government within 7 days of the meeting (Section 224(3).

2.4.2.9 Ceiling limit on Audit

Ceiling limit on audit is specified in Section 224(IB) as under

1. In case of a company holding paid up share capital of less than Rs 25 Lacks, a firm or a person can audit such 20 companies.

2. In case of companies holding paid up share capital of Rs 25 lakhs or more, a firm or the person can audit such 10 companies and other 10 shall have the paid up capital less than Rs. 25 lakhs.

Thus a firm or person can be the auditor for 20 Public companies at the most and also for as many as private companies as they like (Amendment 2000).

2.4.2.10 Rights and Duties of an Auditor

Every auditor of a company shall have a right of access the books of account and vouchers of the company, whether kept at the registered office of the company or at any other place. An auditor can inspect books and accounts, receive notices, attend general meeting, have right to get remuneration and right to obtain information. An auditor shall be entitled to require from the officers of the company such information and explanation as he may think necessary for the execution of duties as auditor and amongst other matters inquire into the following matters:

(a) Whether loans and advances made by the company on the basis of security have been properly secured and whether the terms on which they have been made are prejudicial to the interests of the company or its members;

(b) Whether transactions of the company which are represented merely by book entries are prejudicial to the interests of the company;

(c) Where the company not being an investment company or a banking company, whether so much of the assets of the company as consist of shares, debentures and other securities have been sold at a price less than that at which they were purchased by the company;

(d) Whether loans and advances made by the company have been shown as Deposits;

(e) Whether personal expenses have been charged to revenue account;

(f) Where it is stated in the books and documents of the company that any shares have been allotted for cash, whether cash has actually been received in respect of such allotment, and if no cash has actually been so received, whether the position as stated in the account books and the balance sheet is correct, regular and not misleading: provided that the auditor of a company which is a holding company shall also have the right of access to the records of all its subsidiaries in so far as it relates to the consolidation of its financial statements with that of its subsidiaries.

The auditor shall make a report to the members of the company on the accounts examined by him and on every financial statements which are required by or under this Act to be laid before the company in general meeting and the report shall after taking into account the provisions of this Act, the accounting and auditing standards and matters which are required to be included in the audit report under the provisions of this Act. Auditor shall look into the financial statements that give a true and fair view of the state of the company's affairs as at the end of its financial year and profit or loss and cash flow for the year and such other matters as may be prescribed.

The auditor's report shall also state:

(a) Whether he has sought and obtained all the information and explanations Which to the best of his knowledge and belief were necessary for the purpose of his audit and if not, the details thereof and the effect of such information on the financial statements;

(b) Whether, in his opinion, proper books of account as required by law have been kept by the company so far as appears from his examination of those books and proper returns adequate for the purposes of his audit have been received from branches not visited by him;

(c) Whether the report on the accounts of any branch office of the company Audited under sub-section (*8*) by a person other than the company's auditor has been sent to him under the proviso to that sub-section and the manner in which he has dealt with it in preparing his report.

(*d*) Whether the company's balance sheet and profit and loss account dealt with in the report are in agreement with the books of account and returns;

(*e*) Whether, in his opinion, the financial statements comply with the accounting standards;

(*f*) the observations or comments of the auditors on financial transactions or matters which have any adverse effect on the functioning of the company;

(*g*) Whether any director is disqualified from being appointed as a director.

(*h*) Any qualification, reservation or adverse remark relating to the maintenance of accounts and other matters connected therewith.

The Comptroller and Auditor-General of India shall appoint the auditor and direct such auditor the manner in which the accounts of the Government company are required to be audited and thereupon the auditor so appointed shall submit a copy of the audit report to the Comptroller and Auditor-General of India which, among other things, include the directions, if any, issued by the Comptroller and Auditor-General of India, the action taken thereon and its impact on the accounts and financial statement of the company.

2.4.2.11 Remuneration and Removal

Remuneration means the sum paid to the auditor for rendering duties as an auditor. The remuneration of the auditor is subject to the following conditions:

(i) In case of an auditor appointed by the board or the central government, his remuneration will be fixed by board or the central government as per the case.

(ii) In case an auditor is appointed by the comptroller and auditor general of India, the remuneration shall be fixed by the company in general meeting.

(iii) In other cases, remuneration shall be fixed by the company in general meeting or in such manner as the company in general meeting may determine.

Dear learner you would have understood by now the appointment process of auditors along with their duties and powers. Now question is that can the auditors be removed or vacated? We know that auditors appointed by board of directors, company or central government holds their position until the conclusion of next general meeting. But it is important to know that they can also be removed or vacated prior to their term.

The Subsequent auditors can be removed by the company by a special resolution obtaining approval of central government. The first auditor can be removed conducting general meeting without a prior approval of central government.

There are certain conditions where a vacation is resulted out of resignation of the auditor/s. Auditor may vacate his office at any time by resigning at the position. Following points are important in this regard:

1. The vacancy arising out of resignation of the auditor can be filled only by the company in the general meeting. In this case board of directors do not have the power of appointment for filling such vacancy.
2. The vacant position, as long as not filled, the remaining auditors may act as auditor, if any.
3. If a new auditor is appointed to the fill the casual vacancy resulted by the resignation, auditor shall hold the position until conclusion of the next annual general meeting.

2.5 Summary

The term accounts refer to the books of accounts maintained by the company. Section 209 of the Company Act makes it mandatory to have proper books of financial accounts i.e. Balance Sheet, Profit & Loss account are said as important books of accounts.

Companies engaged in production, processing, mining and manufacturing are required to keep proper books of accounts in relation to utilisation of material, labour and other expenses. The books of accounts are to be kept safe at the registered office. The persons who are held responsible for maintaining proper books of accounts of a company:

1. Managing director or a Manager of a company if any.
2. Where the company neither has a Managing Director nor a Manager then every director of a company.

In addition to it every officer, employee and agent as defined in section 240 (6) of the act excluding bankers, auditors and legal advisors of the company.

The books of accounts along with some other important documents can be inspected by any of the directors at any time during business hours. Section 209 (A) emphasises that these books of accounts shall remain open to inspection during business hours. Proper books of accounts are to be preserved safely for at least 8 consecutive years for every company. Not only should the books of accounts but relevant vouchers also be made available for the above purposes.

Section 215 provides that Balance Sheet and Profit & Loss accounts of every company except banking company shall be signed by the manager or secretary on behalf of the board of directors. This is to be signed by at least two directors of the company one of whom should be a managing director, if any. The Board of Directors shall have the following documents before annual general meeting i.e. A Balance Sheet, A Profit & Loss Account, A Report of Board of directors. A Copy of Balance Sheet, Profit and Loss account, Auditor's Report and

Directors Report which is to be presented in the annual general meeting of the company, should be circulated to the every member of the company not less than 21 days before the annual general meeting. The same is to be circulated to the debenture holder's trustee too (Section 219 (i)).

The books of accounts thus prepared and followed by authentication, are required to be submitted to the registrar of the companies in three copies.

Statutory books are prepared in the form of registers and others books which are of great importance. It is the legal obligation of the company to maintain and keep these statutory books at their end. Other books in addition to statutory books are known as optional books.

Audit ensures compliance of rules and regulation while preparing accounts and various books of importance. An audit is conducted by an auditor to identify the errors for rectification and detecting frauds, malpractices, if any. As far as auditing in joint companies are concerned, it gives protection to the share holders and facilitates the true and fair state of affairs. The types of auditing are known as

1. Statutory Auditing
2. Optional Auditing
3. Special Auditing

The first auditors are appointed by the board of directors within the stipulated time frame of one month from the date of registration of a company. These auditors remain there until the conclusion of first annual prior to that, if any general meeting is conducted before annual general meeting. If the board of directors fail to appoint first auditors, company may appoint the auditors in its general meeting.

Subsequent auditors shall be appointed in each annual general meeting by passing an ordinary resolution. Subsequent auditors means auditors appointed after first auditor. The company shall have to give intimation to all the auditors appointed within 7 days compulsorily. Section 224(IA) requires the auditor so appointed to communicate his acceptance or refusal to the registrar within a period of 30 days. When auditors are not appointed in annual general meeting for some reason, the company shall intimate to the government with 7 days of appointment failure. The central government may appoint auditors then to fill up the gap. If a gap arises out of casual vacancy, board of directors may fill the vacancy. In the case of resignation of auditors the vacancy shall be filled by the company only in general meeting. An auditor is appointed from the conclusion of one annual general meeting and until the conclusion of next annual general meeting. If an annual general

meeting is adjourned then the tenure of auditor shall deemed to be extended till the conclusion of the adjourned meeting (Section 224 (i)).

The appointment of auditor shall be made be a special resolution only if 25% or more of its share capital is held by jointly or solely by the following:

1. A public financial institution or a central govt. company or a state government company or combination of both, or
2. An institution established by any state act in which a state government holds not less than51% of the subscribed share capital. or
3. A nationalised bank or an insurance company carrying on general insurance business.

Where at an annual general meeting no auditor is appointed or reappointed, the central govt. may appoint a person to fill the vacancy. The company is responsible to intimate the above fact to the central government within 7 days of the meeting (Section 224(3).

Section 224(IB) defines Ceiling limit on audit as follows:

1. In case of a company holding paid up share capital of less than Rs 25 Lacks, a firm or a person can audit such 20 companies.
2. In case of companies holding paid up share capital of Rs 25 lakhs or more, a firm or the person can audit such 10 companies and other 10 shall have the paid up capital less than Rs. 25 lakhs.

Thus a firm or person can be the auditor for 20 Public companies at the most and also for as many as private companies as they like (Amendment 2000).

Every auditor of a company shall have a right of access the books of account and vouchers of the company, whether kept at the registered office of the company or at any other place. An auditor can inspect books and accounts, receive notices, attend general meeting, have right to get remuneration and right to obtain information. An auditor shall be entitled to require from the officers of the company such information and explanation as he may think necessary for the execution of duties as auditor.

The auditor shall make a report to the members of the company on the accounts examined by him and on every financial statements which are required by or under this Act to be laid before the company in general meeting and the report shall after taking into account the provisions of this Act, the accounting and auditing standards and matters which are required to be included in the audit report under the provisions of this Act. Auditor shall look into the financial statements that give a true and fair view of the state of the company's affairs as at the end of its financial year and profit or loss and cash flow for the year and such other matters as may be prescribed.

The Comptroller and Auditor-General of India shall appoint the auditor and direct such auditor the manner in which the accounts of the Government company are required to be audited and thereupon the auditor so appointed shall submit a copy of the audit report to the Comptroller and Auditor-General of India which, among other things, include the directions, if any, issued by the Comptroller and Auditor-General of India, the action taken thereon and its impact on the accounts and financial statement of the company. In case of an auditor appointed by the board or the central government, his remuneration will be fixed by board or the central government as per the case. In case an auditor is appointed by the comptroller and auditor general of India, the remuneration shall be fixed by the company in general meeting. In other cases, remuneration shall be fixed by the company in general meeting or in such manner as the company in general meeting may determine.

Auditor can be removed conducting general meeting without a prior approval of central government. There are certain conditions where a vacation is resulted out of resignation of the auditor/s. Auditor may vacate his office at any time by resigning at the position. If a new auditor is appointed to the fill the casual vacancy resulted by the resignation, auditor shall hold the position until conclusion of the next annual general meeting.

2.6 Glossary

Annual Accounts- Annual accounts refer to the financial statements prepared by a company at the end of each financial year to showcase its financial position.

Remuneration - Remuneration means the sum paid to the auditor for rendering duties as an auditor.

Financial Audit- A financial audit is conducted to provide an opinion whether "financial statements" are stated in accordance with specified criteria.

SEBI- Securities and Exchange Board of India

Optional Audit-

CMA- Chartered Management Accountant

2.7 Check your progress

State True or False

1. The company Act 1956 makes it compulsory for every company to keep the books of accounts at their office
2. Section 209 of the company Act makes it mandatory to have proper books of accounts.
3. In case of a company holding paid up share capital of less than Rs 25 Lacks, a firm or a person can audit such 10 companies.
4. The first auditor can be removed conducting general meeting without a prior approval of central government.
5. Auditor may vacate his office at any time by resigning at the position.

2.8 Answers to check your progress

1. True 2. True 3. False 4. True 5. True

2.9 Terminal Questions

Q1. What types of books are kept by a company?

Q2. What are the legal provisions related to the books of accounts?

Q3. What do you mean by an audit? Who so ever is qualified to conduct an audit?

Q4. How do we appoint first auditor, subsequent auditor and casual auditor?

Q5. What are the provisions of Company Act on removal and resignation of auditors?

2.10 Reference Books

1. N.D.Kapoor, Company Law, Sultan Chander and Sons, New Delhi

2. S.C.Agarwal, Company Law, Dhanpat Rai Publication, New Delhi

3. S.K.Agarwal, Business Law, Galgotia Publishing Company, New Delhi

4. K.R.Balchandri, Business Law for Management, Himalaya Publishing House, New Delhi

5. S.S.Gulshan and G.K Kapoor, Business Law, New Age International Publishers, New Delhi

6. S.C.Puchal , Mercantile Law, Vikas Publishing House, New Delhi .

Unit – 3 Corporate Governance

3.1 Introduction

3.2 Corporate Governance and its Meaning

3.2.1 Development of Corporate Governance across the Globe

3.2.2 Development of Corporate Governance in India

3.3 Chief Characteristics of Corporate Governance

3.4 Constituents of Corporate Governance

3.5 Principles of Corporate Governance

3.5.1 OECD Principles

3.6 Benefits of Corporate Governance

3.7 Corporate Governance Guidelines

3.7.1 SEBI's Clause 49 of Listing Agreement

3.7.2 Corporate Governance Guidelines 2009

3.8 Summary

3.9 Glossary

3.10 Check your progress

3.11 Answers to check your progress

3.12 Terminal Questions

3.13 Reference Books

Objectives

Learning Objectives of this unit are as follows:

- To know the meaning of Corporate Governance.
- To investigate its development in India and abroad.
- To learn its role in corporate world.
- To check its characteristics and principles.
- To go through OECD norms.
- To work out the benefits of Corporate Governance.

3.1 Introduction

Corporate governance is comparatively a new concept which emphasizes upon the good governance in corporate sector. However the need of good governance in rest of the sectors cannot be ignored as a matter of fact but here we shall deal Corporate Governance exclusively. Corporate Governance is indeed in the development phase and it shall be more strengthened in the years to come.

The global financial crisis has ushered the need for corporate BODs to provide well-informed strategic direction that stretches beyond short-term financial performance. This particular way of dealing the things prepares companies to hedge against risks by anticipating adverse impacts on people and the environment. It can enhance wealth by creating shareholder value through an increase in business opportunities and making easy access to markets. A new vision of business is emerging with a set of core values encompassing through human rights, environmental protection and anti-corruption measures, board's relationship with management and accountability towards shareholders.

3.2 Corporate Governance and its Meaning

The word Corporate Governance stands for the good governance in the corporate world. It encompasses through the proper and fair management of a company by imposing measures of control. In this regard it also deals with the rules pertaining to the power of owners, the board of directors, management and stakeholders. Corporate governance would include the relationship between shareholders, creditors, and corporations; between financial markets, institutions, and corporations; and between employees and corporations. Corporate governance would also encompass the issue of corporate social responsibility, including such aspects as the firm's dealings affecting culture and the environment and the sustainability of firms' operations. Dear learner let us have some significant definitions over the subject to make a clear picture in our mind.

"Corporate governance is about promoting corporate fairness, transparency and accountability".

Wolfensohn

"Corporate governance is concerned with holding the balance between economic and social goals and between individual and communal goals".

Sir Adrian Cadbury

We can understand corporate governance meaning in two ways as under:

1 In a Narrow Sense

2 In a broader Sense

In a *narrow* sense, corporate governance includes in itself a set of relationships amongst the company's management, its board of directors, its shareholders, its auditors and other stakeholders. These guide lines on relationships forms rules and provide the basic structure through which the objectives of the company are set, and the means of attaining these objectives as well as monitoring performance are determined. Thus, the key aspects of good corporate governance include transparency of corporate structures and operations, the accountability of managers and the boards to shareholders, and corporate responsibility towards stakeholders.

In a *broader* sense, corporate governance is creating long-term trust between companies and the external providers of capital. In this sense governance is concerned with holding the balance between economic and social goals and between individual and communal goals. The governance framework work out to encourage the efficient use of resources and equally to require accountability for the stewardship of those resources. The main objective is to achieve as nearly as possible the interest of individuals, of corporations and of society.

It fixes the responsibility and accountability of almost all the parties in association in pursuit of transparency and fairness. The term governance manages to protect interest of all the stakeholders. In this way the keys words of Corporate Governance should be focused approach, true picture, Disclosure, transparency, participation, accountability, efficiency & effectiveness and utmost stakeholder satisfaction.

The corporate governance is also used in listing companies at stock exchange under clause 49. It ensures the compliance of corporate governance rules strictly and any violation in this regard may De-list the company shares with immediate effect. However, the provision of company act are sufficiently concentrated towards the rights of shareholders, the responsibilities of Board of Directors, the statutory books of accounts, protecting shareholders interest, detecting and avoiding fraud etc. but then a need of strengthening good governance is found inevitable keeping in view the scams like Harshad Mehta, M S shoes and Satyam Computers in the past.

Corporations around the world are growing with unprecedented pace to cater the need of growing population and development. In order to be sustainable in this competitive era

organization requires cooperation of all stakeholders along with strict adherence to the best corporate governance practices. The Company management should play as trustees of the shareholders. Corporate governance includes in its purview the following:

1. The power to be exercised by the management.
2. Control over management power through Boards of Directors.
3. Management's accountability to stakeholders.
4. The formal and informal processes by which stakeholder's effect management decisions.

3.2.1 Development of Corporate Governance across the Globe

The trend of developing corporate governance has not been too old even at international level. Guidelines and codes of best practices started in the early nineties in UK and Canada. There have been a number of committees since early nineties at International level of develop appropriate framework of corporate governance. Few Important committees are being highlighted here from learner's point of view:

1. Cadbury Committee Report (1992)
2. Greenbury Committee Report (1993)
3. Hampel Committee Report, UK (1998)
4. London Stock Exchange: The combined code, principles of good governance and best practices (1998)
5. Calpers Global Principles of Accountable Corporate Governance (1999).
6. Blue Ribbon Committee Report (1999)
7. King Committee on Corporate Governance (2002)
8. Sarbanes Oxley Act, USA (2002)
9. Higgs Report: Review of the role and effectiveness of non executive directors , UK(2003)
10. The Combined Role on Corporate Governance (2003)
11. ASX Corporate Governance council Report (2003)
12. OECD Principle of Corporate Governance (2004)
13. Combined Code of corporate Governance (2006)
14. UNCTAD
15. The Combined Code on Corporate Governance (2008). Guidance on good practices in Corporate Governance Disclosure (2006)

During the financial crises in 1998 in Russia, Asia, and Brazil, the behaviour of the corporate sector affected economies of various countries and this led not only the corporate

governance in danger viz a viz the stability of the global financial system. Confidence in the corporate sector was dwindled by corporate governance scandals in the United States and Europe that resulted some of the largest insolvencies in past at about 2000 A/D. Sir Adrian Cadbury, in the Report on Financial Aspects of Corporate Governance in the United Kingdom said: "Corporate governance is the system by which companies are directed and controlled".

Actually these recommendations and principles have been mainly focused on structure of the company, financial and non-financial disclosures, compliance with codes of corporate governance, competitive remuneration policy, shareholders rights and responsibilities, financial reporting and internal controls, etc. All these efforts at international level, in turn, helped to bring favourable changes in the operating systems of Board of Directors, Company's management and administration; as well as improve face of relationship between supervisory and executive bodies.

The pioneer investigation at international level in this regard inculcated a sense of creating good governance to all the countries across the globe. However, Studies of corporate governance practices across several countries conducted by the Asian Development Bank, International Monetary Fund, Organization for Economic Cooperation and Development and the World Bank emphasized that there is no single model of good corporate governance.

The OECD Benchmarks recognizes that different legal systems and institutional frameworks have led to different approaches to the corporate governance. However, utmost priority has been given to the interests of shareholders.

3.2.2 Development of Corporate Governance in India

India is one of the countries having largest number of listed companies in the world, Major corporate governance initiatives were launched in India between 1990-2000. The first step was witnessed in the form of Confederation of Indian Industry (CII) voluntary code of corporate governance in 1998. The second major step was taken by the SEBI, by ushering Clause 49 of the listing agreement. The third initiative was taken by the Naresh Chandra Committee by its report submitted in 2002. The fourth endeavour was again by SEBI in the form of Narayana Murthy Committee's report (2002) and there after development process goes on till today. .

(1) The CII Code

CII established a committee to examine corporate governance issues, and to recommend a voluntary code of best practices before the Asian crisis. The committee was assured that good corporate governance was perhaps essential for Indian companies to access domestic and global capital. The first draft of its code was prepared in April 1997 but the final code 'Desirable Corporate Governance', was released in April 1998. The code was voluntary in nature.

(2) Kumar Manglam Birla committee report and Clause 49

It was further realised that under prevailing Indian conditions a statutory code rather than a voluntary code would be more affective & meaningful. As a result the second major corporate governance initiative in the country was formulated by SEBI in early 1999. An old saying is very popular that necessity is the mother of invention. Keeping in view the necessity SEBI set up a committee under Kumar Manglam Birla to formulate the standards of good corporate governance in early 2000. The SEBI accepted key recommendations of this committee and consequently these were incorporated into Clause 49 of the Listing Agreement of the Stock Exchanges.

(3) Naresh Chandra committee on corporate Governance

The Naresh Chandra committee was set up in August 2002 by the Department of Company Affairs (DCA) under the Ministry of Finance and Company Affairs to examine various corporate governance issues. The Committee submitted its report with its recommendation in December 2002. The report had recommendations in two key aspects of corporate governance.

(i) Financial & non-financial disclosures

(ii) Independent auditing and board oversight of management.

(4) Narayana Murthy Committee report on corporate governance

The fourth initiative step on corporate governance in country was taken in the form of the recommendations of the Narayana Murthy committee. The committee was set up by to review Clause 49, and suggest measures to improve corporate governance standards. Major recommendations of the committee (2002) were related to audit committees, audit reports, independent directors, related party transactions, risk management, directorships and director compensation, codes of conduct and financial disclosures. The Narayana Murthy Committee

Report, 2003 suggested further improvements in the previous recommendations, the revised Clause 49 has been made effective then.

3.3 Chief Characteristics of Corporate Governance

1. Good Governance
2. Social value to the Society
3. Economic value to the society
4. Transparency
5. Complete Disclosure
6. Proper Division of Power
7. Environment Protection
8. Establishing Accountability
9. Stakeholder's Protection
10. Fair Management
11. Anti –Corruption Control
12. Corporate Social Responsibility
13. Sustainability
14. Efficiency & effectiveness
15. Stakeholder's Satisfaction.
16. Protection of minorities.

These two definitions make the picture more clear:

"Corporate governance is the acceptance by management of the inalienable rights of shareholders as the true owners of the corporation and of their own role as trustees on behalf of the shareholders. It is about commitment to values, about ethical business conduct and about making a distinction between personal and corporate funds in the management of a company."

Securities and Exchange Board of India, 2003.

"The term 'corporate governance' is susceptible both to broad and narrow definitions. In fact, many of the codes do not even attempt to articulate what is encompassed by the term. . . . The important point is that corporate governance is a concept, rather than an individual instrument. It includes debate on the appropriate management and control structures of a company. Further it includes the rules relating to the power relations between owners, the

Board of Directors, management and, last but not least, the stakeholders such as employees, suppliers, customers and the public at large."

N.R. Narayana Murthy, Chairman, Committee on Corporate Governance, Securities and Exchange Board of India, 2003.

3.4 Constituents of Corporate Governance

The Chief Constituents of Good Corporate Governance are:

- Role and powers of Board
- Legislation
- Code of Conduct
- Board Independence
- Board Skills
- Management Environment
- Board Appointments
- Board Induction and Training
- Board Meetings
- Strategy Setting
- Business and Community Obligations
- Financial and Operational Reporting
- Monitoring the Board Performance
- Audit Committee
- Risk Management

3.5 Principles of Corporate Governance

The first and the foremost principle of corporate governance is to maintain good governance which includes honesty, transparency trust integrity, openness performance orientation, responsibility and accountability, mutual respect, and commitment to the organisation,

division of Power, Protection to Stakeholders etc. Various efforts have been done at International level to formulate adequate principles of corporate governance. OECD norms do have Pioneer notion amongst all.

3.5.1 OECD Principles: OECD (Organization for Economic Co-operation and Development) norms were firstly formulated in the year 1999, The OECD Principles support government in improving the legal and regulatory framework that facilitate good corporate governance and ultimately result in financial and economic stability. The OECD Principles emphasise for the best governance practices. The OECD Principles of Corporate Governance were originally formulated by the OECD Council Meeting in Ministerial level on 27-28 April 1998 to develop, in conjunction with national govt., other relevant international originations and the private sector, a set of corporate governance standards and guidelines at International level.

The purpose of the OECD principles of Corporate Governance was revised in 2004 with the view to develop best practice standards of corporate governance that countries with different cultures could give their consensus. The principles apply irrespectively to the country's level of ownership. The principles are basically concerned with listed companies, but they may also be a useful otherwise too.

These principles are identified into six broad issues:

• Ensuring the basis for an effective corporate governance framework
• The rights of shareholders and key ownership functions
• The equitable treatment of shareholders
• The role of stakeholders in corporate governance
• Disclosure and transparency
• The responsibilities of the board

OECD GOVERNANCE GUIDELINES FOR STATE-OWNED ENTERPRISES:

The OECD adopted a set of guidelines on corporate governance for state-owned enterprises in the year 2005. It was particularly in the belief that SOEs would likely remain vital in many of the countries and that their governance shall be a important in ensuring their positive contribution to the overall upliftment of economic efficiency and competitiveness. The guidelines contain focus on:

• Ensuring an effective legal and regulatory framework for SOEs

• The state acting as owner
• Equitable treatment of shareholders
• Relations with stakeholders
• Transparency and disclosure
• The responsibilities of SOE boards

3.6 Benefits of Corporate Governance

The research conducted so far indicates that corporate governance has several benefits. Some of them are being listed for learners:

1 Increased access to external world can led to larger investment, higher growth and employment creation.
2 Lower cost of capital.
3 Better allocation of resources results in better management.
4 Transparency and disclosure add faithfulness and loyalty.
5 Good corporate governance ensures reduced risk of financial crises.
6 Good corporate governance can mean generally better relationships with all stakeholders.
7 It improves strategic decision making at top level by inducting independent directors.
8 Protection of investor interest and strong capital markets position.
9 Good governance always generate higher market valuation.
10 Ensures full commitment of the board.
11 Good corporate governance can minimise the risk of scams and fraud.
12 It can enhance the overall performance of the company and consequently result in Economical grown, social growth and national prosperity.
13 It provides pprotection to minorities.

3.7 Corporate Governance Guidelines

Out of the research and investigation in corporate world, various guidelines are being issued worldwide to enhance good corporate governance. These guidelines formulated at International level in the form of a pioneer model are suggestive only to the countries in the world. However these countries are developing their own mandatory and voluntary code of

corporate governance to be followed by the country concerned. Indian code of corporate governance can be understood as under:

3.7.1 SEBI's Clause 49 Of Listing Agreement

SEBI set up a committee under Kumar Manglam Birla to formulate the standards of good corporate governance. In early 2000, The SEBI accepted recommendations of this committee and consequently these were incorporated into Clause 49 of the Listing Agreement of the Stock Exchanges. Indian Companies are required to comply with Clause 49 of the listing agreement primarily focusing on following areas for good corporate governance:

_ Board composition specifying independent directors.
_ Remuneration to director.
_ Board Procedure
_ Management
_ Audit Committee
_ Subsidiary companies
_ Risk management
_ CEO/CFO certification of financial statements and internal controls
_Shareholders
_Report on Corporate Governance
_ Compliance
_ Other disclosures etc.

3.7.2 Corporate Governance Guidelines 2009

Ministry of corporate affair Govt. of India formulated voluntary guidelines 2009 on corporate governance during the Indian corporate week 14-21 December 2009. These guidelines are as follows:

1. BOARD OF DIRECTORS

(i) Appointments to the Board

Companies should issue formal letters of appointment to Non-Executive Directors (NEDs) and Independent Directors as done by them while appointing employees and Executive Directors. The letter should specify:

(a) The term of the appointment.
(b) The Board's expectation from the appointed director and the Board-level committee(s) in which the director is expected to serve and its tasks.

(c) The fiduciary duties that come with such an appointment along with Accompanying liabilities.

(d) Provision for Directors and Officers.

(e) The Code of Business Ethics that the company expects from its directors and employees to follow.

(f) The list of acts that a director should not do while functioning in the company.

(g) The remuneration, including sitting fees and stock options.

(h) Formal letter should form a part of the disclosure to shareholders at the time of the ratification of his/her appointment or re-appointment to the Board. This letter should also be placed by the company on its website (if any).In case the company is a listed company; it should also be on the website of the stock exchange where the securities of the company are listed.

(ii) Separation of Offices of Chairman & Chief Executive Officer

To prevent unfettered decision making power with a single individual there should be a clear demarcation of the roles and responsibilities of the Chairman of the Board and that of the Managing Director/Chief Executive Officer (CEO). The roles and offices of Chairman and CEO should be separated, to promote balance of power.

(iii) Nomination Committee

(a) The companies may have a Nomination Committee comprising of majority of Independent Directors, including its Chairman. This Committee should consider proposals for searching, evaluating, and recommending

Appropriate Independent Directors and Non-Executive Directors [NEDs], based on an objective and transparent set of guidelines which should be disclosed and include the criteria for determining qualifications, positive attributes, independence of a director and availability of time with him or her to devote to the job.

(b) The committee determines processes for evaluating the skill, knowledge, experience and effectiveness of individual directors as well as the Board as a whole.

(c) With a view to enable Board to take proper and rational decisions, Nomination Committee should ensure that the Board comprises of a balanced combination of Executive Directors and Non-Executive Directors.

(d) The Nomination Committee should evaluate and recommend the appointment of Executive Directors.

(e) A separate section in the Annual Report should outline the guidelines being followed by the Nomination Committee and the role and work done by it during the year under consideration.

(iv) Number of Companies in which an Individual may become a director

In case an individual is a Managing Director or Whole-time Director in a public company the maximum number of companies in which such an individual can serve as a Non-Executive Director or Independent Director should be restricted to seven.

2. INDEPENDENT DIRECTORS

(i) Attributes for Independent Directors

(a) The Board should put in place a policy for specifying positive attributes of Independent Directors such as integrity, experience expertise, foresightedness, managerial qualities and ability to read and understand financial statements. Disclosure about such policy should be made by the Board in its report to the shareholders. Such a policy may be subject to approval by shareholders.

(b) All Independent Directors should provide a detailed Certificate of Independence at the time of their appointment, and should continue thereafter annually. This certificate should be placed by the company on its Website, if any, and in case the company is a listed company it shall also be placed on the website of the stock exchange where the securities of the company are listed.

(ii) Tenure for Independent Director

(a) An Individual may not remain as an Independent Director in a company for more than six years.

(b) A period of three years should elapse before such an individual is inducted in the same company in any capacity.

(c) No individual may be allowed to have more than three tenures as Independent Director in the manner suggested in a and b above.

(d) The maximum number of public companies in which an individual may become an Independent Director should be restricted to seven.

(iii) Independent Directors to have the Option and Freedom to meet Company Management periodically

(a) In order to enable Independent Directors to perform their duties effectively, they should have the option and freedom to interact with the company management periodically.

(b) Independent Directors should be provided with adequate independent office space, other resources and support by the companies including the power to have access to additional information to enable them to study and analyze various information and data provided by the company management.

3. REMUNERATION OF DIRECTORS

(i) The companies should ensure that the remuneration is reasonable and sufficient to attract, retain and motivate quality directors required to run the company successfully. It should also be ensured that relationship of remuneration to performance is clear. Incentive schemes should be designed around appropriate performance benchmarks and provide rewards for materially improved company performance. Benchmarks for performance laid down by the company should be disclosed to the members annually.

(ii) Remuneration Policy for the members of the Board and Key Executives should be clearly laid down and disclosed. Remuneration packages should involve a balance between fixed and incentive pay, reflecting short and long term performance objectives appropriate to the company's circumstances and goal.

(iii) The performance-related elements of remuneration should form a significant proportion of the total remuneration package of Executive Directors and should be designed to align their interests with those of shareholders and to give these Directors keen incentives to perform at the highest levels.

4. Remuneration of Non-Executive Directors (NEDs)

(i) The companies should have the option of giving a fixed contractual remuneration, not linked to profits, to NEDs. The companies should have the option to pay:

(a) A fixed contractual remuneration to its NEDs, subject to an appropriate ceiling depending on the size of the company. or

(b) An appropriate percent of the net profits of the company.

(ii) The choice should be uniform for all NEDs,

(iii) If the option chosen is 'i(a)' above, then the NEDs should not be eligible for any commission on profits.

(Iv) If stock options are granted as a form of payment to NEDs, then these should be held by the concerned director until three years of his exit from the Board.

5. Structure of Compensation to NEDs

The companies may use the following pattern in structuring remuneration to NEDs:

(A) **Fixed component:** The fixed component should be relatively low, so as to enable NEDs to a greater share of variable pay and this should not be more than one-third of the total remuneration package.

(B) **Variable component:** Based on attendance of Board and Committee meetings (at least 75% of all meetings should be an eligibility pre-condition)

(C) Additional variable payment for being:

• The Chairman of the Board, especially if he/she is a non executive Chairman.

• The Chairman of the Audit Committee and/or other committees

• Members of Board committees.

(D) If above mentioned structure or any similar structure of remuneration is adopted by the Board, it should be disclosed to the shareholders in the Annual Report of the company.

6. Remuneration of Independent Directors (IDs)

(i) In order to attract, retain and motivate Independent Directors of quality to contribute to the company, they should be paid adequate sitting fees which may depend upon the twin criteria of Net Worth and Turnover of companies.

(ii) The IDs may not be allowed to be paid stock options or profit based Commissions, so that their independence is not compromised.

7. Remuneration Committee

(i) Companies should have Remuneration Committee of the Board. This Committee should comprise of at least three members, majority of whom should be non executive directors with at least one being an Independent Director.

(ii) This Committee should have responsibility for determining the remuneration for all executive directors and the executive chairman, including any compensation payments, such as retirement benefits or stock options. It should be ensured that no director is engaged in deciding his or her own remuneration.

(iii) This Committee should also determine principles, criteria and the basis of remuneration policy of the company which should be disclosed to shareholders and their comments, if any, considered suitably. Whenever, there is any deviation from such policy, the justification/reasons should also be indicated/disclosed adequately.

(iv) This Committee should also recommend and monitor the level and structure of pay for senior management, i.e. one level below the Board.

(v) This Committee should make available its terms of reference, its role, the authority delegated to it by the Board, and what it has done for the year under review to the shareholders in the Annual Report.

8. Training of Directors

(i) The companies should ensure that directors are inducted through a suitable familiarization process covering, inter-alia, their roles, responsibilities and liabilities. Efforts should be made to ensure that every director has the ability to understand basic financial statements and information and related documents/papers. There should be a statement to this effect by the Board in the Annual Report.

(ii) Besides, the Board should also adopt suitable methods to enrich the skills of directors from time to time.

9. Enabling Quality Decision making

The Board should ensure that there are systems, procedures and resources available to ensure that every Director is supplied, in a timely manner, with precise and concise information in a form and of a quality appropriate to effectively enable/ discharge his duties. The Directors should be given substantial time to study the data and contribute effectively to Board discussions.

10. Risk Management

(i) The Board, its Audit Committee and its executive management should collectively identify the risks impacting the company's business and document their process of risk identification, risk minimization, risk optimization as a part of a risk management policy or strategy.

(ii) The Board should also affirm and disclose in its report to members that it has put in place critical risk management framework across the company, which is overseen once every six months by the Board. The disclosure should also include a statement of those elements of risk, that the Board feels, may threaten the existence of the company.

11. Evaluation of Performance of Board of Directors, Committees and of Individual Directors

The Board should undertake a formal and rigorous annual evaluation of its own performance and that of its committees and individual directors. The Board should state in the Annual Report how performance evaluation of the Board, its committees and its individual directors has been conducted.

12 Board to place Systems to ensure Compliance with Laws

(i) In order to safeguard shareholders' investment and the company's assets, the Board should, at least annually, conduct a review of the effectiveness of the company's system of internal controls and should report to shareholders that they have done so. The review should cover all material controls, including financial, operational and compliance controls and risk management systems.

(ii) The Directors' Responsibility Statement should also include a statement that proper systems are in place to ensure compliance of all laws applicable to the company. It should follow the "comply or explain" principle.

(iii) For every agenda item at the Board meeting, there should be attached an "Impact Analysis on Minority Shareholders" proactively stating if the agenda item has any impact on the rights of minority shareholders. The Independent Directors should discuss such Impact Analysis and offer their comments which should be suitably recorded.

13. Audit Committee – Constitution

The companies should have at least a three-member Audit Committee, with Independent Directors constituting the majority. The Chairman of such Committee should be an Independent Director. All the members of audit committee should have knowledge of financial management, audit or accounts.

14. Audit Committee – Enabling Powers:

(i) The Audit Committee should have the power to:

• have independent back office support and other resources from the company;

• have access to information contained in the records of the company; and

• obtain professional advice from external sources.

(iii) The Audit Committee should also have the facility of separate discussions with both internal and external auditors as well as the management.

15. Audit Committee - Role and Responsibilities

(i) The Audit Committee should have the responsibility to:

- monitor the integrity of the financial statements of the company;
- review the company's internal financial controls, internal audit function and risk management systems;

• make recommendations in relation to the appointment, reappointment and removal of the external auditor and to approve the remuneration and terms of engagement of the external auditor;

• review and monitor the external auditor's independence and objectivity and the effectiveness of the audit process.

(ii) The Audit Committee should also monitor and approve all Related Party Transactions including any modification/amendment in any such transaction.

(iii) A statement in a prescribed/structured format giving details about all related party transactions taken place in a particular year should be included in the Board's report for that year for disclosure to various stake holders.

16 Appointments of Auditors

(i) The Audit Committee of the Board should be the first point of reference regarding the appointment of auditors.

(ii) The Audit Committee should have regard to the profile of the audit firm, qualifications and experience of audit partners, strengths and weaknesses, if any, of the audit firm and other related aspects.

(iii) To discharge its duty, the Audit Committee should:

• discuss the annual work programme and the depth and detailing of the audit plan to be by the auditor, with the auditor.

• examine and review the documentation and the certificate for proof of independence of the audit firm.

• Recommend to the Board, with reasons, either the appointment/re-appointment or removal of the statutory auditor along with the annual audit remuneration.

17. Certificate of Independence

(i) Every company should obtain a certificate from the auditor certifying his/its independence and arm's length relationship with the client company.

(ii) The Certificate of Independence should certify that the auditor together with its consulting and specialized services affiliates, subsidiaries and associated companies or network or group entities has not/have not undertaken any prohibited non-audit assignments for the company and are independent vis-à-vis the client company.

18 Rotations of Audit Partners and Firms

(i) In order to maintain independence of auditors with a view to look at an issue (financial or non-financial) from a different perspective and to carry out the audit exercise with a fresh outlook, the company may adopt a policy of rotation of auditors which may be as under:-

- Audit partner - to be rotated once every three years
- Audit firm - to be rotated once every five years.

(ii) A cooling off period of three years should elapse before a partner can resume the same audit assignment. This period should be five years for the firm.

19. Need for clarity on information to be sought by auditor and/or provided by the company to him/it

(i) With a view to ensure proper and accountable audit, there should be clarity between company management and auditors on the nature and amount of information/documents/ records etc and periodicity/frequency for supply/obtaining such information documents/ records etc.

(ii) In any case the auditor concerned should be under an obligation to certify whether he had obtained all the information he sought from the company or not. In the latter case, he should specifically indicate the effect of such non receipt of information on the financial statements.

20. Appointment of Internal Auditor

In order to ensure the independence and credibility of the internal audit process, the Board may appoint an internal auditor and such auditor, where appointed, should not be an employee of the company.

Since the Board has the overarching responsibility of ensuring transparent, ethical and responsible governance of the company, it is important that the Board processes and compliance mechanisms of the company are robust. To ensure this, the companies may get the Secretarial Audit conducted by a competent professional. The Board should give its comments on the Secretarial Audit in its report to the shareholders.

(i) The companies should ensure the institution of a mechanism for employees to report concerns about unethical behaviour, actual or suspected fraud, or violation of the company's code of conduct or ethics policy.

(ii) The companies should also provide for adequate safeguards against victimization of employees who avail of the mechanism, and also allow direct access to the Chairperson of the Audit Committee in exceptional cases.

3.8 Summary

Corporate governance is comparatively a new concept which emphasizes upon the good governance in corporate sector. . It is indeed in the development phase and it shall be more strengthened in the years to come. It encompasses through the proper and fair management of a company by imposing measures of control. In this regard it also deals with the rules pertaining to the power of owners, the board of directors, management and stakeholders. Corporate governance would include the relationship between shareholders, creditors, and corporations; between financial markets, institutions, and corporations; and between employees and corporations. Corporate governance would also encompass the issue of corporate social responsibility, including such aspects as the firm's dealings affecting culture and the environment and the sustainability of firms' operations.

In a *narrow* sense, corporate governance includes in itself a set of relationships amongst the company's management, its board of directors, its shareholders, its auditors and other stakeholders. In a *broader* sense, corporate governance is creating long-term trust between companies and the external providers of capital. In this sense governance is concerned with holding the balance between economic and social goals and between individual and communal goals.

There has been a number of committees since early nineties at International level of develop appropriate framework of corporate governance like Cadbury Committee Report (1992), Greenbury Committee Report (1993), Hampel Committee Report, UK (1998), London Stock Exchange: The combined code, principles of good governance and best practices (1998), Calpers Global Principles of Accountable Corporate Governance (1999), Blue Ribbon Committee Report (1999), King Committee On Corporate Governance (2002), Sarbanes Oxley Act , USA(2002), Higgs Report: Review of the role and effectiveness of non executive directors , UK(2003), The Combined Role on Corporate Governance (2003), ASX Corporate Governance council Report. (2003), OECD Principle of Corporate Governance (2004), Combined Code of corporate Governance (2006), UNCTAD Guidance on good practices in Corporate Governance Disclosure (2006), The Combined Code On Corporate Governance (2008).

India is one of the countries having largest number of listed companies in the world, Major corporate governance initiatives were launched in India between 1990-2000. The first step was witnessed in the form of Confederation of Indian Industry (CII) voluntary code of corporate governance in 1998. The second major step was taken by the SEBI, by ushering

Clause 49 of the listing agreement. The third initiative was taken by the Naresh Chandra Committee by its report submitted in 2002. The fourth endeavour was again by SEBI in the form of Narayana Murthy Committee's report (2002).

Ministry of corporate affair Govt. of India formulated voluntary guidelines 2009 on corporate governance during the Indian corporate week 14-21 December 2009. Some of the voluntary codes of corporate governance are being used on experimental basis and depending upon their suitability in Indian corporate environment, they may come up as mandatory codes in the years to come.

3.9 Glossary

Business: an organization or enterprising entity engaged in commercial, industrial, or professional activities.

Globalisation: Globalization is the process by which the world's economies and societies become integrated, and the exchange of goods, services, capital, and information increases

Liberalisation: the practice of making laws, systems, or opinions less restrictive

Governance: Governance is the process of overseeing and controlling the direction of an organization or country

Code of Conduct: A code of conduct is a set of rules and principles that guide behavior and decisions in a workplace or community

3.10 Check your progress

1. ..... encompass the issue of corporate social responsibility, including such aspects as the firm's dealings affecting culture and the environment and the sustainability of firms' operations.
2. ..... Principles support government in improving the legal and regulatory framework that facilitate good corporate governance and ultimately result in financial and economic stability.
3. Keeping in view the necessity SEBI set up a committee under ..... to formulate the standards of good corporate governance in early 2000.
4. An Individual may not remain as an Independent Director in a company for more than .....

3.11 Answers to check your progress

1. Corporate Governance 2. OECD 3. Kumar Manglam Birla 4. 6

3.12 Terminal Questions

Q1. What is the importance of Corporate Governance?

Q2. Do write a detailed note on growth and development of corporate governance.

Q3. What are the OECD principles regarding corporate governance?

Q4. What are the corporate governance rules in India?

Q5. What are the pros and cons of implementing corporate governance?

3.13 Reference Books

1. N.D.Kapoor, Company Law, Sultan Chander and Sons, New Delhi

2. S.C.Agarwal, Company Law, Dhanpat Rai Publication, New Delhi

3. S.K.Agarwal, Business Law, Galgotia Publishing Company, New Delhi

4. K.R.Balchandri, Business Law for Management, Himalaya Publishing House, New Delhi

5. S.S.Gulshan and G.K Kapoor, Business Law, New Age International Publishers, New Delhi

6. S.C.Puchal , Mercantile Law, Vikas Publishing House, New Delhi .

Unit –4 Company Management

4.1 Introduction

4.2 Company Management; An overview

4.3 Director of a company

- 4.3.1 Qualification and disqualification of director
- 4.3.2 Type of Directors
- 4.3.3 Appointment Of Directors
- 4.3.4 Number of Directors
- 4.3.5 DIN
- 4.3.6 Power & duties of Directors
- 4.3.7 BODs Meeting
- 4.3.8 Remuneration
- 4.3.9 Vacation of a director

4.4 Managing Director of a Company

- 4.4.1 Appointment of a Managing Director
- 4.4.2 Disqualification of a Managing Director
- 4.4.3 Term and Remuneration Of a Managing Director

4.5 Manager of a Company

- 4.5.1 Appointment and Disqualification of a Manager
- 4.5.2 Term and Remuneration of a Manager
- 4.5.3 Managing Director and A manager; A Comparison

4.6 Company Secretary

- 4.6.1 Appointment Qualification & Appointment of a Secretary
- 4.6.2 Role of a company secretary
- 4.6.3 Dismissal of a company secretary

4.7 Meetings & Resolutions; An overview

- 4.7.1 Different types of Meeting and Legal provisions
- 4.7.2 Resolutions and Legal Provisions

4.8 Winding up of company

4.9 Summary

4.10 Glossary

4.11 Check your progress

4.12 Check your progress answers
4.13 Terminal Questions
4.14 Suggested Readings

Objectives

Objectives of this unit from learner's point of view are as follows:

(i) To know the concept of company management.

(ii) To understand the power of BODs & Managing Director.

(iii) To understand the role of managers, secretary & share holders.

(iv) To learn appointment and vacation procedure of the company management.

(v) To memorise the provisions related to various type of Meetings.

(vi) To recognise different resolutions.

(vii) To understand winding up modes of a company.

4.1 Introduction

Company is considered as an artificial person in the eyes of the law. It means company can work like a person but indeed it is not a natural person. The persons associated with the company make the company successful or unsuccessful by their efforts. The various natural bodies working together for managing company activities come under the purview of company management. As stated earlier, company is created under law and thus various provisions under company act in vogue shall have to be followed compulsorily. Board of directors, Managing Directors, Managers, Secretary & share holders are the persons engaged in managing company's affairs.

4.2 Company Management; An overview

Board of directors, Managing Directors, Managers, Secretary & share holders jointly known as company management who are engaged in managing company's affairs. A joint stock company is an artificial person without a human body, soul and mind. Consequently it cannot perform acts on its own. Company management acts on behalf of the company for executing various activities.

The Board of Directors in the form of company management plays a vital role and considered must for the management and administration of a company as per company act provisions while other kinds of managerial staff like managing directors or managers are

optional. The company may or may not appoint them. Either the Board of Directors may manage the company by themselves or Board of Directors with the help of MD/Manager may facilitate company affairs.

The unit deals with the appointment of company management professionals i.e. (1) Directors, (2) Managing Director, (3) Manager (4) Secretary etc. and discusses their role and activities to be performed legally.

4.3 Directors of a Company

The number of directors jointly constitutes the board known as BODs of company. Board of directors manage and facilitates broad company affairs ranging from framing policies to supervision and control. Other activities are performed by Managerial personnel.

Section 2(13) of the Companies Act defines a director as 'any person

Occupying the position of director, by whatever name called'. Board of directors act as a trustee as far as management of assets and liabilities of companies are concerned. The number of directors to be appointed in a company to manage all the affairs is subject to the provisions of law. There exist some restrictions for the directors of Private companies and public companies.

The directors cannot be said as servant to the company because they are not employed but they are appointed by the shareholders in general meeting. Directors have the position of an agent or a trustee of a company.

4.3.1 Qualification and Disqualification of Director

The Act does not specify any academic qualification to become a director of a company. It does not make it mandatory to hold qualification share even unless provided in Articles of company. Generally articles provide for having qualification share for a director. Qualification share refer to the number of shares to be held by the director in the company.

The directors must obtain qualification shares, within two months of their appointment unless they already hold the same. In the case of a newly floated company, directors should pay their qualification shares before the Certificate of Commencement of Business. (Sec. 149). The nominal value of the qualification shares must not exceed 5000 rupees.

If a director does not purchase qualification shares within the prescribed period his office shall deemed to be vacated. Moreover, a penalty may also be imposed as per the provisions with this regard.

Disqualification of the directors may be understood as follows as per the section 274:

A person shall not be appointed as a director of a company if

1. He has been found of unsound mind by a court.
2. He is an undercharged insolvent.
3. He has applied to declare an insolvent.
4. He has been accused by a court of any offence including moral turpitude and imprisonment of at least 6 months and 5 years has not been passed by now.
5. He has not paid call on share for six months.
6. Court disqualifies anybody to become as director.
7. If he is already a director of a public company which has not filed annual accounts or annual return for continuous three financial years commencing on or after 1st April 1999.

Or

If he has failed to repay its deposit or interest thereon on due date or redeem its debentures on due date or pay dividend and such failure continues for one year or more. Such person shall not be appointed as a director of any other public company for a period of 5 years from the date of being guilty.

4.3.2 Type of Directors

Directors are named differently like

1. Appointment of first director
2. Appointment of director at general meeting
3 Appointment by the board of directors
4. Appointment by third party
5 Appointments by Central Govt.

4.3.3 Appointment of Directors

Only an individual can become a director of a company and no corporate body or association of person can take charge (section 253). The companies (amendment) Act 2006 amended section 253 and provided that a person can be appointed and reappointed as a director of a company only if he has been allotted a DIN.

Appointment of first director:

The first directors of a company are appointed by the promoters as laid in the articles of association. If Articles does not specify the names of first director then the subscribers to the memorandum, who are individuals, shall be deemed to be the first directors. Such directors shall remain at the office till the appointment of director in annual general meeting of the company.

Subsequent directors: Subsequent directors are appointed by the shareholders in general meeting. 2/3 of the total number of directors of a public company or its subsidiary private company must be appointed by the company in its general meeting of shareholders. The remaining directors of such company and private company may be appointed as per the provision of articles of association.

In case of default in appointment or absence of provision in articles of association, these vacancies are also filled in general meeting by shareholders. 2/3 of the total directors retire by rotation and only 1/3 may be appointed permanently. An ordinary resolution is required for appointment of directors in general meeting.

Appointment of Directors by the Board

The Board of Directors may use their power to appoint directors in the following case :

1. Additional Directors (section 260)
2. Filling up the casual vacancies (section 262)
3. Alternate Directors (section 313)

Additional Directors**:** If articles permit, the Board of Directors can appoint additional directors with the ceiling of maximum number of directors fixed in the articles. Additional directors shall be vested with the same powers as other directors do have.

Casual vacancies: If the office of a director is vacated for some reason including death, resignation, insolvency etc. before his actual term, it creates a casual vacancy. Such casual vacancy is filled according to the regulations specified in articles of association. Absence of provision in articles equips Board of directors to appoint against casual vacancy.

Alternate directors: An alternate director may be appointed in lieu of other if that other is absent for more than three months from the State in which the meetings of the Board are

ordinarily held. Thus an alternate director shall vacate his office either on the original director's term or on the date of getting back of the original director. (Sec. 313).

Appointment of Directors by Central Government

The central government may appoint directors of the company on recommendation of national company law tribunal to prevent oppression and mismanagement in company affairs. Tribunal may pass the order to do so after investigation if

1. A reference is made to it by the central government.
2. An application of at least 100 members of company is received.
3. An application of the members of company not less than 1/10 of the total voting power.

The term of the directors so appointed shall not exceed three years in any case. However central govt. may remove such director at any time and appoint another person to hold the office. The directors appointed by central government are not required to hold qualification shares and they are not liable to retirement by rotation.

Appointment of Directors by Third Parties

Directors may also be appointed by third party. Third party refers to parties outside the company like Financial Institutions, Foreign Collaborators, Debenture holders, Banking companies etc.

The directors appointed into this category are known as nominee directors. The number of nominee directors must not exceed 1/3 of the total directors.

4.3.4 Number of Directors

As per the provisions of company act every company should have at least:

1. Three directors in case of a public company.
2. Two directors in case of a private company.

Maximum number in case of the directors is not mentioned in the act and hence article of association may authorise maximum number if any.

Maximum Directorships Ceiling (Sec 275 to 279 Companies (Amendment) Act, 2000)

No person can become a director of more than 15 companies at the same time (earlier limit was 20). Any person found holding office of director in more than fifteen companies at the implementation of the

Companies (Amendment) Act, 2000 shall select within two months not more than fifteen companies and resign in other companies. He shall inform his choice to each of the companies, the Registrar of Companies and the Central Government.

However following shall not be counted in figure of 15.;

(1) Directorships of a private company which is neither a subsidiary Company nor a holding company of a public company.

(2) Directorships of unlimited companies.

(3) Directorships of non profit making associations.

(4) Alternate directorships.

4.3.5 DIN

The term 'DIN' stands for Director Identification Number. This identification number is allotted to the directors by the central government for the sake of their recognition. The persons intending to become directors shall apply with requisite fee to central govt. in order to get DIN. An individual can become director only in case when he has been allotted a DIN.

4.3.6 Power & duties of Directors

Section 291 deals with the general powers of the board of directors. It provides that the board of directors shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do.

Statutory Powers of Directors: under Section 292, as amended by the Companies (Amendment) Act, 2001, the following powers, subject to any restriction placed by the articles, can be exercised by the Board only by means of resolutions passed at meetings of the Board and not by circulation,

(1) The power to make calls

(2) The power to authorise the company to buy back its own shares or other specified securities up to 10% of the total of its paid-up equity capital and free reserves.

(3) The power to issue debentures.

(4) The power to borrow moneys otherwise than on debentures.

(5) The power to invest the funds of the company.

(6) The power to make loans.

Intervention by shareholders: The shareholders can intervene to a some extent by passing resolution in general meeting. They can have the control in the following matters:

1. Where the director acts in a malafied manner to promote their personal interest ignoring the interest of the company.
2. Where the directors have become incompetent to act for the company.
3. Where the board has failed to act owing to deadlock among the directors.
4. Where directors have become litigants against the company.

The director is supposed to perform all of his duties with good faith, due diligence, care and honesty.

4.3.7 BODs Meeting

Dear learner, you must have understood by now that a director can exercise his powers through board meetings. Board meetings are important from decision making point of view. Company act provides that board meeting of its directors must be held at least once in three months. Thus four meetings should be held in a year. Central government have the power to waive off the condition to a class of companies. The notice of board meeting must be given in writing to all the directors positively, failing which a meeting is considered invalid.

Quorum: The quorum means minimum number of qualified persons whose presence is necessary for transacting legally. The quorum of board meeting shall be one-third of its total strength or two directors, whichever is higher. The determination of the total strength shall not count the vacancies.

In case board meeting could not be held in lack of quorum, then the meeting shall automatically stand adjourned till the same day in the next week and at the same time and place.

4.3.8 Remuneration

The remuneration payable to director is subject to the article of association or resolution passed in general meeting. The remuneration payable to director should be within the overall maximum remuneration. The maximum limit is determined by section 198 of company act which is as follows:

1. The total managerial remuneration which can be paid by a public company to its subsidiary private company to its directors or managers in respect of a financial year shall not exceed 11% of the net profit of the company of that year. However the fee received for attending meeting shall not be considered for calculating the maximum limit of managerial remuneration.

2. If in any financial year company does not attain adequate profit, the company shall not pay any managerial remuneration in general condition.

4.3.9 Vacation of a director

The office of the directors deemed to be vacant when a director attains disqualification as per the act as follows:

1. When director fails to obtain qualification shares within two months of appointment.
2. When director is found to be unsound mind by a competent court.
3. When director applies to the court to be declared as insolvent.
4. When director is declared insolvent by the court.
5. When director has been announced imprisonment for at least 6 months for an offence of moral turpitude.
6. When director fails to pay call on his shares for 6 months from the date of payment.
7. When director remains absent without the permission of board for consecutive three meetings or continuously for three months, whichever is longer.
8. When director accepts a loan, guarantee security for a loan without previous approval of central government.
9. When director fails to disclose the BODs his interest in any contract entered into by the company.
10. When director is disqualified by the court.
11. When director is removed before the expiry of period of office is an ordinary resolution of the company.
12. When director has been appointed by virtue of his holding any office or employment in the company. His office of the director shall deem to be vacant when he holds such office or employment in the company.

The directors may also be removed by either of the followings:

1. By company through resolution in general meeting.
2. By Central govt. on the recommendation of the tribunal.

The director may resign also from his office if he feels to do so.

4.4 Managing Director of a Company

Section 2(26) defines a managing director as "a director who, by virtue of an agreement with the company or of a resolution passed by the company in general meeting or by its Board of Directors or, by virtue of memorandum or articles of association, is entrusted with substantial

powers of management which would not otherwise be exercisable by him, and includes a director occupying the position of a managing director, by whatever name called."

Substantial power means the power to take some decision regarding pricing of products, implementing new techniques, buying and selling, appointment of employees etc. Underlying act shall be considered beyond the powers of a managing director like:

1. Power to affix the common seal of the company.
2. Power to draw or endorse any cheque on account of company.
3. Power to sign any certificate of share.

Learners should note that BODs function to control and supervise major issues and affairs of company while some other routine works are to be taken care by the managerial personnel like Managing director or Manager.

4.4.1 Appointment of a Managing Director

A managing director can be appointed in any of the following ways:

1. By virtue of an agreement with the company.
2. By virtue of a resolution passed by the company in general meeting.
3. By virtue of a resolution passed by the board of directors.
4. By virtue of Memorandum or Articles of company.

4.4.2 Disqualification of a Managing Director

All the disqualification of a director explained earlier stands valid in case of a managing director. However section 267 provides that the person holding following disqualification cannot become managing director of a company:

1. Person who is an undercharged insolvent or a person declared insolvent by court at any point of time.
2. Person who suspends payment to his creditors.
3. Person who makes or made composition with his creditors.
4. Person who is or has at any time, been convicted by court of an offence involving moral turpitude.

4.4.3 Term and Remuneration of a Managing Director

According to section 317 (i) A person cannot be appointed as a managing director for a term exceeding 5 years at a time. The person cannot become managing director of more than two

companies i.e. one public and one private company) at a time. However he may be a managing director of any number of private companies.

As far as remuneration is concerned a managing director may get remuneration by a way of a monthly payment or a specified percentage of the net profit of the company or partially with both. The remuneration of a managing director should not exceed 5% of the net profit without a prior approval of central government. Every public company having a paid-up share capital of Rs. five crores or more shall have a managing or whole-time director or manager [Sec. 269(1)].

4.5 Manager of a Company

Section 2(24) defines a manager as "an individual who, subject to the Superintendence, control and direction of the Board of Directors, has the management of the whole, or substantially the whole of the affairs of a company, and includes a director or any other person occupying the position of a manager, by whatever name called, and whether under a contract of service or not"

A manger is an individual appointed to manage whole or substantial affairs of company and thus the term 'manager' means the chief executive officer of a company in the present context. He may or may not be a director of the company.

4.5.1 Appointment and Disqualification of a Manager

Dear learner, the provisions with respect to the appointment of a manager are the same as applicable to the managing director discussed earlier.

The person suffering from following disqualification cannot be appointed as a manager of the company as per section 385 if:

1. Person who is an undercharged insolvent or a person declared insolvent by court at any point of time within the preceding 5 years.
2. Person who suspends payment to his creditors, or who has suspended the payment to his creditors at any time within the preceding 5 year.
3. Person who makes or made composition with his creditors at any point of time within the preceding 5 years.
4. Person who is or has at any time, been convicted by court of an offence involving moral turpitude at any point of time within the preceding 5 years..

4.5.2 Term and Remuneration of a Manager

The provisions related to the tenure or term of the manager is the same as applicable to managing director as discussed earlier. A person can be appointed as a manager for 5 years at a time.

The manager of a company may receive his remuneration either by a way of monthly payment or by a way of specified percentage of the net profit of the company. The remuneration shall not exceed 5% of the net profit except the approval of central government as per section 387 of company act.

4.5.3 Managing Director and A manager; A Comparison

S,NO,	Managing Director	Manager
1	A managing director must be a director of the company.	A manager need not be a director of the company.
2	There may be more than one managing director in a. company,	There cannot be more than one manager in a company.
3	A managing director does not enjoy the whole powers of management. He exercises only such powers of management as the Board or the Articles entrusts to him.	A manager has management of the whole or substantially the whole of the affairs of the company.
4	The law does not make any provision regarding waiving off the disqualification.	The Central Government may remove the disqualifications on its will.

4.6 Company Secretary

Section 2(45) defines a company secretary as "Secretary means a company secretary within the meaning of clause (c) of sub section (1) of section 2 of the company secretary act 1980 and includes any other individual possessing the prescribed qualification and appointment to perform the duties which may be performed by a secretary under this act and any other ministerial or administrative duties."

The company secretary act defines company secretary as a person who is a member of Institute of company secretary of India. It is to be noted that:

1. Only individual person can become company secretary and thus a body corporate or a firm cannot be appointed for this purpose.
2. A company secretary should have adequate qualification.
3. A company secretary performs the function performed by a secretary under the company act.

It means company secretary is the person who execute duties of a secretary i.e. ensures that the provisions of law are being followed in performing affairs of the company.

4.6.1 Qualification for appointment of a secretary

The academic qualification of a secretary varies from company to company. The companies having paid up share capital of Rs 50 lakhs or more should the whole-time company secretary who shall be a member of the Institute Of company secretaries of India.

In case of companies having paid up capital of less than 50 lakhs, the secretary must possess one or more of the following qualification:

1. Member of the Institute of company secretaries of India.
2. Pass in Intermediate exam conducted by the institute of company secretary of India
3. Member of the Institute of chartered accountants of India.
4. Member of Institute of Cost and works accountants of India (ACMA now)
5. Post graduate Degree in commerce by any university.
6. Degree in Law by any of the universities.
7. Post Graduate Diploma in Management by IIMs
8. Diploma in corporate laws and management granted by Indian law institute.
9. Post Graduate diploma in company secretary by institute of commercial practice.
10. Membership of association of secretaries and managers, Kolkata
11. Post Graduate diploma in company law and secretarial practises granted by university of Udaipur.

The companies registered under section 25 of company act need not to follow aforesaid conditions.

4.6.2 Appointment of a Company Secretary

Secretary is the person who possesses knowledge of legal provisions related to company affairs. That is why promoters very often appoint secretary for assisting in initial formalities. Secretary at this stage is known as pro-tem secretary. However there is no guarantee that pro-tem secretary will be continued as first secretary afterwards. First secretary is appointed through a resolution passed in the Board meeting. The pro-tem secretary should get the

resolution passed in his favour by the board immediately after incorporation of company to stay as first secretary of the company.

4.6.3 Role of a Company Secretary

In Panorma Developments (Guildford) Ltd. Vs Fidelis Furnishing fabrics Ltd. (1971) Lord Denning observed that:

"A company secretary is a much more important person now a days than he was in earlier days. He is an officer of the company with extensive duties and responsibilities. He is no longer a mere clerk. He regularly makes representations on behalf of the company and enters into contract on its behalf. **Justice Soloman** also observed in this case that the secretary has ostensible authority to sign contracts on behalf of the company."

In the wake of his duties to the company, we can say that a company secretary performs mainly two types of duties:

1. General Duties
2. Statutory Duties

General Duties: Ordinarily, a secretary has to present in all meetings of the company. Secretary makes all the minutes and proceedings of the meeting and issues necessary notices to the members and others under the direction of the board. He is the in charge of all the internal books of the company and manages all correspondence with the share holders. He does necessary correspondence with registrar of the company even.

Statutory Duties: The company secretary is the person who ensures compliance of the provision of company act as well as other existing laws in the country. Some statutory duties to be performed by secretary are identified here:

(i) To verify and sign documents of proceedings need authentication by the company. (section54)

(ii) To give notice to the registrar regarding increase in share capital (section 97).

(iii) To deliver for registration return of allotment and contracts related to allotment of shares for consideration other than cash. (Section 75)

(iv) To deliver the share certificates within three months of allotment or with two months of transfer (section 113)

(v) To make available trust deed for inspection to every member or debenture holder on their request within 7 days of request. (Section 118)

(vi) To make entries in the register of member on issue of share warrants. (Section 115)

(vii) To deliver for registration to the registrar particulars of mortgages and charges. (Section 125-127)

(viii) To make the statutory declaration for obtaining the certificate of commencement of business. (Section 149)

(ix) To get painted the name or name plate of the company outside every office, get it printed on documents and get it on the seal.

(x) To sign the annual return and certify the document as annexure.

(xi) To make available for inspection and furnish copies of the register of members.

(xii) To file resolution and agreements requiring registration with the registrar. (Section 192)

(xiii) To send notices of general meetings to member as well as of board meetings to directors.

(xiv) To record minutes of the proceedings of every general meeting and of every meeting of the board of directors within 30 days of the conclusion of every such meeting. (section 193)

(xv) To make available for inspection the register of directors. (Section 304)

(xvi) To available for inspection the minutes book of general meeting. (section196)

(xvii) To maintain statutory books like register of investment held by the company in the name of its nominee, register of charges , register of members, index of members, register of contracts in which directors are interested, register of director manager and secretary, register of directors shareholdings.

4.6.4 Dismissal of a Company Secretary

Board of directors may remove a company secretary by a resolution. He can be removed by giving a notice or compensation. However a secretary can be dismissed without giving him a notice in the following cases:

1. In case of wilful disobedience.
2. In case of misconduct or moral turpitude
3. In case of negligence.
4. In case of incompetence or permanent disability.

As soon as appointment of secretary is terminated, information in duplicate in form no. 32 should be filled with the registrar of companies with in 30 days of termination.

4.7 Meetings & Resolutions- An Overview

Companies often encompass through problems and various decisions are taken to resolve them out. Some decisions are taken at individual level but some of them require consensus of majority. Company meetings are conducted to get either consent or denial on the subject involving BODs, Other Staff, and Shareholders etc. As a lay man we can say meeting means gathering of person to ponder over subject in question.

When people in the meeting give their consensus by majority to do or to abstain the act in question, it is said that resolution is passed.

4.7.1 Different types of Meeting and Legal provisions

Company may hold different type of meetings which are as follows:

1. Share holders Meetings
(i) Statutory Meeting
(ii) Annual general Meeting
(iii) Extra ordinary General Meeting
(iv) Class meeting
2. Board Meetings
3. Meetings of Debenture Holders
4. Meeting of Creditors

Statutory Meeting: The first meeting of the members after incorporation is known as statutory meeting. This meeting is to be held by the company after 1 moth but before 6 months after getting commencement of the business certificate. Statutory meeting is organised only once in the life time of the company. A private company and a public company limited by guarantee with no share capital need not to hold statutory meeting.

Annual General Meeting: As the name itself implies, this meeting is organised annually. It enables members to express their opinion and gives shareholders a chance to have control

over company's affairs. Every company is required to hold annual general meeting no matter whether a private or a public Ltd. Company. The gap between two annual general meetings cannot exceed 15 months in normal circumstances, however registrar of company may allow for some extension but up to 3 more months at the most. The first annual general meeting should be held within 18 months from the date of incorporation of the company. A notice of a meeting is to be circulated to every member at least 21 days before in writing.

Extraordinary General Meeting: All general meetings conducted other than the statutory and annual general meetings are known as extraordinary, general meetings. Regulation 47 of 'Table A' defines: "All general meetings other than annual general meetings shall be called extraordinary general meetings".

The extraordinary general meetings may be organised by:

(1) T**he directors:** The directors, may, whenever they think fit, organise an extraordinary general meeting by passing a resolution to that effect in the Board's meeting.

(2) T**he directors on requisition** (Sec 169): The directors must organise an extraordinary general meeting on the requisition at written demand of members holding not less than 1/10th of total voting rights. The requisition must mention the matters for the consideration for which the meeting is to be organised. The requisitionists themselves may conduct extra ordinary meeting if the directors fail to organise the meeting within stipulated time limits provided that they are not less than 1/10th of the total voting rights of all the members

(3) T**he Company Law Board** (Sec. 186). At times it is impracticable to call or conduct an extraordinary general meeting. The Company Law Board (Tribunal) may call or conduct the meeting.

Class Meeting: Class meeting means a meeting of one particular class of shareholders. A company may two different types of shareholders i.e. Preference shareholders and Equity shareholders. Sometimes we need only one special class of shareholder to be present in the meeting. For instance, if the rate of the preference share holder dividend has to be reduced then only a class of shareholders are required to be present in this meeting.

Board Meetings: Meeting conducted by the board of director is known as Board meeting. It is conducted once in every three months.

Meetings of Debenture Holders: Debenture holder may be called for meeting as per the debenture trust deed. This particular meeting is held generally to alter the condition of issue of shares. However court is also empowered to announce debenture holders meetings at any point of time.

Meeting of Creditors: Meetings of creditors are organised by an order of court.

4.7.2 Resolutions and Legal Provisions

A passed resolution is initially a proposal in question in the meeting which is accepted by members to make it a resolution. In other words a 'Proposed Resolution' when passed by requisite majority of votes by the shareholders becomes a company resolution. The Companies Act provides three kinds of resolutions that can be passed at the general meeting of a company:

(a) Ordinary resolution;

(b) Special resolution;

(c) Resolution requiring special notice.

Ordinary Resolution: A resolution shall be called an ordinary resolution if the vote casted in favour of the resolution exceeds the votes in against. Members remaining absent or remaining neutral are not considered. An ordinary resolution is normally used for the ordinary purposes i.e. to pass the annual accounts, to declare dividend, to appoint directors and to appoint auditors.

The voting may either be done by raising hands or by conducting a poll.

Special Resolution: Special resolution is passed by the ¾ majority of the members present in the meeting. Proxies are also considered valid for this purpose. Special resolution is meant for taking major decision affecting the constitution, policy matters and administration.

The Companies Act specified certain matters requiring a special resolution to be passed. Some of the examples are

1. To alter the memorandum of the company (Sec. 17).
2. To alter the articles of the company (Sec. 31).
3. To change the name of the company.
4. To issue sweat equity shares (Sec. 77A).
5. To issue further shares without pre-emptive rights (Sec. 81).
6. To create Reserve Capital (Sec. 99).
7. To reduce the share capital (Sec. 100).
8. To variation of rights of shareholders (Sec. 106).
9. To pay interest out of capital to members (Sec. 208).
10. To authorise a director to hold an office or place of profit (Sec. 314).
11. To voluntary winding up of a company (Sec. 484).

Resolution Requiring Special Notice: It is an ordinary resolution with the difference that the mover of the proposed resolution is supposed to give special notice of at least 14 days to the company. Company must give such notice to the shareholders at least seven days before the meeting either individually, or through an advertisement in an appropriate newspaper (Sec. 190).

Generally a special notice is obligatory in the following cases:

(a) Appointment of an auditor other than the retiring auditor (Sec. 225).

(b) Provision that a retiring auditor shall not be re-appointed (Sec. 225).

(c) Removal of a director before the expiry of his term (Sec. 284).

(d) Appointment of another person as a director in place of the director removed before the expiry of his term. (Sec.284).

(e) Appointment of the person who is not a retiring director, as the director. (Section 257)

Passing of Resolution by Postal Ballot (Sec. 192A)

The Companies (Amendment) Act, 2000 has emerged a new Section 192A for passing a resolution by postal ballot only by a listed public company.

Postal ballot shall include voting by electronic mode instead of vote casting in meeting. This can be used by the companies in any case of passing resolution. If a resolution is to be passed by postal ballot, proper notice is to be given to all the shareholders along with a draft resolution explaining the reasons for postal ballot resolution. They are required to give their assent or denial in writing on a postal ballot within a period of 30 days from the date of posting of the notice. The notice is to be sent by registered post with acknowledgement due, or by any other means as may be prescribed by the Central Government. A postage pre-paid envelope is also to be sent for facilitating the communication of the assent or denial of the shareholders to the resolution.

If any person found fraudulently defacing or destroying the ballot paper or declaration of identity of the shareholder, such person shall be punished with imprisonment up to six months or fined or with both.

4.8 Winding up of company

It is assumed that a company shall exist for ever with its basic characteristic of perpetual succession, as you have studied in unit 1. But in fact a company may get dissolves even or say it may come to an end.

In the words of professor grower "Winding up of company is the process whereby its life is ended and its property is administered for the benefit of its creditors and members. And an administrator called liquidator, is appointed and he takes control of the company, collects its assets, pays its debt and finally distributes any surplus among the members in accordance with their rights."

Modes of Winding Up of company

There exists three different ways of winding up of companies;

1 Compulsory Winding up by the Tribunal

2 Voluntary Winding up (no intervention by Tribunal)

3 Voluntary Winding up with the intervention of Tribunal

4.9 Summary

The various natural bodies working together for managing company activities come under the purview of company management. As stated earlier, company is created under law and thus various provisions under company act in vogue shall have to be followed compulsorily. Board of directors, Managing Directors, Managers, Secretary & share holders are the persons engaged in managing company's affairs. A joint stock company is an artificial person without a human body, soul and mind. Consequently it cannot perform acts on its own. Company management acts on behalf of the company for executing various activities.

The Board of Directors in the form of company management plays a vital role and considered must for the management and administration of a company as per company act provisions while other kinds of managerial staff like managing directors or managers are optional. The company may or may not appoint them. Either the Board of Directors may manage the company by themselves or Board of Directors with the help of MD/Manager may facilitate company affairs.

Section 2(13) of the Companies Act defines a director as 'any person Occupying the position of director, by whatever name called'. Board of Director's act as a trustee as far as management of assets and liabilities of companies are concerned. He should be qualified to become as director in the eyes of the law. Appointment of Directors is done in different ways like

Appointment of first director, Appointment of director at general meeting, Appointment by the board of directors, Appointment by third party, Appointment by Central Govt. As per the provisions of company act every company should have at least:

1. Three directors in case of a public company.
2. Two directors in case of a private company.

An individual can become director only in case when he has been allotted a DIN. The total managerial remuneration which can be paid by a public company ot its subsidiary private company to its directors or managers in respect of a financial year shall not exceed 11% of the net profit of the company of that year. However the fee received for attending meeting shall not be considered for calculating the maximum limit of managerial remuneration.

Section 2(26) defines a managing director as "a director who, by virtue of an agreement with the company or of a resolution passed by the company in general meeting or by its Board of Directors or, by virtue of memorandum or articles of association, is entrusted with substantial powers of management which would not otherwise be exercisable by him, and includes a director occupying the position of a managing director, by whatever name called."

Where as Section 2(24) defines a manager as "an individual who, subject to the superintendence, control and direction of the Board of Directors, has the management of the whole, or substantially the whole of the affairs of a company, and includes a director or any other person occupying the position of a manager, by whatever name called, and whether under a contract of service or not"

Section 2(45) defines a company secretary as "Secretary means a company secretary within the meaning of clause (c) of subsection (1) of section 2 of the company secretary act 1980 and includes any other individual possessing the prescribed qualification and appointment to perform the duties which may be performed by a secretary under this act and any other ministerial or administrative duties."

Company may hold different type of meetings which are as follows:

Statutory Meeting, Annual general Meeting, Extra ordinary General Meeting, Class meeting, Board Meetings, Meetings of Debenture Holders, Meeting of Creditors

The Companies Act provides three kinds of resolutions that can be passed at the general meeting of a company i.e. Ordinary resolution, Special resolution, Resolution requiring special notice.

The Companies (Amendment) Act, 2000 has emerged a new Section 192A for passing a resolution by postal ballot only by a listed public company. Postal ballot shall include voting by electronic mode instead of vote casting in meeting. This can be used by the companies in any case of passing resolution.

It is assumed that a company shall exist for ever with its basic characteristic of perpetual succession but in fact a company may get dissolves even. There exists three different ways of winding up of companies i.e. Compulsory Winding up by the Tribunal, Voluntary Winding up (no intervention by Tribunal) , Voluntary Winding up with the intervention of Tribunal.

4.10 Glossary

Management: the process of dealing with or controlling things or people.

DIN: A unique 8-digit number assigned to individuals who are or want to be directors of a company in India. The Ministry of Corporate Affairs (MCA) issues DINs.

Director: A company director is a person who is appointed to oversee a company's operations and manage its affairs.

4.11 Check your progress

1. The first meeting of the members after incorporation is known as .....

2. The number of directors jointly constitutes the board known as ..... of company.

3. All general meetings conducted other than the statutory and annual general meetings are known as .....

4.12 Answers to Check your progress

1. statutory meeting , 2. BODs , 3. Extraordinary general meetings.

4.13 Terminal Questions

Q1. Define a director. What are the legal issues related to appointment of a director?

Q2. What does a managing director do? Discuss disqualification and tenure term of a managing director in a company.

Q3. What is the difference between the managing director and a manager?

Q4. What is the status of a company secretary? Who so ever is qualified to become company secretary as per the act?

Q5. Discuss various Duties of a company secretary in detail.

Q6. Explain different types of meetings called by a company. What does the term quorum imply in the context of a meeting?

Q7. Identify different type of resolutions including provisions of act related to them. What is the importance of postal ballot in this regard?

4.14 Suggested Readings

1. N.D.Kapoor, Company Law, Sultan Chander and Sons, New Delhi

2. S.C.Agarwal, Company Law, Dhanpat Rai Publication, New Delhi

3. S.K.Agarwal, Business Law, Galgotia Publishing Company, New Delhi

4. K.R.Balchandri, Business Law for Management, Himalaya Publishing House, New Delhi

5. S.S.Gulshan and G.K Kapoor, Business Law, New Age International Publishers, New Delhi

6. S.C.Puchal , Mercantile Law, Vikas Publishing House, New Delhi .

UNIT 5 - INSURANCE REGULATORY & DEVELOPMENT ACT 1999

5.1 Introduction

5.2 Formation of IRDA

5.3 Composition of Authority

5.4 Meetings of the Authority

5.5 Duties Powers and Functions of IRDA

5.6 Finance Accounts and Audit of IRDA

5.7 Power to Make Rule

5.8 Insurance Advisory Committee or IAC

5.9 Power to make regulations

5.10 Summary

5.11 Glossary

5.12 Check Your Progress

5.13 Answers to check your progress

5.14 Terminal Questions

5.15 Suggested Readings

OBJECTIVES

- To help the students know about the basics of Insurance in India
- To make aware about the formation of IRDA.
- To make the students aware about the composition and meetings of Authority.
- To help students understand the Duties, Power and Functions of IRDA.
- To acquaint students with the Finance and Accounts and Audits

5.1 Introduction

In India, insurance has a deep-rooted history. It finds mention in the writings of Manu (*Manusmrithi*), Yagnavalkya (*Dharmasastra*) and Kautilya (*Arthasastra*). The writings talk in terms of pooling of resources that could be re-distributed in times of calamities such as fire, floods, epidemics and famine. This was probably a pre-cursor to modern day insurance. Ancient Indian history has preserved the earliest traces of insurance in the form of marine trade loans and carriers' contracts. Insurance in India has evolved over time heavily drawing from other countries, England in particular.

1818 saw the **advent of life insurance business in India** with the establishment of the Oriental Life Insurance Company in Calcutta. This Company however failed in 1834. In 1829, the Madras Equitable had begun transacting life insurance business in the Madras Presidency. 1870 saw the enactment of the British Insurance Act and in the last three decades of the nineteenth century, the Bombay Mutual (1871), Oriental (1874) and Empire of India (1897) were started in the Bombay Residency. This era, however, was dominated by foreign insurance offices which did good business in India, namely Albert Life Assurance, Royal Insurance, Liverpool and London Globe Insurance and the Indian offices were up for hard competition from the foreign companies.

In 1914, the Government of India started publishing returns of Insurance Companies in India. The Indian Life Assurance Companies Act, 1912 was the first statutory measure to regulate life business. In 1928, the Indian Insurance Companies Act was enacted to enable the Government to collect statistical information about both life and non-life business transacted in India by Indian and foreign insurers including provident insurance societies. In 1938, with a view to protecting the interest of the Insurance public, the earlier legislation was consolidated and amended by the Insurance Act, 1938 with comprehensive provisions for effective control over the activities of insurers.

The Insurance Amendment Act of 1950 abolished Principal Agencies. However, there were a large number of insurance companies and the level of competition was high. There were also allegations of unfair trade practices. The Government of India, therefore, decided to nationalize insurance business.

An Ordinance was issued on 19th January, 1956 nationalising the Life Insurance sector and Life Insurance Corporation came into existence in the same year. The LIC absorbed 154 Indian, 16 non-Indian insurers as also 75 provident societies—245 Indian and foreign insurers in all. The LIC had monopoly till the late 90s when the Insurance sector was reopened to the private sector.

The **history of general insurance dates** back to the Industrial Revolution in the west and the consequent growth of sea-faring trade and commerce in the 17th century. It came to India as a legacy of British occupation. General Insurance in India has its roots in the establishment of Triton Insurance Company Ltd., in the year 1850 in Calcutta by the British. In 1907, the Indian Mercantile Insurance Ltd, was set up. This was the first company to transact all classes of general insurance business.

1957 saw the formation of the General Insurance Council, a wing of the Insurance Association of India. The General Insurance Council framed a code of conduct for ensuring fair conduct and sound business practices.

In 1968, the Insurance Act was amended to regulate investments and set minimum solvency margins. The Tariff Advisory Committee was also set up then.

In 1972 with the passing of the General Insurance Business (Nationalisation) Act, general insurance business was nationalized with effect from 1st January, 1973. 107 insurers were amalgamated and grouped into four companies, namely National Insurance Company Ltd., the New India Assurance Company Ltd., the Oriental Insurance Company Ltd and the

United India Insurance Company Ltd. The General Insurance Corporation of India was incorporated as a company in 1971 and it commence business on January 1sst 1973.

This millennium has seen insurance come a full circle in a journey extending to nearly 200 years. The process of **re-opening of the sector** had begun in the early 1990s and the last decade and more has seen it been opened up substantially. In 1993, the Government set up a committee under the chairmanship of RN Malhotra, former Governor of RBI, to propose recommendations for reforms in the insurance sector. The objective was to complement the reforms initiated in the financial sector. The committee submitted its report in 1994 wherein, among other things, it recommended that the private sector be permitted to enter the insurance industry. They stated that foreign companies be allowed to enter by floating Indian companies, preferably a joint venture with Indian partners.

Following the recommendations of the Malhotra Committee report, in 1999, the Insurance Regulatory and Development Authority (IRDA) was constituted as an autonomous body to regulate and develop the insurance industry. The IRDA was incorporated as a statutory body in April, 2000. The key objectives of the IRDA include promotion of competition so as to enhance customer satisfaction through increased consumer choice and lower premiums, while ensuring the financial security of the insurance market.

The IRDA opened up the market in August 2000 with the invitation for application for registrations. Foreign companies were allowed ownership of up to 26%. The Authority has the power to frame regulations under Section 114A of the Insurance Act, 1938 and has from 2000 onwards framed various regulations ranging from registration of companies for carrying on insurance business to protection of policyholders' interests.

In December, 2000, the subsidiaries of the General Insurance Corporation of India were restructured as independent companies and at the same time GIC was converted into a

national re-insurer. Parliament passed a bill de-linking the four subsidiaries from GIC in July, 2002.

Today there are 14 general insurance companies including the ECGC and Agriculture Insurance Corporation of India and 14 life insurance companies operating in the country.

The **insurance sector is a colossal one** and is growing at a speedy rate of 15-20%. Together with banking services, insurance services add about 7% to the country's GDP. A well-developed and evolved insurance sector is a boon for economic development as it provides long- term funds for infrastructure development at the same time strengthening the risk taking ability of the country.

5.2 FORMATION OF IRDA

As mentioned earlier in the chapter that following the recommendation of Malhotra Committee report, in 1999, the Insurance Regulatory and Development Authority (IRDA) was constituted as an autonomous body to regulate and develop the insurance industry. The IRDA was incorporated as a statutory body in April, 2000. The various aspects of the authority has been discussed here under:

5.3 COMPOSITION OF IRDA

The Authority shall consist of the following members, namely:-

(a) A Chairperson;

(b) Not more than five whole-time members;

(c) Not more than four part-time members,

To be appointed by the Central Government from amongst persons of ability, integrity and standing who have knowledge or experience in life insurance, general insurance,

actuarial science, finance, economics, law, accountancy, administration or any other discipline which would, in the opinion of the Central Government, be useful to the Authority:

Provided that the Central Government shall, while appointing the Chairperson and the whole-time members, ensure that at least one person each is a person having knowledge or experience in life insurance, general insurance or actuarial science, respectively.

5.4 MEETINGS OF THE AUTHORITY

(1) The Authority shall meet at such times and places and shall observe such rules and procedures in regard to transaction of business at its meetings (including quorum at such meetings) as may be determined by the regulations.

(2) The Chairperson, or if for any reason he is unable to attend a meeting of the Authority, any other member chosen by the members present from amongst themselves at the meeting shall preside at the meeting.

(3) All questions which come up before any meeting of the Authority shall be decided by a majority of votes by the members present and voting, and in the event of an equality of votes, the Chairperson, or in his absence, the person presiding shall have a second or casting vote.

(4) The Authority may make regulations for the transaction of business at its meetings.

5.5 DUTIES POWERS AND FUNCTIONS OF IRDA

(1) Subject to the provisions of this Act and any other law for the time being in force, the Authority shall have the duty to regulate, promote and ensure orderly growth of the insurance business and re-insurance business.

(2) Without prejudice to the generality of the provisions contained in sub-section (1), the powers and functions of the Authority shall include, -

(a) issue to the applicant a certificate of registration, renew, modify, withdraw, suspend or cancel such registration;

(b) protection of the interests of the policy holders in matters concerning assigning of policy, nomination by policy holders, insurable interest, settlement of insurance claim, surrender value of policy and other terms and conditions of contracts of insurance;

(c) Specifying requisite qualifications, code of conduct and practical training for intermediary or insurance intermediaries and agents;

(d) Specifying the code of conduct for surveyors and loss assessors;

(e) Promoting efficiency in the conduct of insurance business;

(f) Promoting and regulating professional organizations connected with the insurance and re-insurance business;

(g) Levying fees and other charges for carrying out the purposes of this Act;

(h) calling for information from, undertaking inspection of, conducting enquiries and investigations including audit of the insurers, intermediaries, insurance intermediaries and other organizations connected with the insurance business;

(i) control and regulation of the rates, advantages, terms and conditions that may be offered by insurers in respect of general insurance business not so controlled and regulated by the Tariff Advisory Committee under section 64U of the Insurance Act, 1938 (4 of 1938);

(j) Specifying the form and manner in which books of account shall be maintained and statement of accounts shall be rendered by insurers and other insurance intermediaries;

(k) Regulating investment of funds by insurance companies;

(l) Regulating maintenance of margin of solvency;

(m) Adjudication of disputes between insurers and intermediaries or insurance intermediaries;

(n) Supervising the functioning of the Tariff Advisory Committee;

(o) Specifying the percentage of premium income of the insurer to finance schemes for promoting and regulating professional organizations referred to in clause (f);

(p) Specifying the percentage of life insurance business and general insurance business to be undertaken by the insurer in the rural or social sector; and

(q) Exercising such other powers as may be prescribed.

5.6 FINANCE ACCOUNTS AND AUDIT OF IRDA

(1) The Authority shall maintain proper accounts and other relevant records and prepare an annual statement of accounts in such form as may be prescribed by the Central Government in consultation with the Comptroller and Auditor-General of India.

(2) The accounts of the Authority shall be audited by the Comptroller and Auditor-General of India at such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the Authority to the Comptroller and Auditor-General.

(3) The Comptroller and Auditor-General of India and any other person appointed by him in connection with the audit of the accounts of the Authority shall have the same rights, privileges and authority in connection with such audit as the Comptroller and Auditor-General generally has in connection with the audit of the Government accounts and, in particular, shall have the right to demand the production of books of account, connected vouchers and other documents and papers and to inspect any of the offices of the Authority.

(4) The accounts of the Authority as certified by the Comptroller and Auditor-General of India or any other person appointed by him in this behalf together with the audit-report thereon shall be forwarded annually to the Central Government and that Government shall cause the same to be laid before each House of Parliament.

5.7 POWER TO MAKE RULE

(1) The Central Government may, by notification, make rules for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:

(a) The salary and allowances payable to, and other terms and conditions of service of, the members other than part-time members under sub-section(1) of section 7;

(b) The allowances to be paid to the part-time members under sub-section (2) of section 7;

(c) Such other powers that may be exercised by the Authority under clause (q) of sub-section (2) of section 14;

(d) The form of annual statement of accounts to be maintained by the Authority under sub-section (1) of section 17;

(e) The form and the manner in which and the time within which returns and statements and particulars are to be furnished to the Central Government under sub-section(1) of section 20;

(f) The matters under sub-section(5) of section 25 on which the Insurance Advisory Committee shall advise the Authority;

(g) Any other matter which is required to be, or may be, prescribed, or in respect of which provision is to be or may be made by rules.

5.8 INSURANCE ADVISORY COMMITTEE OR IAC

(1) The Authority may, by notification, establish with effect from such date as it may specify in such notification, a Committee to be known as the Insurance Advisory Committee.

(2) The Insurance Advisory Committee shall consist of not more than twenty-five members excluding ex-officio members to represent the interests of commerce, industry, transport, agriculture, consumer for a, surveyors, agents, intermediaries, organisations engaged in safety and loss prevention, research bodies and employees' association in the insurance sector.

(3) The Chairperson and the members of the Authority shall be the ex officio Chairperson and ex officio members of the Insurance Advisory Committee.

(4) The objects of the Insurance Advisory Committee shall be to advise the Authority on matters relating to the making of the regulations under section 26.

(5) Without prejudice to the provisions of sub-section (4), the Insurance Advisory Committee may advise the Authority on such other matters as may be prescribed.

5.9 POWER **TO MAKE REGULATIONS**

1) The Authority may, in consultation with the Insurance Advisory Committee, by notification, make regulations consistent with this Act and the rules made there under to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:-

(a) The time and places of meetings of the Authority and the procedure to be followed at such meetings including the quorum necessary for the transaction of business under sub-section(1) of section 10;

(b) The transactions of business at its meetings under sub-section(4) of section 10;

(c) The terms and other conditions of service of officers and other employees of the Authority under sub-section(2) of section 12;

(d) The powers and functions which may be delegated to Committees of the members under sub-section(2) of section 23; and

(e) Any other matter which is required to be, or may be, specified by regulations or in respect of which provision is to be or may be made by regulations.

5.10 Summary

The **advent of life insurance business in India was witnessed in 1818** with the establishment of the Oriental Life Insurance Company in Calcutta. . The Indian Life Assurance Companies Act, 1912 was the first statutory measure to regulate life business. Following the recommendation of Malhotra Committee report, in 1999, the Insurance Regulatory and Development Authority (IRDA) was constituted as an autonomous body to regulate and develop the insurance industry. The IRDA was incorporated as a statutory body in April, 2000. The various aspects of the authority includes formation of IRDA, Composition of Authority, Meetings of the Authority, Duties Powers and Functions of IRDA, Finance Accounts and Audit of IRDA, Power to Make Rule, Insurance Advisory Committee or IAC

The Authority shall have the duty to regulate, promote and ensure orderly growth of the insurance business and re-insurance business. The powers and functions of the Authority shall includes matter relating to registration, terms and conditions of contracts of insurance, insurance intermediaries and agents code of conduct for surveyors and loss assessors and conduct of insurance business and other matters relating to the insurance and re-insurance business.

Apart from this matters concerning levying fees and other charges, calling for information, control and regulation of the rates, advantages, terms and conditions that may be offered by insurers in respect of general insurance business, specifying the form and manner in which books of account shall be maintained and statement of accounts shall be rendered by insurers and other insurance intermediaries, regulating investment of funds by insurance companies and maintenance of margin of solvency, adjudication of disputes between insurers and intermediaries or insurance intermediaries are also included in this.

Supervising the functioning of the Tariff Advisory Committee, specifying the percentage of premium income of the insurer to finance schemes for promoting and

regulating professional organizations and the percentage of life insurance business and general insurance business to be undertaken by the insurer in the rural or social sector are also prescribed.

5.11 Glossary

Insurance: protection from financial loss.

Reserve Bank: Central Bank of India

Autonomous: having freedom to govern itself or control its affairs.

Claim: An insurance claim is a formal request by a policyholder to an insurance company for coverage or compensation for a covered loss or policy event.

Supervision: the act of watching a person or activity and making certain that everything is done correctly, safely, etc.

5.12 Check Your Progress

1. 1818 saw the **advent of life insurance business in India** with the establishment of the ……..in Calcutta.

2. An Ordinance was issued on 19th January, 1956 to nationalize ……..

3. The accounts of the Authority shall be audited by the Comptroller and Auditor-General of India at such intervals as may be specified by him

4. The Insurance Advisory Committee shall consist of not more than ……..

5.13 Answers to check your progress

1. Oriental Life Insurance Company ,2. the Life Insurance sector , 3. the Comptroller and Auditor-General of India, 4. twenty-five members.

5.14 Terminal Questions

1. What are the contributions of the Malhotra committee for reforms in insurance sectors
2. Trace the history of insurance sector in India.
3. What are the provisions of the authority relating to finance accounts and audit of IRDA
4. Write short notes on Insurance Advisory committee
5. Enlist the various functions of IRDA.
6. Write a note on power of Authority to make rule make regulations
7. What are the various provisions of IRDA relating to the meeting and functions?
8. Describe the composition and functions of IRDA

5.15 References

1. Raviner Kumar, Legal Aspects of Business
2. PPS Gogna, Mercantile Law
3. N.D.Kapoor, Elements of Mercantile Law,
4. M C Kuchhal, Mercantile Law including Company Law
5. B S Moshal, Mercantile Law
6. GK Kapoor, Business Law

Unit-6 INSURANCE REGULATORY AND DEVELOPMENT AUTHORITY ACT, 1999 REGULATIONS AND PROVISIONS

6.1 Introduction

6.2 Preliminary

6.2.1. Short Title, Extent and Commencement

6.2.2. Definitions

6.3 Insurance Regulatory and Development Authority

6.3.1 Establishment and Incorporation of Authority

6.3.2 Composition of Authority

6.3.3. Tenure of Office of Chairperson and Other Members

6.3.4. Removal from Office

6.3.5. Salary and Allowances of Chairperson and Members

6.3.6. Bar on Future Employment of Members

6.3.7. Administrative Powers of Chairperson

6.3.8. Meetings of Authority

6.3.9. Vacancies, etc., not to invalidate proceedings of authority

6.3.10. Officers and Employees of Authority

6.4 Transfer of assets, liabilities, etc., of interim insurance regulatory authority

6.5 Duties, Powers and Functions of Authority

6.6 Finance, Accounts and Audit

6.6.1 Grants by Central Government

6.6.2. Accounts and Audit.

6.6.3 Constitution of Funds

6.7 Miscellaneous

6.7.1 Power of Central Government to Issue Directions

6.7.2. Power of Central Government to Supersede Authority

6.7.3. Furnishing of Returns, etc., to Central Government

6.7.4. Chairperson, Members, Officers and Other Employees to Be Public Servants

6.7.5. Protection of Action Taken In Good Faith

6.7.6. Delegation of Powers

6.7.7. Power to Make Rules

6.7.8 Establishment of Insurance Advisory Committee

6.7.9. Power to Make Regulations

6.7.10. Rules and Regulations to Be Laid Before Parliament

6.7.11. Application of Other Laws Not Barred

6.7.12. Power to Remove Difficulties

6.8 Summary

6.9 Glossary

6.10 Check your progress

6.11 Answers to check your progress

6.12 Terminal Questions

6.13 References

Objectives

- To make the students aware about the regulations and provisions of IRDA
- To explain the duties, powers and functions of authority.
- To understand the power of central government to issue directions.
- To understand the establishment of the Insurance Advisory Council.

6.1 Introduction

This is an Act to provide for the establishment of an Authority to protect the interests of holders of insurance policies, to regulate, promote and ensure orderly growth of the insurance industry and for matters connected therewith or incidental thereto and further to amdend the Insurance Act, 1938, the Life Insurance Corporation Act, 1956 and the General Insurance Business (Nationalisation) Act, 1972.

6.2 PRELIMINARY

6.2.1. SHORT TITLE, EXTENT AND COMMENCEMENT

(1) This Act may be called the Insurance Regulatory and Development Authority Act, 1999.

(2) It extends to the whole of India.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint:

Provided that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

6.2.2. DEFINITIONS

(1) In this Act, unless the context otherwise requires, -

(a) "appointed day" means the date on which the Authority is established under sub-section (1) of section 3;

(b) "Authority" means the Insurance Regulatory and Development Authority established under sub-section (1) of section 3;

(c) "Chairperson" means the Chairperson of the Authority;

(d) "Fund" means the Insurance Regulatory and Development Authority Fund constituted under sub-section (1) of section 16;

(e) "Interim Insurance Regulatory Authority" means the Insurance Regulatory Authority set up by the Central Government through Resolution No.17(2)/94-Ins-V, dated the 23rd January, 1996;

(f) "intermediary or insurance intermediary" includes insurance brokers, reinsurance brokers, insurance consultants, surveyors and loss assessors;

(g) "member" means a whole time or a part time member of the Authority and includes the Chairperson;

(h) "notification" means a notification published in the Official Gazette;

(i) "prescribed" means prescribed by rules made under this Act;

(j) "regulations" means the regulations made by the Authority.

(2) Words and expressions used and not defined in this Act but defined in the Insurance Act, 1938 (4 of 1938) or the Life Insurance Corporation Act, 1956 (31 of 1956) or the General Insurance Business (Nationalization) Act, 1972 (57 of 1972) shall have the meanings respectively assigned to them in those Acts.

6.3 INSURANCE REGULATORY AND DEVELOPMENT AUTHORITY

6.3.1 ESTABLISHMENT AND INCORPORATION OF AUTHORITY.

(1) With effect from such date as the Central Government may, by notification, appoint, there shall be established, for the purposes of this Act, an Authority to be called "the Insurance Regulatory and Development Authority".

(2) The Authority shall be a body corporate by the name aforesaid having perpetual succession and a common seal with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract and shall, by the said name, sue or be sued.

(3) The head office of the Authority shall be at such place as the Central Government may decide from time to time.

(4) The Authority may establish offices at other places in India.

6.3.2 COMPOSITION OF AUTHORITY.

The Authority shall consist of the following members, namely:-

(a) a Chairperson;

(b) not more than five whole-time members;

(c) not more than four part-time members,

to be appointed by the Central Government from amongst persons of ability, integrity and standing who have knowledge or experience in life insurance, general insurance, actuarial science, finance, economics, law, accountancy, administration or any other discipline which would, in the opinion of the Central Government, be useful to the Authority:

Provided that the Central Government shall, while appointing the Chairperson and the whole-time members, ensure that at least one person each is a person having

knowledge or experience in life insurance, general insurance or actuarial science, respectively.

6.3.3. TENURE OF OFFICE OF CHAIRPERSON AND OTHER MEMBERS.

(1) The Chairperson and every other whole-time member shall hold office for a term of five years from the date on which he enters upon his office and shall be eligible for reappointment:

Provided that no person shall hold office as a Chairperson after he has attained the age of sixty-five years:

Provided further that no person shall hold office as a whole-time member after he has attained the age of sixty-two years.

(2) A part-time member shall hold office for a term not exceeding five years from the date on which he enters upon his office.

(3) Notwithstanding anything contained in sub-section (1) or sub-section (2), a member may -

(a) relinquish his office by giving in writing to the Central Government notice of not less than three months; or

(b) be removed from his office in accordance with the provisions of section

6.3.4. REMOVAL FROM OFFICE.

(1) The Central Government may remove from office any member who-

(a) is, or at any time has been, adjudged as an insolvent; or

(b) has become physically or mentally incapable of acting as a member; or

(c) has been convicted of any offence which, in the opinion of the Central Government, involves moral turpitude; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions as a member; or

(e) has so abused his position as to render his continuation in office detrimental to the public interest.

(2) No such member shall be removed under clause (d) or clause (e) of sub-section (1) unless he has been given a reasonable opportunity of being heard in the matter.

6.3.5. SALARY AND ALLOWANCES OF CHAIRPERSON AND MEMBERS.

(1) The salary and allowances payable to, and other terms and conditions of service of, the members other than part-time members shall be such as may be prescribed.

(2) The part-time members shall receive such allowances as may be prescribed.

(3) The salary, allowances and other conditions of service of a member shall not be varied to his disadvantage after appointment.

6.3.6. BAR ON FUTURE EMPLOYMENT OF MEMBERS.

The Chairperson and the whole-time members shall not, for a period of two years from the date on which they cease to hold office as such, except with the previous approval of the Central Government, accept-

(a) any employment either under the Central Government or under any State Government; or

(b) any appointment in any company in the insurance sector.

6.3.7. ADMINISTRATIVE POWERS OF CHAIRPERSON.

The Chairperson shall have the powers of general superintendence and direction in respect of all administrative matters of the Authority.

6.3.8. MEETINGS OF AUTHORITY.

(1) The Authority shall meet at such times and places and shall observe such rules and procedures in regard to transaction of business at its meetings (including quorum at such meetings) as may be determined by the regulations.

(2) The Chairperson, or if for any reason he is unable to attend a meeting of the Authority, any other member chosen by the members present from amongst themselves at the meeting shall preside at the meeting.

(3) All questions which come up before any meeting of the Authority shall be decided by a majority of votes by the members present and voting, and in the event of an equality of votes, the Chairperson, or in his absence, the person presiding shall have a second or casting vote.

(4) The Authority may make regulations for the transaction of business at its meetings.

6.3.9. VACANCIES, ETC., NOT TO INVALIDATE PROCEEDINGS OF AUTHORITY.

No act or proceeding of the Authority shall be invalid merely by reason of -

(a) any vacancy in, or any defect in the constitution of, the Authority; or

(b) any defect in the appointment of a person acting as a member of the Authority; or

(c) any irregularity in the procedure of the Authority not affecting the merits of the case.

6.3.10. OFFICERS AND EMPLOYEES OF AUTHORITY.

(1) The Authority may appoint officers and such other employees as it considered necessary for the efficient discharge of its function under this Act.

(2) The terms and other conditions of service of officers and other employees of the Authority appointed under sub-section(1) shall be governed by regulations made under this Act.

6.4 TRANSFER OF ASSETS, LIABILITIES, ETC., OF INTERIM INSURANCE REGULATORY AUTHORITY.

On the appointed day,-

(a) all the assets and liabilities of the Interim Insurance Regulatory Authority shall stand transferred to, and vested in, the Authority.

Explanation - The assets of the Interim Insurance Regulatory Authority shall be deemed to include all rights and powers, and all properties, whether movable or immovable, including, in particular, cash balances, deposits and all other interests and rights in, or arising out of, such properties as may be in the possession of the Interim Insurance Regulatory Authority and all books of account and other documents relating to the same; and liabilities shall be deemed to include all debts, liabilities and obligations of whatever kind;

(b) without prejudice to the previous of clause(a), all debts, obligations and liabilities incurred, all contracts entered into and all matters and things engaged to be done by, with or for the Interim Insurance Regulatory Authority immediately before that day, for

or in connection with the purpose of the said Regulatory Authority, shall be deemed to have been incurred, entered into or engaged to be done by, with or for, the Authority;

(c) all sums of money due to the Interim Insurance Regulatory Authority immediately before that day shall be deemed to be due to the Authority; and

(d) all suits and other legal proceedings instituted or which could have been instituted by or against the Interim Insurance Regulatory Authority immediately before that day may be continued or may be instituted by or against the Authority.

6.5 DUTIES, POWERS AND FUNCTIONS OF AUTHORITY

(1) Subject to the provisions of this Act and any other law for the time being in force, the Authority shall have the duty to regulate, promote and ensure orderly growth of the insurance business and re-insurance business.

(2) Without prejudice to the generality of the provisions contained in sub-section (1), the powers and functions of the Authority shall include, -

(a) issue to the applicant a certificate of registration, renew, modify, withdraw, suspend or cancel such registration;

(b) protection of the interests of the policy holders in matters concerning assigning of policy, nomination by policy holders, insurable interest, settlement of insurance claim, surrender value of policy and other terms and conditions of contracts of insurance;

(c) specifying requisite qualifications, code of conduct and practical training for intermediary or insurance intermediaries and agents;

(d) specifying the code of conduct for surveyors and loss assessors;

(e) promoting efficiency in the conduct of insurance business;

(f) promoting and regulating professional organizations connected with the insurance and re-insurance business;

(g) levying fees and other charges for carrying out the purposes of this Act;

(h) calling for information from, undertaking inspection of, conducting enquiries and investigations including audit of the insurers, intermediaries, insurance intermediaries and other organizations connected with the insurance business;

(i) control and regulation of the rates, advantages, terms and conditions that may be offered by insurers in respect of general insurance business not so controlled and regulated by the Tariff Advisory Committee under section 64U of the Insurance Act, 1938 (4 of 1938);

(j) Specifying the form and manner in which books of account shall be maintained and statement of accounts shall be rendered by insurers and other insurance intermediaries;

(k) regulating investment of funds by insurance companies;

(l) regulating maintenance of margin of solvency;

(m) adjudication of disputes between insurers and intermediaries or insurance intermediaries;

(n) supervising the functioning of the Tariff Advisory Committee;

(o) specifying the percentage of premium income of the insurer to finance schemes for promoting and regulating professional organizations referred to in clause (f);

(p) specifying the percentage of life insurance business and general insurance business to be undertaken by the insurer in the rural or social sector; and

(q) Exercising such other powers as may be prescribed.

6.6 FINANCE, ACCOUNTS AND AUDIT

6.6.1 GRANTS BY CENTRAL GOVERNMENT.

The Central Government may, after due appropriation made by Parliament by law in this behalf, make to the Authority grants of such sums of money as the Government may think fit for being utilized for the purposes of this Act.

6.6.2 CONSTITUTION OF FUNDS.

(1) There shall be constituted a fund to be called "the Insurance Regulatory and Development Authority Fund" and there shall be credited thereto-

(a) all Government grants, fees and charges received by the Authority;

(b) all sums received by the Authority from such other source as may be decided upon by the Central Government;

(c) the percentage of prescribed premium income received from the insurer.

(2) The Fund shall be applied for meeting -

(a) the salaries, allowances and other remuneration of the members, officers and other employees of the Authority;

(b) the other expenses of the Authority in connection with the discharge of its functions and for the purposes of this Act.

6.6.3. ACCOUNTS AND AUDIT.

(1) The Authority shall maintain proper accounts and other relevant records and prepare an annual statement of accounts in such form as may be prescribed by the Central Government in consultation with the Comptroller and Auditor-General of India.

(2) The accounts of the Authority shall be audited by the Comptroller and Auditor-General of India at such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the Authority to the Comptroller and Auditor-General.

(3) The Comptroller and Auditor-General of India and any other person appointed by him in connection with the audit of the accounts of the Authority shall have the same rights, privileges and authority in connection with such audit as the Comptroller and Auditor-General generally has in connection with the audit of the Government accounts and, in particular, shall have the right to demand the production of books of account, connected vouchers and other documents and papers and to inspect any of the offices of the Authority.

(4) The accounts of the Authority as certified by the Comptroller and Auditor-General of India or any other person appointed by him in this behalf together with the audit-report thereon shall be forwarded annually to the Central Government and that Government shall cause the same to be laid before each House of Parliament.

6.7 MISCELLANEOUS

6.7.1 POWER OF CENTRAL GOVERNMENT TO ISSUE DIRECTIONS.

(1) Without prejudice to the foregoing provisions of this Act, the Authority shall, in exercise of its powers or the performance of its functions under this Act, be bound by such directions on questions of policy, other than those relating to technical and administrative matters, as the Central Government may give in writing to it from time to time.

PROVIDED that the Authority shall, as far as practicable, be given an opportunity to express its views before any direction is given under this sub-section.

(2) The decision of the Central Government, whether a question is one of policy or not, shall be final.

6.7.2. POWER OF CENTRAL GOVERNMENT TO SUPERSEDE AUTHORITY.

(1) If at any time the Central Government is of the opinion-

(a) that, on account of circumstances beyond the control of the Authority, it is unable to discharge the functions or perform the duties imposed on it by or under the provisions of this Act, or

(b) that the Authority has persistently defaulted in complying with any direction given by the Central Government under this Act or in the discharge of the functions or performance of the duties imposed on it by or under the provisions of this Act and as a result of such default the financial position of the Authority or the administration of the Authority has suffered; or

(c) that circumstances exist which render it necessary in the public interest so to do, the Central Government may, be notification and for reasons to be specified therein, supersede the Authority for such period, not exceeding six months, as may be specified in the notification and appoint a person to be the Controller of Insurance under section 2B of the Insurance Act, 1938 (4 of 1938), if not already done :

Provided that before issuing any such notification, the Central Government shall give a reasonable opportunity to the Authority to make representations, if any, of the Authority.

(2) Upon the publication of a notification under sub-section(1) superseding the Authority, -

(a) the Chairperson and other members shall, as from the date of supersession, vacate their offices as such;

(b) all the powers, functions and duties which may, by or under the provisions of this Act, be exercised or discharged by or on behalf of the Authority shall, until the Authority is reconstituted under sub-section(3), be exercised and discharged by the Controller of Insurance; and

(c) all properties owned or controlled by the Authority shall, until the Authority is reconstituted under sub-section(3), vest in the Central Government.

(3) On or before the expiration of the period of supersession specified in the notification issued under sub-section(1), the Central Government shall reconstitute the Authority by a fresh appointment of its Chairperson and other members and in such case any person who had vacated his office under clause(a) of sub-section(2) shall not be deemed to be disqualified for reappointment.

(4) The Central Government shall cause a copy of the notification issued under sub-section(1) and a full report to any action to be laid before each House of Parliament at the earliest.

6.7.3. FURNISHING OF RETURNS, ETC., TO CENTRAL GOVERNMENT.

(1) The Authority shall furnish to the Central Government at such time and in such form and manner as may be prescribed, or as the Central Government may direct to furnish such returns, statements and other particulars in regard to any proposed or existing programme for the promotion and development of the insurance industry as the Central Government may, from time to time, require.

(2) Without prejudice to the provisions of sub-section(1), the Authority shall, within nine months after the close of each financial year, submit to the Central Government a report giving a true and full account of its activities including the activities for promotion and development of the insurance business during the previous financial year.

(3) Copies of the reports received under sub-section(2) shall be laid , as soon as may be after they are received, before each House of Parliament.

6.7.4. CHAIRPERSON, MEMBERS, OFFICERS AND OTHER EMPLOYEES OF AUTHORITY TO BE PUBLIC SERVANTS.

The Chairperson, members, officers and other employees of Authority shall be deemed, when acting or purporting to act in pursuance of any of the provisions of this Act, to be public servants within the meaning of section 21 of the Indian Penal Code (45 of 1860).

6.7.5. PROTECTION OF ACTION TAKEN IN GOOD FAITH.

No suit, prosecution or other legal proceedings shall lie against the Central Government or any officer of the Central Government or any member, officer or other employee of the Authority for anything which is in good faith done or intended to be done under this Act or the rules or regulations made there under:

Provided that nothing in this Act shall exempt any person from any suit or other proceedings which might, apart from this Act, be brought against him.

6.7.6. DELEGATION OF POWERS.

(1) The Authority may, by general or special order in writing, delegate to the Chairperson or any other member or office of the Authority subject to such conditions, if any, as may be specified in the order such of its powers and functions under this Act as it may deem necessary.

(2) The Authority may, by a general or special order in writing, also form committees of the members and delegate to them the powers and functions of the Authority as may be specified by the regulations.

6.7.7. POWER TO MAKE RULES.

(1) The Central Government may, by notification, make rules for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :

(a) the salary and allowances payable to, and other terms and conditions of service of, the members other than part-time members under sub-section(1) of section 7;

(b) the allowances to be paid to the part-time members under sub-section(2) of section 7;

(c) such other powers that may be exercised by the Authority under clause (q) of sub-section(2) of section 14;

(d) the form of annual statement of accounts to be maintained by the Authority under sub-section(1) of section 17;

(e) the form and the manner in which and the time within which returns and statements and particulars are to be furnished to the Central Government under sub-section(1) of section 20;

(f) the matters under sub-section(5) of section 25 on which the Insurance Advisory Committee shall advise the Authority;

(g) any other matter which is required to be, or may be, prescribed, or in respect of which provision is to be or may be made by rules.

6.7.8. ESTABLISHMENT OF INSURANCE ADVISORY COMMITTEE.

(1) The Authority may, by notification, establish with effect from such date as it may specify in such notification, a Committee to be known as the Insurance Advisory Committee.

(2) The Insurance Advisory Committee shall consist of not more than twenty-five members excluding ex-officio members to represent the interests of commerce, industry, transport, agriculture, consumer fora, surveyors, agents, intermediaries, organisations engaged in safety and loss prevention, research bodies and employees' association in the insurance sector.

(3) The Chairperson and the members of the Authority shall be the ex officio Chairperson and ex officio members of the Insurance Advisory Committee.

(4) The objects of the Insurance Advisory Committee shall be to advise the Authority on matters relating to the making of the regulations under section 26.

(5) Without prejudice to the provisions of sub-section(4), the Insurance Advisory Committee may advise the Authority on such other matters as may be prescribed.

6.7.9. POWER TO MAKE REGULATIONS.

(1) The Authority may, in consultation with the Insurance Advisory Committee, by notification, make regulations consistent with this Act and the rules made there under to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely :-

(a) the time and places of meetings of the Authority and the procedure to be followed at such meetings including the quorum necessary for the transaction of business under sub-section(1) of section 10;

(b) the transactions of business at its meetings under sub-section(4) of section 10;

(c) the terms and other conditions of service of officers and other employees of the Authority under sub-section(2) of section 12;

(d) the powers and functions which may be delegated to Committees of the members under sub-section(2) of section 23; and

(e) any other matter which is required to be, or may be, specified by regulations or in respect of which provision is to be or may be made by regulations.

6.7.10. RULES AND REGULATIONS TO BE LAID BEFORE PARLIAMENT.

Every rule and every regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive session aforesaid, both Houses agree in making any, modification in the rule or regulation or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.

6.7.11. APPLICATION OF OTHER LAWS NOT BARRED.

The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

6.7.12. POWER TO REMOVE DIFFICULTIES.

(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as may appear to be necessary for removing the difficulty:

Provided that no order shall be made under this section after the expiry of two years from the appointed day.

(2) Every order made under this section shall be laid, as soon as may be, after it is made, before each House of Parliament.

6.8 Summary

IRDA was enacted to provide for the establishment of an Authority to protect the interests of holders of insurance policies, to regulate, promote and ensure orderly growth of the insurance industry and for matters connected therewith or incidental thereto. The entire act is divided into 6 chapters which deal with various provisions relating to the matters dealing with public interest.

Chapter 1 deals with preliminaries which includes Short Title, Extent and Commencement and Definitions. Chapter 2 deals with Insurance Regulatory and Development Authority which comprise of establishment and Incorporation of Authority, Composition of Authority, Tenure of Office of Chairperson and Other Members, Removal from Office, Salary and Allowances of Chairperson and Members, Bar on Future Employment of Members, Administrative Powers of Chairperson, Meetings of Authority, Vacancies, etc., not to invalidate proceedings of authority, Officers and Employees of Authority. Chapter 3 deals with transfer of assets, liabilities, etc., of interim insurance regulatory authority. Chapter 4 deals with duties, power and functions of authority. Chapter 5

deals with Finance, Accounts and Audit which consist of grants by Central Government, accounts and audit and constitution of funds. Chapter 6 deals with miscellaneous provisions consisting of various power of Central Government, Chairperson, Members, Officers and Other Employees to Be Public Servants.

6.9 Glossary

IRDA: The Insurance Regulatory and Development Authority of India (IRDAI) is an autonomous and statutory body under the jurisdiction of Ministry of Finance, Government of India. It is tasked with regulating and licensing the insurance and re-insurance industries in India

6.10 Check your Progress

1. The Chairperson and every other whole-time member shall hold office for a term of ……from the date on which he enters upon his office.

2. Chairperson relinquishes his office by giving in writing to the Central Government notice of not less than …….

6.11 Answers to check your progress

1. five years 2. Three months

6.12 Terminal Questions

9. What are the provisions of the authority relating to finance accounts and audit of IRDA

10. Write short notes on Insurance Advisory committee

11. Enlist the various functions of IRDA.

12. Write a note on power of Authority to make rule make regulations

13. What are the various provisions of IRDA relating to the meeting and functions?

14. Describe the composition and functions of IRDA

6.13 Reference Books

7. Raviner Kumar, Legal Aspects of Business
8. PPS Gogna, Mercantile Law
9. N.D.Kapoor, Elements of Mercantile Law,
10. M C Kuchhal, Mercantile Law including Company Law
11. B S Moshal, Mercantile Law
12. GK Kapoor, Business Law

UNIT 7 CONSUMER PROTECTION ACT 1986

7.1 Introduction

7.2 Meaning of Consumer

7.3 Why Consumerism

7.4 Need of Consumer Protection Act

7.5 Consumer Protection Act, 1986

7.5.1 Features of Consumer Protection Act

7.5.2 Objects of Consumer Protection Act

7.5.3 Who is a Consumer for the Purpose of This Act?

7.5.4 What is a Commercial Purpose?

7.5.5 Meaning of Goods

7.5.6 Services

7.5.7 Complainant

7.5.8 Complaint

7.5.9 Consumer Dispute

7.6 From consumer protection act 1986 to Consumer protection act 2019

7.7 Who is consumer under Consumer protection act 2019

7.8 Consumer protection act 2019

7.9 Summary

7.10 Glossary

7.11 Check your progress

7. 12 Answers to check your progress

7.13 Terminal Questions

7.14 References

OBJECTIVES

- To make the students aware about the consumer protection council.
- To make the students aware about the various rights of the consumers.
- To help students understand the three-tier consumer disputes redressal structure.
- To acquaint students with the composition, Jurisdiction and Redressal procedures**.**

7.1 INTRODUCTION

Everyone has to buy variety of goods and services in their day to day life. Whatever they buy they pay for it and derive satisfaction from its consumption and use. But sometimes it may happen that they may not feel satisfied with the product they buy. This may be on account of poor quality of the product, overcharging by the shopkeeper, lower quality of contents, misleading advertisement, and so on. It is the matter of great concern whether this practice should be allowed to be continued? If not, then is there any remedy for such malpractice? The answer lies in the concept of consumerism and consumer protection. Consumerism is a battle against this exploitation. It is the collective endeavor of the consumers to protect their interests. It is a means of ascertaining their rights against the sellers. It is a social force to make businesses more honest, efficient and responsible. It also pressurizes the Government to adopt necessary legal measures to protect the interests of the consumers. It is basically a protest movement. It is generally a non-official movement initiated by the public and voluntary consumer organizations.

Consumerism has been defined by various authors differently

Marketing Guru **Philip Kotler** has defined the term consumerism as “a social movement seeking to augment the rights and powers of the buyers in relation to sellers”.

This definition clearly lays down that consumerism is a socialistic activity associated with entrusting rights and power to the buyer against the seller so that apart from examining legal check, moral checks can also be exercised.

Mrs**. Virginia K, Knauer** says consumerism may simply be expressed as "Let the seller beware" in comparison to the age-old caveat emptor or "Let the buyer beware."

The definition is not an exhaustive one and does not clearly specify any special characteristics of consumerism. It just lays impression about the legal aspect of caveat emptor.

The comprehensive and elaborate definition is one given by **Craven and Hill** which reads as "Consumerism is a social force within the environment designed to aid and protect the consumers by exerting legal, moral and economic pressures on business".

This definition clearly specify the various constituents of consumerism which may be summed as social forces acting within the business environment and which are air designed to protect and aid the customers by means of legal, moral and economic forces.

7.2 MEANING OF CONSUMER

In general terms consumer is a person which consumes or uses any goods and services. Goods may be consumables like wheat, flour, salt, sugar, fruits etc. or durable items like television, refrigerator, toaster, mixer etc. services refer to items like electricity, cooking gas, telephone, transportation etc. normally, it is the consumption or use of goods and services that makes the person to be called as 'consumer'. But in the eyes of law, both who buy any goods or hires any services for consideration (price) and the one who uses such goods and services with the approval of the buyer are termed as consumers. For example, if a person buys certain goods and it is consumed by certain other person, the person buying as well as the person consuming is treated as the consumers. Even in case of services, the buyer

whether he buys it for himself or for the consumption of some other person is treated as the consumer.

Under the consumer protection act 1986, the word consumer has been defined separately for the purpose of goods and services.

For the purpose of goods a consumer means (i) one who buys any goods and consideration; and (ii) any user of such goods other than the person who actually buys it, provided such use is made with the approval of the buyer.

(The expression 'consumer' does not include a person who obtains such goods for resale or for any commercial purpose)

For the purpose of services, a consumer means (i) one who hires any service or services for consideration; and (ii) any beneficiary of such service(s) provided the service is availed with the approval of such person.

7.3 WHY CONSUMERISM?

Exploitation of the consumer has been observed all around. They are not only subject to the exploitation of private sector enterprises but also the exploitation of public sector enterprises like nationalized commercial banks, State Electricity Boards, Telephone Departments etc. Although much legislation has been passed from time to time but despite of a number of laws passed to protect the interests of the Indian consumers, they are not aware of their rights.

Therefore, the need for consumerism or consumer protection has arisen because of the exploitation of consumers by the business community. Most of the consumers often become the victims of adulterated, spurious, hazardous, duplicate and substandard goods as well as incorrect weights and measurements. By resorting to unethical, false and misleading advertisements, businesses make quick money at the cost of consumers.

Mr. T. Thomas, Chairman of Hindustan Unilever Ltd., in his speech delivered at the 44th Annual General Meeting of the Company rightly pointed out: "While the producer has the power or the right to design the product, distribute, advertise and price it, the consumer has only the power of not buying it. One may argue that the producer runs the greater risk in spite of having several rights because the veto power remains with the consumers. However, the consumer often feels that while he has the power of veto, he is not always fully equipped to exercise that power in his best interest. "This problem facing the consumer has led to consumerism".

In many developed countries, consumers enjoy more protection as compared to Indian consumers. In spite of the various price control measures, the traders in India adopt their own dubious methods to get still higher prices. Even educated people are cheated by businesses in a sophisticated way. Thus the various problems faced by the consumers led to the growth of consumerism.

7.4 NEED OF CONSUMER PROTECTION ACT

The necessity of adopting measures to protect the interest of consumers arises mainly due to the helpless position of the consumers. There is no denying fact that the consumers have the basic right to be protected from the loss or injury caused on account of defective goods and deficiency of services. But they hardly use their rights due to lack of awareness, ignorance and lethargic attitude. However in view of the prevailing malpractices and their vulnerability there to, it is necessary to provide them physical safety, protection of economic interests, access to information, satisfactory product standard and statutory measures for redressal of their grievances. The other main arguments in favour of consumer protection are as follows:

1. **Social Responsibility:** the business must be guided by social and ethical norms it is the moral responsibility of the business to serve the interest of the consumer. Keeping line with this principle it is the duty of produces and traders to provide right quality and

quantity of goods at fair prices to the consumers.

2. **Increasing Awareness:** The consumers are becoming more mature and conscious of their rights against the malpractices by the business. There are many consumer organisation and association who are making efforts to build consumer awareness. Taking up their cases at various level and helping them to enforce their rights

3. **Consumer Satisfaction:** father of nation mahatma Gandhi had once given a call to manufactures and traders to "treat your customers as god". Consumers' satisfaction is the key to success of business. Hence the businessmen should take every step to serve the interests of consumers by providing them quality goods and services at reasonable price.

4. **Principles of Social Justice:** exploitation of consumers is against the directive principles of state policy as laid down by the constitution of India. Keeping in line with this principle, it is expected from the manufacturers, traders and services providers to refrain from malpractices and take care of consumers' interest.

5. **Principle of Trusteeship:** According to Gandhian philosophy, manufactures and producers are not the real owner of the business. Resources are supplied by the society. They are merely the trustees of the resources and therefore, they should use such resources effectively for the benefit of the society, which includes the consumers.

6. **Survival and Growth of Business:** the business has to serve consumer interests for their own survival and growth on account of globalization and increased competition, any business organization which indulges in malpractices or fails to provide improved services to their ultimate consumer shall find it difficult to continue. Hence they must in their own long run interest, become consumer oriented.

7.5 CONSUMER PROTECTION ACT, 1986

With the view of protecting or safeguarding the interest of the consumers and in view of undesirable and unfair trade practices being followed by businesses, Government has enacted certain legislations. These legislations are mainly designed to control production, supply, distribution, price and quality of a large number of goods and services. Among the various legislative measures one of the important legislative measures is **Consumer Protection Act 1986.** This act provides for consumer protection more comprehensively than any other law. Consumer seek legal remedy for a wide range of unfair practices not only with respect to goods but also for deficiency in services like banking, insurance, financing , transport, telephone, supply of electricity or other energy, housing, boarding and lodging, entertainment, amusement, etc. This act also includes provisions for the establishment of consumer protection council at the centre and the state. For the settlement of the consumer disputes, the Act has provided for semi-judicial system. It consists of district forum, state commission and national commission for redressal of consumer disputes. These may be regarded as consumer courts.

The Consumer Protection Act., 1986 is the most powerful piece of legislation the consumer has had to date. It is the only legislation which directly pertains to the market place, and seeks to redress complaints arising from it. It provides an effective protection to consumers against unfair trade practices, unsatisfactory services and defective goods. The objective of the Act is to provide better protection to the interest of consumers, by the establishment of consumer councils and other authorities for the settlement of consumer's disputes and for matters connected therewith. The Act extends to the whole of India except the State of Jammu and Kashmir.

7.5.1 FEATURES OF CONSUMER PROTECTION ACT

I) it covers all the sectors whether private, public, and cooperative or any person. The provisions of the Act are compensatory as well as preventive and punitive in nature and the

Act applies to all goods covered by sale of goods Act and services unless specifically exempted by the Central Government;

(II) It enshrines the following rights of consumers:

(a) right to be protected against the marketing of goods and services which are hazardous to life and property; (b) right to be informed about the quality, quantity, potency, purity, standard and price of goods or services so as to protect the consumers against unfair trade practices; (c) right to be assured, wherever possible, access to a variety of goods and services at competitive prices; (d) right to be heard and to be assured that consumers' interests will receive due consideration at the appropriate fora; (e) right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers; and (f) right to consumer education;

(III) The Act also envisages establishment of Consumer Protection Councils at the central, state and district levels, whose main objectives are to promote and protect the rights of consumers; (v) To provide a simple, speedy and inexpensive redressal of consumer grievances, the Act envisages a three-tier quasi-judicial machinery at the national, state and district levels. These are: National Consumer Disputes Redressal Commission known as National Commission, State Consumer Disputes Redressal Commissions known as State Commissions and District Consumer Disputes Redressal Forum known as District Forum; and

(IV) The provisions of this Act are in addition to and not in derogation of the provisions of any other law for the time being in force.

7.5.2 SCOPE OF THE CONSUMER PROTECTION ACT, 1986

The Consumer Protection Act, 1986 was enacted for better protection of the interests of consumers. The provisions of the Act came into force with effect from 15-4-87. Consumer

Protection Act imposes strict liability on a manufacturer, in case of supply of defective goods by him, and a service provider, in case of deficiency in rendering of its services. The term "defect" and "deficiency", as held in a catena of cases, are to be couched in the widest horizon of there being any kind of fault, imperfection or shortcoming. Furthermore, the standard, which is required to be maintained, in services or goods is not to be restricted to the statutory mandate but shall extend to that claimed by the trader, expressly or impliedly, in any manner whatsoever.

7.5.3 Who is a Consumer for the Purpose of This Act?

Any person who buys any goods for a consideration (payment in cash or kind) is a "Consumer" as defined under the Consumer Protection Act. But, a person who obtains such goods "for resale or for any commercial purpose" is not a consumer. As a result, he cannot approach a consumer dispute redressal agency alleging any defects in the goods he has purchased.

7.5.4 What is a Commercial Purpose?

When any goods are purchased with a view to use the same "for carrying on any activity on large-scale, for the purpose of earning profit", it is a purchase for commercial purpose. This has. been the consistent view taken by the National Consumer Disputes Redressal Commission.

In other words, if the goods purchased are used for a "large-scale" business activity intended "to earn profit", the purchaser is not a consumer.

7.5.5 Meaning of Goods

The term "goods" in the Consumer Protection Act, has the same meaning as found in the Sale of Goods Act, 1930. It defines goods as "every kind of movable property other than

actionable claims and money; and includes stocks and shares, growing crops, grass, and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale".

In short, all movable goods which are capable of being sold are goods under the Consumer Protection Act. Immovable goods such as land and things attached to it or embedded in it, which cannot be severed from it, are not goods for the purpose of the Consumer Protection Act. Wood, crops, grass etc., which are attached to the earth become goods when they are cut and severed from it.

A person who buys any goods for consideration is a consumer. If immovable properties are not goods, the purchaser of such properties is not a consumer.

7.5.6 Services

A Consumer can also complain about deficiency of any services hired. Deficiency has been defined as fault, imperfection, short-coming or inadequacy in the quality, nature or 'manner of performance', which is required to be maintained by law. This term 'manner of performance' can be interpreted liberally. According to the authoritative opinion, under the existing law, public utility services are to be performed efficiently, economically, and on sound business principles. Thus, if a consumer has a complaint against the Road Transport Corporation or Indian Railways, he can complain under this Act by alleging that the performance is not upto the standards as prescribed by law.

Services include banking, financing, insurance, transport, processing, supply of electricity or other types of energy, boarding or lodging, entertainment, amusement and information. Any service supplied free of charge is not included. Personal services are excluded. Those services rendered by a servant in a master-servant relations are thus outside

the purview of the Act. The Consumer Protection (Amendment) Ordinance 1993 includes house construction within the definition of services.

7.5.7 Complainant

A 'Complainant' may be a consumer or any recognized consumer association or the Central or any State Government.

Thus the Consumer Protection Act recognizes three categories of complainants who can make a complaint. It is to be noted that the Government need not be a consumer as defined in the Act, but can still make a complaint.

7.5.8 Complaint

Under this Act, a 'Complaint' means any allegation in writing made by a complainant in regard to one or more of the following:

(1) If the complainant has suffered loss or damage as a result of unfair trade practice adopted by any trader.

(2) If the goods delivered to the complainant have one or more defects.

(3) If the service rendered is deficient in any respect.

(4) If the trader charges a price for the goods that exceeds the price fixed by or under any law for the time being in force or displayed on the goods or displayed on any package containing such goods.

The consumer can also seek redressal against public services like: roads and their maintenance; public toilets, sewages and their maintenance; water distribution system; public electricity distribution system; telephone system; public road transports; pollution control methods; public broadcasting system; medical facilities etc.

7.5.9 Consumer Dispute

A complaint, under this Act, does not automatically become a consumer dispute. If the person, against whom a complaint has been made, denies or disputes the allegations contained in the complaint, it becomes a consumer dispute.

7.6 From consumer protection act 1986 to consumer protection act 2019

The Consumer Protection Act, 1986 is repealed after three decades and replaced by the Consumer Protection Act, 2019. Consumer Protection Bill 2019 was passed in Lok Sabah on 30th July 2019 and in Rajya Sabha on 6th August 2019. The Consumer Protection Act 2019 was got the approval of President on 9th August, 2019. This act is implemented from 20th July 2020.

The Consumer Protection Act, 2019 has been enacted with a view to widen the scope of consumer rights and cover the field of e-commerce, direct selling, tele-shopping and other multi levels of marketing in the age of digitization. Consumer Protection Act 2019 is applicable to whole of India including Jammu &Kashmir.

7.7 Who is a Consumer under the 2019 Act?

As per Section 2(7) of the 2019 Act, consumer is any person who buys goods or avails any service for a consideration and includes any user except for the person who has availed such services or goods for the purpose of resale or commercial use.

The explanation to the definition specifically states that the expression "buys any goods" and "hires or avails any services" includes all online transactions conducted through electronic means or direct selling or teleshopping or multi-level marketing. Online transactions is an exclusive feature of this act

7.8 Consumer Protection Act 2019

It covers E-Commerce transactions and tele-shopping. Consumer Complaint can be filed at a place where complainant resides or work. E-Filling of complaints is included. Hearing of cases can be done online by video Conferencing.

District forum: value of goods or services (upto 1 crore), state commission (from 1 crore to 10 crore) and National commission (above 10 crore).

Central Consumer Protection Authority (CCPA) has been established. This authority can investigate the matters, recall the product or withdrawal of services and file cases at different forums.

Consumer can get compensation for any harm after the use of any product or service from the seller. Mediation centers have been established for dispute resolution with all forums. Courts can refer settlements through mediation.

7.9 Summary

The Consumer Protection Act, 1986 was enacted for better protection of the interests of consumers. The provisions of the Act came into force with effect from 15-4-87. Consumer Protection Act imposes strict liability on a manufacturer, in case of supply of defective goods by him, and a service provider, in case of deficiency in rendering of its services. It covers all the sectors whether private, public, and cooperative or any person. The provisions of the Act are compensatory as well as preventive and punitive in nature and the Act applies to all goods covered by sale of goods Act and services unless specifically exempted by the Central Government. It enshrines the various rights of consumers like right to be protected, right to be informed, right to be assured, right to be heard, right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers; and right to consumer education. The Act also envisages establishment of Consumer Protection Councils at the central, state and district levels, whose main objectives are to promote and protect the rights of consumers.

Under the CPA, Consumer Forums at the District, State and National level have been specifically constituted to adjudicate claims of consumers for any "defect" in goods.

On arriving at a finding of defect in the goods according to Section 14 CPA, the jurisdictional Consumer Forum may direct one or more of the pronouncements.

There exists no clear pronouncement of the Supreme Court (the apex court in India) till date on whether the liability under the CPA is strict or fault based. However, failure to conform to the standards required under any law, contract or representations of the trader are sufficient to constitute a defect.

According to CPA,where a trader or the complainant fails to comply with an order made by the relevant consumer forum , such person is liable to a punishment with imprisonment for a term which is not less than one month but which may extend to three years or with fine of not less than two thousand rupees but which may extend to ten thousand rupees or with both

7.10 Glossary

1. Consumer: For the purpose of goods a consumer means one who buys any goods and consideration; and any user of such goods other than the person who actually buys it, provided such use is made with the approval of the buyer. For the purpose of services, a consumer means one who hires any service or services for consideration; and any beneficiary of such service(s) provided the service is availed with the approval of such person.

2. Commercial Purpose: When any goods are purchased with a view to use the same "for carrying on any activity on large-scale, for the purpose of earning profit", it is a purchase for commercial purpose.

3. Goods: Goods means goods as defined in the Sale of Goods Act, 1930. Under that act, goods means every kind of movable property other than actionable claims and money and

includes stocks and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

4. Services are the (set of) benefits which are trigger able, consumable and effectively utilizable for any authorized service consumer and which are rendered to him as soon as he triggers one service. The description of these benefits must be phrased in the terms and wording of the intended service consumers.

5. Complainant: A 'Complainant' may be a consumer or any recognized consumer association or the Central or any State Government.

6. Complaint: Under the Consumer Protection Act, a 'Complaint' means any allegation in writing made by a complainant in regard to one or more of the things provided under the Act.

7. Consumer Dispute: Consumer dispute means dispute where the person against whom a complaint has been made, denies or disputes the allegation contained in the complaint.

7.11 Check your Progress

1. ……..is a social force within the environment designed to aid and protect the consumers by exerting legal, moral and economic pressures on business.
2. The Consumer Protection Act, 1986 was enacted for better protection of the interests of consumers. The provisions of the Act came into force with effect from …….

7.12 Answers to check your progress

1. Consumerism, 2. 15-4-87.

7.13 Terminal Questions

1. What do you mean by consumerism?
2. Why is consumerism needed?

3. Who is a consumer?

4. Give the leading characteristics of Consumer Protection Act 1986.

5. What is the role of Consumer Protection Council?

6. Explain the jurisdiction of a District Consumer Redressal Forum.

7. Explain the provisional jurisdiction of a State Commission or National Commission.

8. Define the term consumer and consumerism. What are the salient features of Consumer Protection Act 1986?

9. Explain the main provision of Consumer Protection Act 1986 as amended to the date. Has the Act been able to protect the right and interests of the consumers?

7.14 References

Raviner Kumar, Legal Aspects of Business
PPS Gogna, Mercantile Law
N.D.Kapoor, Elements of Mercantile Law,
M C Kuchhal, Mercantile Law including Company Law
B S Moshal, Mercantile Law
GK Kapoor, Business Law

UNIT 8 Consumer Protection Councils and the Machinery for Redressal

8.1 Introduction

8.2 Consumer Protection Councils

8.3 Consumer Dispute Redressal Forums

8.3.1 Composition of the District Forum

8.3.2 Composition of the State Commission

8.3.3 Composition of the National Commission

8.4 Summary

8.5 Glossary

8.6 References

8.7 Terminal Questions

Objectives

- To make the students aware about the consumer protection council.
- To make the students aware about the various rights of the consumers.
- To help students understand the three-tier consumer disputes redressal structure.
- To acquaint students with the composition, Jurisdiction and redressal procedures.

8.1 Introduction

Protection of the rights of the consumers is one of the prime considerations for the Government taking into consideration the need of the hour. The Consumer Protection Act envisages the establishment of a Central Consumer Protection Council at the national level by the Central Government and a Consumer Protection Council, at the State level in each State by the State Government concerned. The Minister in charge of the Department of Food and

Civil Supplies in the Central Government is the Chairman of the Central Council. The Council also consists of other officials and non-official members representing several interests. The major objectives of the Central Council are to protect the rights of the consumers. The Act envisages the establishment of a three-tier consumer disputes redressal structure. The Consumer Disputes Redressal Forums includes A District Forum in each district, A State Commission in each State and A National Commission at the Central level.

8.2 CONSUMER PROTECTION COUNCILS

The Consumer Protection Act provides that the Central Government and the State Government of the respective states shall be the responsible authority for the constitution of the Consumer Protection Council at the centre and each of the state. The Act envisages the establishment of a Central Consumer Protection Council at the national level by the Central Government and a Consumer Protection Council, at the State level in each State by the State Government concerned. This Consumer Protection Council shall be constituted for the promotion and protection of the various consumer rights provided in the Act. The Minister in charge of the Department of Food and Civil Supplies in the Central Government is the Chairman of the Central Council. Apart from the Chairman, the Central Council consists of other officials and non-official members representing several interests.

The major objectives of the Central Council are to protect the rights of the consumers. John F Kennedy, the then President of the USA declared the four basic rights of consumers They are, the right to safety, the right to be informed, the right to choose and the right to be heard. Later, the International Organization of Consumers Union added three more rights viz., the right to redress, the right to consumer education and the right to a healthy environment.

- **The Right to Choose**: Consumers should be assured, wherever possible of access to a variety of products and services at competitive prices. Even in a competitive market, consumers should have an assurance of satisfactory quality and services

at fair prices.

- **The Right to be informed:** Consumers should be protected against fraudulent, deceitful or grossly misleading information, advertising, labeling or other practices. They should be provided with full information concerning the product or service such as the quality and performance standards, ingredients of the product, operational requirements, freshness of the product, possible adverse side effects etc. This right also enables consumers to make a better choice and to bargain.

- **The Right to Safety:** The goods or services used / bought should not be hazardous to the health or life of consumers. The products available in the market should not bring any physical danger to them.

- **The Right to Redressal**: This right ensures compensation to consumers for the loss suffered by them or injury caused to them by the sellers. In a broader sense, the term 'redress' includes all the means open to consumers to set right the perceived wrongs or to prevent future abuses.

- **The Right to be heard**: Consumer should be assured that their interest will receive full and sympathetic consideration in the formulation of Government policy and fair and expeditious treatment in its administrative tribunals.

- **Right to a Healthy Environment**: The products or services supplied to the public should not bring any harmful effect to the physical environment. They should not pollute air or water. They should not adversely affect the lives of users as well as non-users. Every consumer has the right to a healthy environment.

- **The Right to Consumer Education:** Mere legislative measures will not ensure protection to consumers. Unless consumers are made aware of their rights and the

remedies available to them, they cannot protect themselves against the unfair and unethical trade practices of unscrupulous traders. Therefore, consumers should be educated about their rights through consumer education. Such education can be provided by educational institutions, voluntary organizations and institutional agencies.

8.3 CONSUMER DISPUTE REDRESSAL FORUMS

The Act envisages the establishment of a three-tier consumer disputes redressal structure consisting of District Forums at the district level, State Commission at the State level and a National Commission at the Central level for solving consumer disputes.

Thus the Consumer Disputes Redressal Forums include:

(1) A District Forum in each district.

(2) A State Commission in each State.

(3) A National Commission at the Central level.

It is the responsibility of the State Government to establish a District Forum in each district and a State Commission at the State level with the prior approval of the Central Government.

The Consumer Protection (Amendment) Ordinance, 1993 empowers the State Governments to establish more than one District Forum in a District, if it deems fit. The National Commission was set up by the Central Government in August 1988.

8.3.1 Composition of the District Forum

Each District Forum shall consist of:

(1) A person who is, or has been, or is qualified to be a District Judge, to be nominated by the State Government, who shall be its president.

(2) A person of eminence in the field of education, trade or commerce.

(3) A lady social worker.

Thus the District Forum includes a representative of the judiciary, a person of eminence in education, trade and commerce and a lady social worker. The inclusion of a woman social worker in the Forum is a welcome provision. Since housewives are the major shoppers in the market place, especially for non-durables, it is expected that their problems will now be adequately represented. The term of office of a member of the District Forum is five years or up to the age of 65 years, whichever is earlier. However, he/she is not eligible for reappointment.

The proceedings of the District Forum should be conducted in the presence of at least two members, of whom one should be the President of the Forum. The orders of the Forum should be signed by these two persons. When there is a difference of opinion among the two, the opinion of the third member should be sought to make a majority judgment.

Jurisdiction of the District Forum—If the value of the goods or services and the compensation, if any, claimed does not exceed Rs. 5 lakhs, the District Forum can entertain such complaints.

Time limit for filing a complaint—The complainant should make his complaint to the Forum / Consumer Court within one year from the date of the cause of action.

How to file a complaint—The procedures for filing complaints and seeking redressal are simple and speedy. There is no fee for filing a complaint and there is no necessity for an advocate. The consumer or his authorized agent can present the complaint in person or send it by post to the President of the appropriate Forum / Commission.

Every complaint should contain the following information, either typed or handwritten in English or the vernacular language:

(1) Complainant's name, description and address.

(2) The name, description and address of the opposite parties, as the case may be, as they can be ascertained.

(3) The facts relating to the complaint and when and where it arose.

(4) Documents, if any, in support of the allegations contained in the complaint.

(5) The relief that the complainant is seeking.

Procedure for handling the complaints relating to goods—If the complaint received by the District Forum relates to goods, it will refer a copy of the complaint to the opposite party mentioned in the complaint, directing him to give his version of the case within a period of 30 days or such extended period not exceeding 15 days as may be granted by it.

If the opposite party denies or disputes the allegations mentioned in the complaint, or omits or fails to take any action to represent his case within the time given by the District Forum, then the District Forum will proceed to settle the consumer dispute as stated below:

The District Forum will obtain a sample of the goods from the complainant and send it to the appropriate laboratory to find out whether such goods suffer from the defects alleged in the complaint. Appropriate laboratories are those laboratories which are recognized by the Central Government or which are maintained, financed or aided by the Government. The appropriate laboratory should send its report to the District Forum within a period of 45 days from the receipt of the reference or within such extended period as may be granted by the District Forum.

The Forum will require the complainant to pay a fee to the appropriate laboratory for carrying out the necessary test or analysis. The object of this is presumably to discourage frivolous litigation.

After receiving the report from the appropriate laboratory, the Forum will send a copy of the report to the opposite party and require the opposite party or the complainant to submit in writing his objections with regard to the report, if any.

Thus after giving a reasonable opportunity to the complainant as well as the opposite party to present their views in respect of the report given by the appropriate laboratory, the District Forum will issue an appropriate order under Section 14 of the Consumer Protection Act.

Procedure for handling complaints relating to goods which do not require laboratory test or if the complaint relates to any service—In this case, the District Forum will refer a copy of the complaint to the opposite party, directing him to give his version of the case within a period of 30 days or such extended period not exceeding 15 days as may be granted by the District Forum. If the opposite party denies or disputes the allegations mentioned in the complaint, or omits or fails to take any action to represent his case within the time given by the District Forum, it will settle the consumer dispute on the basis of the evidence brought to its notice by the complainant.

For the purpose of handling the complaint the District Forum is vested with all the powers of a Civil Court.

8.3.2 Composition of the State Commission

Each State Commission shall consist of:

(1) A person who is or has been a Judge of a High Court, appointed by the State Government, who shall be its President and

(2) Two other members who shall be persons of ability, integrity and standing and have adequate knowledge or experience of or have shown capacity in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration, one of whom shall be a woman.

Jurisdiction of the State Commission—The State Commission can entertain complaints where the value of the goods or services and compensation claimed, if any, exceeds Rs. 5 lakhs but does not exceed Rs. 20 lakhs.

The State Commission will also entertain appeals against the orders of any District Forum within the Sate.

Further, the Act empowers the State Commission to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Forum within the State, where it appears to the State Commission that such District Forum has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in exercise of its jurisdiction illegally or with material irregularity.

Procedure for handling complaints- State Commission—The procedure for handling the complaint followed by the State Commission is similar to that of the District forum. Any person aggrieved by the order of the State Commission can make an appeal to the National Commission within a period of 30 days from the date of the order.

8.3.3 Composition of the National Commission

The National Commission shall consist of:

(1) a person who is or has been a Judge of the Supreme Court, to be appointed by the Central Government, who shall be its President and

(2) Four other members who shall be persons of ability, integrity and standing and have

adequate knowledge or experience of or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration, one of whom shall be a woman.

Jurisdiction of the National Commission—The National Commission will entertain complaints where the value of the goods or services and compensation claimed, if any, exceeds Rs. 20 lakhs. It will also entertain appeals against the orders of any State Commission. The Commission is empowered to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any State Commission, where it appears to the National Commission that such State Commission has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity.

Procedure for handling complaints - National Commission — the procedure for handling the complaint followed by the National Commission is similar to that of the District Forum. In the disposal of any complaint or of any proceedings before it, the Commission will have all the powers of a Civil Court.

Any person aggrieved by the order of the National Commission can make an appeal against such an order to the Supreme Court within a period of 30 days from the date of the order.

What is the Relief Available?

Depending on the nature of relief sought and the facts pertaining to the issue, the Redressal Forums may pass orders for one or more of the following:

(1) Removal of the defects and deficiencies from the goods and services.

(2) Replacement of the goods with new goods of similar description.

(3) Refund of the price paid or the charges paid.

(4) Award of compensation for the loss or injury suffered by the consumer due to the negligence of the opposite party.

Failure to comply with the order of the District Forum, the State Commission, or the National Commission has been made punishable with imprisonment for any term not exceeding three years or with fine not exceeding Rs. 10,000 or with both.

Time Limit for Disposing of a Complaint

The statutory time limit for disposing of a complaint is 90 days from the date of filing of case. But complaints are pending for more than three years in many Consumer Courts. For instance, since 1989, only three per cent of the total cases filed in all Consumer Courts in Tamil Nadu have been disposed of within the time period.

8.4 Summary

Today the consumers are very well aware about their rights and hence the protection of their rights is the need of the hour. The Consumer Protection Act has thus provided for the establishment of a Central Consumer Protection Council at the national level by the Central Government and a Consumer Protection Council, at the State level in each State by the State Government concerned. The Minister in charge of the Department of Food and Civil Supplies in the Central Government is the Chairman of the Central Council. The Council also consists of other officials and non-official members representing several interests. The major objectives of the Central Council are to protect the rights of the consumers. The Act envisages the establishment of a three-tier consumer disputes redressal structure. The Consumer Disputes Redressal Forums includes A District Forum in each district, A State Commission in each State and A National Commission at the Central level. Each District Forum shall consist of a person who is, or has been, or is qualified to be a District Judge, to

be nominated by the State Government, who shall be its president, a person of eminence in the field of education, trade or commerce, a lady social worker.

Each State Commission shall consist of a person who is or has been a Judge of a High Court, appointed by the State Government, who shall be its President and two other members who shall be persons of ability, integrity and standing and have adequate knowledge or experience. The State Commission can entertain complaints where the value of the goods or services and compensation claimed, if any, exceeds Rs. 5 lakhs but does not exceed Rs. 20 lakhs. The State Commission will also entertain appeals against the orders of any District Forum within the Sate.

The National Commission shall consist of a person who is or has been a Judge of the Supreme Court, to be appointed by the Central Government, who shall be its President and Four other members who shall be persons of ability, integrity and standing and have adequate knowledge or experience The National Commission will entertain complaints where the value of the goods or services and compensation claimed, if any, exceeds Rs. 20 lakhs. It will also entertain appeals against the orders of any State Commission.

8.5 Glossary

1. Consumer Protection Council: Consumer Protection Council shall be the appropriate authority constituted for the promotion and protection of the various consumer rights provided in the Act by the Centre at the National level and State Government at each of the state

2. Consumer rights: The right to safety, the right to be informed, the right to choose and the right to be heard, the right to redress, the right to consumer education and the right to a healthy environment are the various consumer rights which has been incorporated under the Act for the benefit and in the interest of the consumers.

3. District Forum: District Forum shall consist of a person who is, or has been, or is qualified to be a District Judge, to be nominated by the State Government, who shall be its president, a person of eminence in the field of education, trade or commerce, a lady social worker.

4. National Commission: The National Commission will entertain complaints where the value of the goods or services and compensation claimed, if any, exceeds Rs. 20 lakhs. It will also entertain appeals against the orders of any State Commission

5. Redress: In a broader sense, the term 'redress' includes all the means open to consumers to set right the perceived wrongs or to prevent future abuses.

6. State Commission: State Commission shall consist of a person who is or has been a Judge of a High Court, appointed by the State Government, who shall be its President and two other members who shall be persons of ability, integrity and standing and have adequate knowledge or experience. The State Commission can entertain complaints where the value of the goods or services and compensation claimed, if any, exceeds Rs. 5 lakhs but does not exceed Rs. 20 lakhs. The State Commission will also entertain appeals against the orders of any District Forum within the Sate.

8.6 Essay Type Questions

10. What is the basic consumer right enshrined in the Consumer Protection Act 1986?

11. Give the leading characteristics of Consumer Protection Act 1986.

12. What is the role of Consumer Protection Council?

13. Explain the jurisdiction of a District Consumer Redressal Forum.

14. Explain the provisional jurisdiction of a State Commission or National Commission.

8.7 References

1. "Irda wins Ulip battle". Business Standard. 20 June 2010. http://www.business standard.com/india/storypage.php?autono=398840. Retrieved 2010-06-20.

2. IRDA Journal.

3. IRDA official website

4. The IRDA Act 1999

UNIT – 9 AN OVERVIEW OF MRTP ACT

Structure

9.1 Introduction

9.2 Objectives and Coverage of the MRTP Act

9.3 The Enforcement Machinery

9.3.1 The MRTP Commission

9.3.2 Director-General of Investigation and Registration

9.3.3 The Central Government and the Supreme Court

9.4 Monopolistic Trade Practices

9.5 Restrictive Trade Practices

9.6 Unfair Trade Practices

9.7 Summary

9.8 Glossary

9.9 Check your Progress

9.10 Answers to Check your Progress

9.11 Terminal questions

9.12 References

OBJECTIVES

After readings this unit, you should be able to

- Explain the objectives and coverage of MRTP Act.
- Describe the machinery for the enforcement of the MRTP Act.
- Discuss the concept, types and Gateways/control mechanism of Monopolistic Trade Practices, Restrictive Trade Practices and unfair Trade Practices.

9.1 INTRODUCTION

Economic theory tells us that monopolies restrict output and lead to higher prices under standard conditions. In practical life, monopolies restrict competition and consumer choices, are detrimental to economic growth and lead to consumer exploitation. In the long run, they inhibit research and development, breed inefficiency, promote uneconomic use of national resources and accentuate concentration of wealth and income in the society.

A number of countries have anti-monopoly or anti-trust legislation to control and regulate monopolistic tendencies and promote competition in various areas of business activity. In India, the Monopolies and Restrictive Trade Practices (MRTP) Act was passed in 1969 and came into force in 1970 (June 1) with the establishment of the MRTP Commission. The Act was in conformity with Section 39 of the Directive Principles of State Policy which directs the State to ensure that 'the operation of economic system does not result in the concentration of wealth and means of production to the common detriment'.

With the passing of the new Competition Act, 2002, the MRTP Act, 1969 has been repealed and MRTP Commission dissolved. However, in spite of that the section on MRTP Act has been retained due primarily to the fact that most parts of the repealed Act provide foundation and conceptual understanding for the new Competition Act 2002. All the cases pertaining to monopolistic and restrictive trade practices under the MRTP Act have been transferred to the Competition Commission of India constituted under the new Act and shall be adjudicated by the commission in accordance with the provisions of the repealed MRTP as it this act has not been repealed. As the number of such cases is large, the provisions of the MRTP Act will remain in force in spite of the fact that it has been repealed.

The MRTP Act was necessitated in view of a high degree of concentration of economic power in the country discovered by a few countries constituted for the purpose. As early as in 1964, Mahalanobis Committee (under the Chairmanship of P.C. Mahalanobis) reported a high level of producer concentration in a wide range of producer and consumer goods industries. Similar concentration was found in asset ownership. In 1965, Monopolies Enquiry Commission (setup by the Government under the Chairmanship of K.C. Das Gupta) in its report found that in 62 per cent of the total 1380 products, top three firms accounted for three-fourths of the total output in the respective product lines in the organized sector. In this product group, monopoly (only one producer) was found in each of the 425 products, duopoly (only two producers) in each of 225 products and only three producers in each of

160 products. The Commission further found that top 75 business houses at that time (each having total assets exceeding Rs. 5 crore) accounted for 47 per cent of the total assets and 44 per cent of the total paid up capital of the private corporate sector.

9.2 OBJECTIVES AND COVERAGE OF THE MRTP ACT

The Act, before amendments, had the following objectives:

- Control and regulation of concentration of economic power to the common detriment.
- Control of monopolies and monopolistic trade practices; and
- Prohibition of restrictive trade practices.

In the course of subsequent amendments, the objectives of the Act have been modified. In 1984, the Act was extended to cover unfair trade practices (defined later). In the light of the new liberalized industrial policy announced in 1991, the Act was further amended and the asset limit of MRTP companies was scrapped. This greatly diluted its initial objective of preventing concentration of economic power in private hands. By the time of repeal of the Act, its main objectives boiled down to controlling and regulating monopolistic, restrictive and unfair trade practices.

To a limited extent, the Act also regulated mergers and acquisitions. There was a misconception that the Act applies only to large undertakings. In fact, for meeting the above objectives, it applied to all private business entities big or small, irrespective of their corporate form and even individuals. The provisions of the Act are addition to and not in substitution to any other law having similar or related objective, in force. MRTP Act was applicable even where Company Law Board or SEBI is available for redressal.

Since 1991 (as per Government notification dated September 27), the following categories of entities were exempted from the provisions of the MRTP Act:

- Undertakings owned or controlled by the government or a government company, which are engaged in the production of arms and ammunition, allied items of defense equipment, defense aircrafts and warships, atomic energy, minerals for atomic energy, currency and coins.
- Trade Unions and other associations of workmen or employees formed for the purpose of their protection.

Thus, all public sector undertakings except those mentioned above, private undertakings, cooperative institutions and financial institutions including commercial banks

were covered by the Act. Prior to September 1991 notification, the Act did not apply to (a) undertakings owned or controlled by the government or a government company or a corporation (not being a company) established under any central, state or provincial Act; (b) Undertakings engaged in an industry the management of which was taken over by a person or body of persons authorised by the central government under a law (c) undertakings owned by a cooperative society formed and registered under an Act relating to cooperative societies and (d) financial institutions, in addition to the above two categories (post 1991). The Act did not apply to J&K.

9.3 THE ENFORCEMENT MACHINERY

The machinery for the enforcement of the MRTP Act consisted of the MRTP Commission, the Director-General of Investigation and Registration (DGIR) and, in a wider scope, it included central government and the Supreme Court as well. These institutions are described in the following sections.

9.3.1 THE MRTP COMMISSION

The Commission was a quasi-judicial body formed under the MRTP Act. The Act conferred wide powers on the Commission. The composition, powers and functions of the Commission were as follows:

Composition and Qualifications of Members

The Commission consisted of a Chairman and 2-8 members appointed by the central government on a five-year term. The qualifications of the Chairman and the members are listed in Table 10.1. The Chairman and the members could be re-appointed but their total tenure in the Commission could not exceed 10 years. The Chairman or a member could be removed from his position if it was established that he had abused his position or had acquired financial or other interests prejudicial to his functions.

Table 9.1: Qualifications of the Chairman and the Members of the MRTP Commission

Chairman	A person qualified to be a judge of the Supreme Court or a High Court.
Member	No formal qualification. A person of ability, integrity and standing having adequate knowledge and experience in law, commerce, accountancy, industry, public affairs or administration.

Powers of the Commission

The powers of the commission were as follows:

1. Power of Enquiry: The Commission could enquire into any monopolistic, restrictive or unfair trade practice on the basis of:

a) Receipt of complaint from a consumer, a trade association or a registered consumers' association recognized by the central government; or

b) A reference received from the central government; or

c) An application received from the Director-General Investigation and Registration (DGIR) or,

d) The Commission's own information or knowledge.

Enquiry in case of monopolistic trade practice could be started only on the basis of (b), (c) or (d) above. For the purpose of enquiry, the commission had powers of a civil court under which it could summon and examine witnesses, receive evidence on affidavits, call public records from any court or office and order appearance of parties connected with a case. Commission proceeds were deemed to be judicial proceedings.

2. Power to Call Persons and Records: The Commission could issue summons and warrants throughout India and could enforce attendance of witnesses. It could require any person to produce documents or information relating to a trade practice for the purpose of the Act.

It could even authorize other persons to search any premises and seize related documents

3. Power to Grant Temporary Injunction: Till a case pertaining to a trade practice was decided, the Commission could restrain any such person or entity from carrying out such further practice. Such order could be issued at any time during an enquiry

4. Power to Order Compensation and Damage: If any monopolistic, restrictive or unfair practice was proved, the Commission could award compensation for loss or damage caused to the aggrieved party. It must be emphasized that the nature of such compensation was different from a penalty or punishment awarded by a civil court.

In addition to the above, the Commission could allow the contending parties to modify their trade practices within a reasonable period of time. In case of contempt, it had the

same power as that of a High Court to grant punishment. After an enquiry was over, the Commission could give a verdict of any of the following types:

- That the practice in question would be discontinued and would not be repeated in future (called cease and persist order).
- That the agreement relating to the trade practice shall be void or shall stand modified as per the commission's order.

The Commission could review its own orders if there was a material change in the facts of a case or if a new fact came to the notice of the Commission having a bearing on the outcome of the case.

Compliance of the Commission's Orders

The Commission could pass general orders for universal application or specific orders with reference to a particular party or trade practice. Orders of the Commission were enforceable in the same way as the order of decree of a court. If the orders of the Commission were not executed, the Commission could get it executed through the court in the jurisdiction of which the individual or business unit was located. For the compliance of its orders, the Commission could authorize and depute any of its officers or an officer of the DGIR to investigate whether its orders were being complied with. The Commission then took action on the basis of the investigation submitted by the authorised officer. The action could take any of the following two forms:

- The commission might refer the matter to a court of sessions, which has the power to impose penalties and punishment.
- It may provide for 'compounding' of offences. Compounding is the payment determined by the Commission and payable by the erring parry against which the Commission agreed to drop the matter for further action. Compounding is an opportunity given by the Commission to the party to save the cost and time of court proceedings.

Contravention of the orders passed by the Commission later carried deterrent punishment. The Commission was also empowered to punish for its contempt.

Functions

Many functions of the Commission were implicit in its powers summarized above. At the cost of some repetition, the main functions of the Commission may be listed as under:

- To conduct enquiries and hear cases relating to monopolistic, restrictive and unfair trade practices.

- To advice the government in matters relating to division or severance of undertakings to restrict concentration of economic power.
- To give report to the central government on cases relating to monopolistic trade practices for final orders of the government. (In such cases, the Commission could grant temporary injunctions and compensation as pointed out above, but final orders were given by the government on the basis of the Commission's report. The Commission, however, had wide powers in respect of restrictive and unfair trade practices.)

9.3.2 DIRECTOR-GENERAL OF INVESTIGATION AND REGISTRATION (DGIR)

DGIR, as part of the enforcement machinery, was appointed by the central government under the MRTP Act. The government might also appoint additional, joint, deputy or assistant Director-generals as it may consider fit. The Director-General had powers and functions as per provisions of the MRTP Act and worked independent of the Commission. The Director-General was neither appointed nor controlled by the Commission.

The Investigation Function

DGIR, at the behest of the Commission, had the duty to carry out a preliminary investigation into a complaint regarding a trade practice. It could also conduct an investigation on its own and apply to the Commission for enquiry. The DGIR or any person authorised by it to make the preliminary enquiry enjoyed the same power as that of an 'inspector' under Section 240 or Section 240A of the Companies Act. In this regard, the DGIR had the power to call the required information. He had the right to appear in the course of any enquiry before the Commission. He represented the Commission before the Supreme Court or a High Court.

The Registration Function

Under the MRTP Act, all agreements that related to restrictive trade practices had to be registered with the DGIR if at least one of the parties to the agreement carried out its business in India. However, the agreements which were permitted by an existing law or by the government or in which the government itself was a party were exempted from registration requirements on grounds of public policy. The details of the registrable agreements received by the DGIR are maintained by it in a register.

DGIR scrutinized the details of each agreement received for registration. Discrepancies or omissions, if any, were got corrected by the concerned parties. On registration, each document was endorsed with (a) date of registration, (b) serial number and page number on which the entry is made in the register and (c) seal and signature of the DGIR. The register (except a special section) was kept open to public inspection (against a

nominal charge) in the interest of transparency and general information. Any member of the public was free to move court against a particular agreement, in the public or own interest.

Any party could apply to the DGIR for exemption from registration on the ground that the agreement has little economic significance. It might also apply for inclusion of a particular part of the agreement in the 'special section', which was not open to the public. Sufficient reason, however, had to be given in this regard. DGIR or the MRTP Commission could start an enquiry on the basis of an agreement registered or received for registration.

9.3.3 THE CENTRAL GOVERNMENT AND THE SUPREME COURT

The central government and the Supreme Court lay at the apex level of the enforcement machinery. The central government itself appointed the MRTP Commission and the DGIR as the central parts of the machinery. The power on the passing of final orders with regard to the monopolistic trade practices referred by the Commission lay with the central government. The coverage of the Act was extended by the government from time to time. In relatively rare cases, the matters on division of undertakings and severance of interconnected undertakings to check concentration of economic power referred to it by the Commission were decided by the central government.

The Supreme Court, the High Court and the courts of sessions might also be regarded as part of the enforcement machinery. The MRTP Commission made orders in consonance with the Supreme Court and High Court judgments on relevant areas. Courts of sessions were occasionally involved in the execution of the commission's orders in case of non-compliance by the concerned parties. Further, the Supreme Court decided appeals against the orders of the Commission or the central government if these raised substantial questions of law.

9.4 MONOPOLISTIC TRADE PRACTICES (MTP)

The Concept and Types

Under the MRTP Act [Section 2(i)], an MTP was defined as a trade practice which had (or likely to have) any of the following effects:

- Limiting or controlling, supply or distribution of goods or services thereby maintaining their price at unreasonable levels.
- Limiting technical development or capital investment or allowing the quality or goods or services to deteriorate.
- Unreasonably preventing of restricting competition.
- Unreasonably increasing cost or production or charge for services.

- Unreasonably raising the prices of goods or services.
- Unreasonably increasing profits on production, distribution or supply of goods or services.
- Resorting to unfair or deceptive means to reduce or prevent competition in goods or services.

Such practices were seen as serious forms of restrictive practices.

Gateways of Public Interest

Gateways referred to circumstances under which reasonable trade practices would be allowed. All MTPs in the eyes of the law were *per se bad,* i.e. prejudicial to public interest. This clause was important. If a trade practice was not prejudicial to the public interest, it could be exempted from the definition of MTP. The following types of practices under the Act were not prejudicial to the public interest:

- Practices that were expressly authorised by an enactment.
- Practices that were permitted by the central government.

The restrictive practices that were permitted by the government related to strategic goods, essential supplies or were the ones in which the government itself was a party.

Regulation of MTP

The MRTP Commission could make an enquiry on the basis of any of the following:

- A reference received from the central government regarding the existence of such a practice.
- An application received from DGIR in this regard.
- The Commission's own information or knowledge.

The Commission made a full enquiry and submitted the report to the central government, which alone had the power to take a decision on such a practice. However, the Commission had the power to order compensation for the loss incurred due to such a practice. The government, in the extreme judgment, could order discontinuance or prohibition of the practice or cancel the whole agreement containing such a practice. The other forms that the government decision could take might be any of the following:

- Regulating production, supply or control of goods or services and fixing terms of sale including price and supply.
- Fixing or regulating quality standards for goods and services.
- Declaring some parts of the agreement unlawful and cancelling the whole or part of the agreement.

- Regulating profits arising from the trade practice.

The government's order in an MTP case had to be completed within 30 days and the DGIR had to report such compliance within 90 days of the issue of orders. The MTP provisions were applicable to any undertaking. Prior to 1984 Amendment these were applicable only to those undertakings which controlled more than 50 per cent of goods or services of any particular type in question.

9.5 RESTRICTIVE TRADE PRACTICES (RTP)

The Concept and Types

MRTP Act had detailed provisions with regard to the control of RTPs. An RTP under the Act had defined to be the one that had the effect of preventing, distorting or restricting competition in any manner. An RTP in particular had the effect of:

- Obstructing the flow of capital or resources for production; or
- Imposing unjustified costs or restrictions on consumers with regard to the availability of goods or services by manipulating prices or conditions of delivery or supplies to market.

Some of the common practices deemed to be RTPs were the following:

- **Restriction on Buying and Selling.** These may be in the form of limiting persons to whom the goods may be sold or from whom these may be bought.
- **Tie-in Sales.** These force a person, as a matter of compulsion, to buy a product (for which h is not a customer) along with the product that he wishes to buy (e.g. requiring a customer to buy a shaving blade along with cream).
- **Exclusive Dealership Agreement.** The agreement requires the dealer of a particular product not to deal in another product (usually of a rival). It also includes exclusive dealership rights to a person(s) in a particular geographical location (creating local monopoly).
- **Collective Price Fixation and Tendering.** It is the practice of collecting agreement among individuals or business units to collectively buy or sell a product or tend only at mutually agreed price and terms. In oligopoly, firms may collude and resort to this practice as a 'cartel' to eliminate competition between them and charge a monopolistically high price.
- **Discriminatory Dealing.** Under this practice, a seller discriminates between different buyers, charges different prices and imposes different terms of sale (including discounts, trade credit etc.) on the basis of the size of the order. Under the practice, a wholesaler

may give a larger discount to a retailer whose order is larger. Such a practice would make larger retailers more competitive than smaller retailers and competition no longer remains fair.

- **Resale Price Maintenance.** This practice is found to prevail in dealings between traders at different levels in the distribution chain. Under this practice one dealer (say a distributor) requires another buying dealer (say a wholesaler) not to sell the product 'below a certain price' or 'above a certain price'. Any such agreement was void under the Act, unless specifically allowed by the MRTP Commission on a valid ground.
- **Output or Supply Restrictions.** Such agreements seek a limit, withhold or restrict the output or supply of a product or allocate any particular market for their disposal. Sometimes area restrictions are justified on such grounds as after-sale service, continuous contact with the customer or limited distribution network of the manufacturer.
- **Manufacturing Process Restrictions.** Such restrictions are usually imposed by one manufacturer on the other when they are in some sort of relationship like licensing, franchising, co production arrangement, sub-contracting, buy-back, joint tendering, buy-back arrangements, market sharing arrangement, joint venture or any other type of collaboration. Such an agreement may require a manufacturer not to use a particular type of capital equipment, technology and production process or to produce a product only up to a limited quantity using a particular process or technology. Such agreements restrict output and competition.
- **Price Control Agreements.** Such agreements seek to sell products at prices which would destroy competition and competitors. This may be done through collusive price fixing, predatory pricing or dumping. Selling products at prices much below the normal market price or even the cost of production are examples of such a practice. However, giving price discounts in competition is not covered under the practice.
- **Collective Bidding.** This practice is very common but very difficult to prove. In this practice bidders at an auction collude rather than compete. In collusion, the bidders pre-plan not to let the bid price beyond a particular price or let the auction go in favor of a particular individual or parry.
- **Any other Agreement.** The above list being not exhaustive, the government under the Act, could, on the recommendation of the MRTP Commission, declare any other practice as restrictive. The practice might be declared restrictive under a notification.

The purpose of this provision was to enable the government to control any such restrictive practice which may come in vogue in future.

Gateways and Balancing Provisions

Restrictive trade practices falling in any one of the following categories were exempted from the definition of the RTPs:

- Agreements that were not against the public interest.
- Agreements that satisfied the 'rule of reason. Under this rule, a practice might be allowed keeping in view the balance between negative effects of restrictive agreement and the circumstances under which the restriction appears normal.
- Agreement in which reasonable restriction had to be provided to prevent injury to the public (persons or their premises) resulting from use, consumption or installation of the products.
- Restrictions the withdrawal of which was likely to cause denial of certain benefits to the public (e.g. restrictions regarding storage or transportation of poisonous or dangerous products).
- Restrictive practices that had to be undertaken in defense against such practices of rivals (for example, discriminatory discounts of a supplied product might be justified on the ground that such practice was widely prevalent among the competitors).
- Restrictive practices that might enable a buyer to negotiate better terms with a supplier who controlled a dominant part of trade in the market. The latter was likely to exploit the buyer by virtue of his dominant position and the restrictive practice on the part of the buyer might offset exploitation.
- Restrictive practices the withdrawal of which might hamper exports or create serious - unemployment.
- The restriction which was secondary or allied to an earlier one allowed by the MRTP Commission on the ground of public interest.
- Practices, which were covered by the 'principle of deminimis'. Under the principle, a practice is exempted if it has little adverse impact on existing competition.
- Restrictions, which were specifically allowed by the government. For example, if government controlled the price of a product under some existing law (e.g. Drug Price Control Order), it might attract the provisions of the Act.
- Restriction, which is necessary for the security of the country or for maintaining the supply of essential goods and services under Essential Commodities Act.

- Resale price maintenance per se bad and prohibited might be permitted by the Commission in case of certain products if the Commission was convinced that the removal of the condition would cause any one or more of the following:

a) Deterioration in the quality of goods to the detriment of the public interest, or

b) Increase in retail price would increase hurting the consumer interest; or,

c) The necessary supplies would be reduced or stopped injuring the consumer interest.

In addition to the above exemptions, the MRTP Commission may allow any restrictive practice that it considered reasonable after weighing the circumstance under which it prevails and its effect on competition or public in general.

The Control Mechanism for RTPS

As pointed out in the preceding sections relating to DGIR, all agreements containing any of the restrictive clauses mentioned above had to be registered with the DGIR within 60 days of the agreement giving details of the parties concerned and the terms of agreement. The registration requirement applied to any firm, trust, association or individual. The registration was for the information and database of the DGIR as well as the members of the public. Registered agreement was held void only after a complaint was received, enquiry conducted and 'cease and desist' orders passed. The registration, by itself was no positive or negative reflection on the agreement. The registration requirement motivated the concerned parties to avoid any restrictive clauses in the agreement and thus served as a deterrent.

Investigation

The MRTP Commission could initiate an enquiry into a particular restrictive trade practice on the basis of any of the following:

a) A complaint received from a consumer or a consumer organization; or,

b) A reference made by the central or state government; or,

c) Application received from BIFR; or,

d) Its own knowledge or information.

The Commission could start an enquiry irrespective of the fact whether the RTP in question was registered or not. The Commission can even investigate an expired agreement and deliver judgment so that the same or some other party might not resort to the practice again. The Commission, in its enquiry, heard all the parties concerned and its decisions fell into one of the following categories:

- The practice might be allowed if it was found not prejudicial to the public interest; or

- 'Cease and Desist Order' might be passed if it was found prejudicial to the public interest; or,
- The agreement might be modified as per orders of the Commission;
- Proceedings may be dropped if the party on its own promised to discontinue, altered or not to repeat the practice in future.

9.6 UNFAIR TRADE PRACTICES (UTPs)

The Concept and Types

UTPs were added to the MRTP Act in its 1984 amendment as Part-B to Chapter V. It was done on the recommendations of the Sacher Committee Report in order to protect the consumer from a wide variety of unfair trade practices, which exploit the consumers. The practices are also mentioned in the Consumer Protection Act, 1986 The Act identified the following categories of UTPs:

False or Misleading Representation. It could be in form of a statement, (written or oral) or visible presentation in public falsely representing:

- the quality or standard of a good or service;
- old goods as new;
- sponsorship or approval of goods or services suppliers;
- the need or utility of a good or service;
- guarantee of goods without proper tests;
- prices of goods or services; or
- The facts of goods and services of other persons.

A statement, which is unlikely to mislead a common man, may not be considered an UTP. Some of the main types of UTPs are the following:

- **Bargain Sale, Bait and Switch Selling.** It includes bargain sale without the real intention of offering the same. It could be offered for an unreasonably small time or for a small quantity or at the so-called bargain price without reference to the normal price. Similarly bargain price may be advertised as a bait to attract a customer so as to know his mind and preference for a product. Once attracted, the customer is offered other products, which is called 'switch selling'.
- **Free Gifts and Promotional Contests.** It covers 'free gifts or prizes which are actually not free and their price may be implicitly included in the price of the main product itself'. Similarly, giving a discount after increasing the price is also a UTP. The MRTP Commission considered promotional contests as per se bad and prejudicial to public

interest as these tempt people to buy products on considerations different from cost, quality or need.

- **Ignoring Product Safety Standards.** The practice refers to selling goods not conforming to the product standards prescribed by a competent authority and is essential to prevent injury or risk to the prospective consumers. Such standards may be in respect of composition, design, performance, finishing or packaging of a product.
- **Hoarding or Deliberate Destruction of Goods.** Such an act could be with the intention of reducing the supply, creating scarcity and raising the price of the product. Commodities Act also deals with such practices.

Control of UTPs

It must be clarified that the gateways, which were available under RTPs, were not available to UTPs. However, order on a UTP could be passed only if it was prejudicial to public interest. Similarly, a practice, which was specifically authorised by some existing law, was not actionable under the MRTP Act. The burden of proof that a practice is prejudicial to public interest lies on the complainant.

As a number of complaints about UTPs can be bogus, in genuine or frivolous, the MRTP Commission required ordering the DGIR to make a preliminary enquiry in this regard. The enquiry could be started on any of the bases as specified in case of RTPs and its order could fall in any one of the categories mentioned in case of RTPs. In addition, the Commission could order any information, statement or advertisement relating to a UTP to be published in public interest. The Commission could also order compensation for loss or damage to the affected person or party. The loss could be:

- **Directly pecuniary,** capable of being quantified;
- **Indirectly pecuniary,** like loss of profitable opportunity, reputation or credibility; or,
- **Non-pecuniary** loss like mental agony, physical illness etc.

9.7 SUMMARY

In the typical Indian business environment, MRTP Act had been the active example of conflict between growth and equity. The liberalization and dilution of the Act was considered necessary from time to time as it tended to scuttle industrial growth. As it placed limits, directly or indirectly, on the growth of the large firms, these could not attain competitiveness in the world markets. Paradoxically, the Act, during the larger part of its past tenure, sought

to promote competiveness in the economy by circumscribing the growth and competitiveness of the larger firms.

9.8 GLOSSSARY

Trade : Trade business industry or profession relating to production, supply distribution or control of goods and provision of services.

Trace Practices: Any practice is relation to carrying on any trade including any activity, which controls or affects price or method of trading.

Restrictive Trade Practice: An restrictive trade practice is one that had the effect of preventing distorting or restricting competition in any manner.

9.9 Check your progress

1. Fill in the blanks:

a) MRTP Act was extended to cover unfair trade practices in the year_____.

b) The MRTP commission was a _____body formed under the MRTP Act.

c) The chairman and the members of MRTP commission could be re-appointed but their total tenure in the commission could not exceed _____ years.

d) Orders of the MRTP commission were enforceable in the same way as the order of decree of a _____.

e) DGIR represents the _____ before the Supreme Court or a High Court.

f) _____ refers to circumstances under which reasonable trade practices would be allowed.

g) _____ practice is found prevail in dealings between traders at different levels in the distribution chain.

h) Giving a discount after increasing the price is also a _____.

9.10 ANSWERS TO CHECK YOUR PROGRESS

a) 1984

b) Quasi-judicial

c) 10

d) Court

e) MRTP Commission

f) Gateways

g) Resale price maintenance

h) UTP

9.11 TERMINAL QUESTIONS

1. What are the powers of MRTP Commission? Explain.
2. Explain the functions of Director-General of Investigator and Registration.
3. What are the 'Gateways of Public Interest'? How are these applied to MRTPs?
4. Discuss the control mechanism to MTPs, RTPs and UTP under the MRTP Act, What are the limitations of the mechanism?
5. Do you think that the MRTP Act has become irrelevant under the present economic policy based on liberalization privatization and globalization? Give reasons and examples in support of your answer.

9.12 REFERENCES

1. Govt. of India, The Monopolies and Restrictive Trade Practices Act.
2. Govt. of India, The Competition Act.
3. Ahluwalia, IJ and IMD Little, India's Economic Reforms and Development.
4. Gupta, C.B, Business Environment.
5. Adhikary, M, Economic Environment of Business.
6. Dhingra, IC, The Indian Economic: Environment and Policy.

UNIT-10 INTRODUCTION TO COMPETITION ACT, IMPROVEMENTS OVER MRTP ACT, 1969

STRUCTURE

10.1 Introduction

10.2 History and Establishment of Competition Regime

10.3 Salient Features of New Competition Policy

10.4 Components of Competition Act

10.5 Difference between MRTP and Competition Act

10.6 Summary

10.7 Glossary

10.8 Check Your Progress

10.9 Answers to Check Your Progress

10.10 Terminal Questions

10.11 Suggested Readings

OBJECTIVES

After reading this unit, you should be able to:

- Discuss the history and establishment of competition regime.
- Explain the salient features of new competition policy.
- Describe the components of competition act
- Distinguish between MRTP Act and Competition Act.

10.1 introduction

Since attaining Independence in 1947,India, for the better part of half a century thereafter, adopted and followed policies comprising what are known as Command-and-Control laws, rules, regulations and executive orders. The Competition Law of India, namely, the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act, for brief) was one such. It was in 1991 that widespread economic reforms were undertaken and consequently the march from Command-and-Control economy to an economy based more on free market principles commenced its stride. As is true of many countries, economic liberalization has taken root in India and the need for an effective competition regime has also been recognized. In the

context of the new economic policy paradigm, India has chosen to enact a new competition law called the Competition Act, 2002. The MRTP Act has metamorphosed into the new law, Competition Act, 2002. The new law is designed to repeal the extant MRTP Act. It is said that the competition act is, "an act to provide, keeping in view of the economic development of the country, for the establishment of a commission to prevent practices having adverse effect on competition in the market, to protect the interest of consumers and to ensure freedom of trade carried on by other participants in the markets, in India, and for matters connected there with or incidental thereto."

10.2 HISTORY AND ESTABLISHMENT OF COMPETITION REGIME

The Government of India appointed Mahalanobis Committee on Distribution of Incomes and Levels of Living which submitted its report in 1960 highlighting growing income inequalities in India in the post-independence period. Such inequality in income was seen as being contrary to the constitutional ideal of "Justice-Social, Economic and Political" as also provisions contained in the Directive Principles of State Policy read with reasonable restrictions on fundamental rights and constitutional freedom relating to trade and commerce. This led to constitution of a high-powered Monopolies Inquiry Commission (MIC) which submitted its report in 1965. Based on the MIC recommendations, India enacted its first competition law called the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act). The MRTP Act aimed at achieving twin objectives of preventing concentration of economic wealth by private enterprises, and ensuring non-prejudicial public interest in economic activities within India. The MRTP Act provided for a setting up of a Commission to implement the provisions of the law. In the wake of economic liberalization and reforms introduced by Government of India since 1991 with a view to meet the challenges and avail of the opportunities offered by globalization, the Raghavan Committee was set up in 1999 to assess the need to evolve India's competition regime. The Committee in its report of 2000 recommended setting up of a modern competition law and phasing out of the MRTP Act. The Competition Act, 2002 ("the Act") was enacted by Parliament of India in December 2002. It received the Presidential assent on 13th January, 2003, and as discussed below it is now being implemented. The Act has an overriding effect over any inconsistent provision in any other law for the time being in force,7 and provides for establishment of a commission to:

(a) Prevent practices having an adverse effect on competition,

(b) Promote and sustain the competition in the markets,

(c) Protect the interests of the consumers and

(d) Ensure the freedom of trade carried on by the other participants in the markets in India.

Pursuant to the Act, the Competition Commission of India (the Commission) was established and one Chairperson as also an Administrative Member of the Commission were appointed 14th October, 2003. However, before the Chairperson could enter office,
a public interest litigation was filed before the Supreme Court of India on 30th October, 2003 inter alia challenging the appointment on the grounds, amongst others, that since:

(a) The proposed Commission, to be headed by a bureaucrat, would replace the MRTP Commission which had all along been headed by a Judicial Member;

(b) Commission had adjudicatory functions which warranted that the Chairperson must be a Judicial Member.

The matter was finally disposed of by the Supreme Court of India in January 2005 noting that the Government of India was introducing an amendment to the law to constitute a judicial appellate authority while leaving the expert regulatory space to the Commission without answering the challenge.

In this backdrop, the Act was amended in September 2007 providing for setting up of a Competition Appellate Tribunal ("the Appellate Tribunal") headed by a Judicial Member to adjudicate appeals and the compensation claims arising out of the decisions of Commission.

Ever since its enactment in 2002, the provisions of the Act have selectively
been brought into effect. The substantive provisions being Sections 3 to 6, 18 to 21, 26 to 33, 35, 38-39, 41-48 and 66 are yet to be enforced.

On 28th February, 2009, the Government appointed the Chairperson and two other Members of the Commission, who have assumed office. Two other Members have been appointed and they too have assumed office recently. Processes for appointing the Chairperson and two Members of the (Appellate Tribunal) are at the active stage of consideration by the Supreme Court of India and the Government, respectively.

It is now expected that the Commission and Appellate Tribunal would become fully operational by the third quarter of 2009. The MRTP Act and the commission set up there under, is expected to be repealed and dissolved simultaneously.

10.3 SALIENT FEATURES OF NEW COMPETITION POLICY

Competition Law for India was triggered by Articles 38 and 39 of the Constitution of India. These Articles are a part of the Directive Principles of State Policy. Pegging on the Directive

Principles, the first Indian competition law was enacted in 1969 and was christened the Monopolies And Restrictive Trade Practices, 1969 (MRTP Act). Articles 38 and 39 of the Constitution of India mandate, inter alia, that the State shall strive to promote the welfare of the people by securing and protecting as effectively, as it may, a social order in which justice social, economic and political shall inform all the institutions of the national life, and the State shall, in particular, direct its policy towards securing

1. That the ownership and control of material resources of the community are so distributed as best to sub serve the common good; and
2. That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

In October 1999, the Government of India appointed a High Level Committee on Competition Policy and Competition Law to advise a modern competition law for the country in line with international developments and to suggest a legislative framework, which may entail a new law or appropriate amendments to the MRTP Act. The Committee presented its Competition Policy report to the Government in May 2000. The draft competition law was drafted and presented to the Government in November 2000. After some refinements, following extensive consultations and discussions with all interested parties, the Parliament passed in December 2002 the new law, namely, the Competition Act, 2002.

Following are the features of The Competition Act:

(a) The Industries (Development and Regulation) Act, 1951 may no longer be necessary except for location (avoidance of urban-centric location), for environmental protection and for monuments and national heritage protection considerations, etc.

(b) The Industrial Disputes Act, 1947 and the connected statutes need to be amended to provide for an easy exit to the non-viable, ill-managed and inefficient units subject to their legal obligations in respect of their liabilities.

(c) The Board for Industrial Finance & Restructuring (BIFR) formulated under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985 should be abolished.

(d) World Trade Organization: There should be necessary provision and teeth to examine and adjudicate upon anti-competition practices that may accompany or follow developments arising out of the implementation of WTO Agreements. Particularly, agreements relating to foreign investment, intellectual property rights, subsidies,

countervailing duties, anti-dumping measures, sanitary and phytosanitary measures, technical barriers to trade and Government procurement need to be reckoned in the Competition Policy/Law with a view to dealing with anti-competition practices. The competition law should be made extraterritorial.

(e) MRTP Act: It is suggested that

(i) The MRTP Act 1969 may be repealed and the MRTP Commission wound up. The provisions relating to unfair trade practices need not figure in the Indian Competition Act as they are presently covered by the Consumer Protection Act, 1986.

(ii) The pending UTP cases in the MRTP Commission may be transferred to the concerned consumer Courts under the Consumer Protection Act, 1986. The pending MTP and RTP Cases in MRTP Commission may be taken up for adjudication by the CCI from the stages they are in.

10.4 COMPONENTS OF COMPETITION ACT

The rubric of the new law, Competition Act, 2002 has essentially four compartments:

- Anti - Competition Agreements
- Abuse of Dominance
- Combinations Regulation
- Competition Advocacy
- These four compartments are described in the narrative that follows:

1. Anti – Competition Agreements

Firms enter into agreements, which may have the potential of restricting competition. A scan of the competition laws in the world will show that they make a distinction between "horizontal" and "vertical" agreements between firms. The former, namely the horizontal agreements are those among competitors and the latter, namely the vertical agreements are those relating to an actual or potential relationship of purchasing or selling to each other. A particularly pernicious type of horizontal agreements is the cartel. Vertical agreements are pernicious, if they are between firms in a position of dominance. Most competition laws view vertical agreements generally more leniently than horizontal agreements, as, *prima facie,* horizontal agreements are more likely to reduce competition than agreements between firms in a purchaser – seller relationship.

Horizontal Agreements

Agreements between two or more enterprises that are at the same stage of the production chain and in the same market constitute the horizontal variety. An obvious example that comes to mind is an agreement between enterprises dealing in the same product or products. But the market for the product(s) is critical to the question, if the agreement trenches the law. The Act has taken care to define the relevant market. To attract the provision of law, the products must be substitutes. If parties to the agreement are both producers or retailers (or wholesalers), they will be deemed to be at the same stage of the production chain.

A specific goal of competition policy/law is and needs to be the prevention of economic agents from distorting the competitive process either through agreements with other companies or through unilateral actions designed to exclude actual or potential competitors. It needs to control agreements among competing enterprises (horizontal agreements) on prices or other important aspects of their competitive interaction. Likewise, agreements between firms at different levels of the manufacturing or distribution processes (vertical agreements, for example between a manufacturer and wholesaler) which are likely to harm competition (albeit less harmful than horizontal agreements) need to be addressed in the competition policy/law. The foremost constituent of any competition policy/law is obviously the objective to foster competition and its obverse is the need to deal effectively against practices and conduct that subvert competition. The Act reckons these propositions.

In general the "rule of reason" test is required for establishing that an agreement is illegal. However, for certain kinds of agreements, the presumption is generally that they cannot serve any useful or pro–competitive purpose. Because of this presumption, the law makers do not

subject such agreements to the "rule of reason" test. They place such agreements in the *per se* illegal category (please see next section). The Act presumes that the following four types of agreements between enterprises, involved in the same or similar manufacturing or trading of goods or provision of services have an appreciable adverse effect on competition :

- Agreements regarding prices. These include all agreements that directly or indirectly fix the purchase or sale price.
- Agreements regarding quantities. These include agreements aimed at limiting or controlling production, supply, markets, technical development, investment or provision of services.
- Agreements regarding bids (collusive bidding or bid rigging). These include tenders submitted as a result of any joint activity or agreement.
- Agreements regarding market sharing. These include agreements for sharing of markets or sources of production or provision of services by way of allocation of geographical area of market or type of goods or services or number of customers in the market or any other similar way.

***Per Se* Illegality**

Such horizontal agreements, which include membership of cartels, are presumed to lead to unreasonable restrictions of competition and are therefore presumed to have an appreciable adverse effect on competition. In other words, they are *per se* illegal. This provision of *per se* illegality is rooted in the provisions of the US law and has a parallel in most legislations on the subject. The Australian law prohibits price fixing arrangements, boycotts and some forms of exclusive dealing. The new UK competition law, namely, Competition Act, 2000, endorses certain agreements to have an appreciable effect on competition (presumption is however rebuttable). A *per se* illegality would mean that there would be very limited scope for discretion and interpretation on the part of the prosecuting and adjudicating authorities. The underlying principle in such presumption of illegality is that the agreements in question have an appreciable anti-competitive effect. Barring the aforesaid four types of agreements, all the others will be subject to the "rule of reason" test in the Act.

Vertical Agreements

By and large, as noted earlier, vertical agreements will not be subjected to the rigors of competition law. However, where a vertical agreement has the character of distorting or

preventing competition, it will be placed under the surveillance of the law. For instance, the following types of agreements, *inter alia*, will be subjected to the "rule of reason" test.

- Tie – in arrangement;
- Exclusive supply agreement
- Exclusive distribution agreement;
- Refusal to deal;
- Resale price maintenance.

The Act lists the following factors to be taken into account for adjudicatory purposes to determine whether an agreement or a practice has an appreciable adverse effect on competition, namely,

a) creation of barriers to new entrants in the market,

b) driving existing competitors out of the market,

c) foreclosure of competition by hindering entry into the market,

d) accrual of benefits to consumers,

e) improvements in production or distribution of goods or provision of services, and

f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

Exceptions

The provisions relating to anti-competition agreements will not restrict the right of any person to restrain any infringement of intellectual property rights or to impose such reasonable conditions as may be necessary for the purposes of protecting any of his rights which have been or may be conferred upon him under the following intellectual property right statutes;

- the Copyright Act, 1957;
- the Patents Act, 1970;
- the Trade and Merchandise Marks Act, 1958 or the Trade Marks Act, 1999;
- the Geographical Indications of Goods (Registration and Protection) Act, 1999;
- the Designs Act, 2000;

- the Semi-conductor Integrated Circuits Layout-Design Act, 2000.

The rationale for this exception is that the bundle of rights that are subsumed in intellectual property rights should not be disturbed in the interests of creativity and intellectual/innovative power of the human mind. No doubt, this bundle of rights essays an anti-competition character, even bordering on monopoly power. But without protecting such rights, there will be no incentive for innovation, new technology and enhancement in the quality of products and services. However, it may be noted, that the Act does not permit any unreasonable condition forming a part of protection or exploitation of intellectual property rights. In other words, licensing arrangements likely to affect adversely the prices, quantities, quality or varieties of goods and services will fall within the contours of competition law as long as they are not in reasonable juxtaposition with the bundle of rights that go with intellectual property rights.

Yet another exception to the applicability of the provisions relating to anti-competition agreements is the right of any person to export goods from India, to the extent to which, an agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export. In a manner of speaking, export cartels are outside the purview of competition law. In most jurisdictions, export cartels are exempted from the application of competition law. A justification for this exemption is that most countries do not desire any shackles on their export effort in the interest of balance of trade and/or balance of payments. Holistically, however, exemption of export cartels is against the concept of free competition.

The Central Government has power under the Act to exempt from the application of the Act, or any provision thereof, a class of enterprises, a practice, an agreement etc.

2. Abuse of Dominance

"Dominant Position" has been appropriately defined in the Act in terms of the "position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market, in its favor". This definition may perhaps appear to be somewhat ambiguous and to be capable of different interpretations by different judicial authorities. But then, this ambiguity has a justification having regard to the fact that even a firm with a low market share of just 20% with the remaining 80% diffusedly held by a large number of competitors may be in a position to abuse its dominance, while a firm with say 60% market share with the remaining 40% held by a competitor may not be in a position

to abuse its dominance because of the key rivalry in the market. Specifying a threshold or an arithmetical figure for defining dominance may either allow real offenders to escape (like in the first example above) or result in unnecessary litigation (like in the second example above). Hence, in a dynamic changing economic environment, a static arithmetical figure to define "dominance" may, perhaps, be an aberration. With this suggested broad definition, the Regulatory Authority will have the freedom to fix errant undertakings and encourage competitive market practices, even if there is a large player around. Abuse of dominance is key for the Act, in so far as dominant enterprises are concerned.

It is important to note that the Act has been designed in such a way that its provisions on this count only take effect, if dominance is clearly established. As already stated, there is no single objective market share criterion that can be blindly used as a test of dominance. The Act seeks to ensure that only when dominance is clearly established, can abuse of dominance be alleged. Any ambiguity on this count could endanger large efficient firms.

Product Market and Geographical Market

Before assessing whether an undertaking is dominant, it is important, as in the case of horizontal agreements, to determine what the relevant market is. There are two dimensions to this – the product market and the geographical market. On the demand side, the relevant product market includes all such substitutes that the consumer would switch to, if the price of the product relevant to the investigation were to increase. From the supply side, this would include all producers who could, with their existing facilities, switch to the production of such substitute goods. The geographical boundaries of the relevant market can be similarly defined. Geographic dimension involves identification of the geographical area within which competition takes place. Relevant geographic markets could be local, national, international or occasionally even global, depending upon the facts in each case. Some factors relevant to geographic dimension are consumption and shipment patterns, transportation costs, perishability and existence of barriers to the shipment of products between adjoining geographic areas. For example, in view of the high transportation costs in cement, the relevant geographical market may be the region close to the manufacturing facility.

The Act posits the factors that would have to be considered by the adjudicating Authority in determining the "Relevant Product Market" and the "Relevant Geographic Market", reproduced herein below:

Relevant Product Market

- physical characteristics or end-use of goods;

- price of goods or service;
- consumer preferences;
- exclusion of in-house production;
- existence of specialized producers;
- classification of industrial products.

Relevant Geographic Market

- regulatory trade barriers;
- local specification requirements;
- national procurement policies;
- adequate distribution facilities;
- transport costs;
- language;
- consumer preferences;
- need for secure or regular supplies or rapid after-sales services.

The determination of 'relevant market' by the adjudicating Authority has to be done, having due regard to the 'relevant product market' and the 'relevant geographic market'.

Predatory Pricing

One of the most pernicious forms of abuse of dominance is the practice of predatory pricing. Predatory pricing occurs, where a dominant enterprise charges low prices over a long enough period of time so as to drive a competitor from the market or deter others from entering the market and then raises prices to recoup its losses. The greater the diversification of the activities of the enterprise in terms of products and markets and the greater its financial resources, the greater is its ability to engage in predatory behavior.

"Predatory price" is defined in the Act to mean the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors. Predatory pricing, therefore is a situation where a firm with market power prices below cost so as to drive competitors out of the market and, in this way, acquire or maintain a position of dominance. But there is a danger of confusing pro-competitive pricing with

predatory behavior. In reality, predation is only established after the fact i.e. once the rival has left the market and the predator has acquired a monopoly position in the market. However, any law to prevent is meaningful, only if it takes effect before the fact i.e. before the competitor has left the market.

Predatory pricing is a kind of Antitrust violation. The Monopolies and Restrictive Trade Practices Commission in India in the Modern Food Industries Ltd. (MRTP Commission, 1996) case observed that the essence of predatory pricing is pricing below cost with a view to eliminating a rival. Further, the Commission made it clear that the "mere offer of a price lower than the cost of production cannot automatically lead to an indictment of predatory pricing" and that evidence of "malafide intent to drive competitors out of business or to eliminate competition" is required. The logic underlying the caution of the Commission is that price-cutting may be for genuine reasons, for example in the case of inventory surplus. Price-cutting has therefore to be coupled with the *mens rea* of eliminating a competitor or competition to become an offence under Competition Act. The Act outlaws predatory pricing as an abuse of dominance.

Distinguishing predatory behavior from legitimate competition is difficult. The distinction between low prices, which result from predatory behavior and low prices, which result from legitimate competitive behavior is often very thin and not easily ascertainable. Indeed, it is sometimes argued that predatory behavior is a necessary concomitant of competition.

When does abuse of dominance attract the law?

To attract the provision of the Act, it needs to be established whether the restraints create a barrier to new entry or force existing competitors out of the market. The key issue is the extent to which these arrangements foreclose the market to manufacturers (inter-brand rivalry) or retailers (intra-brand rivalry) and the extent to which these raise rivals' costs and/or dampen existing competition. The costs of such arrangements need to be weighed against the benefits. For example, some of these restraints help to overcome the free-rider problem and allow for the exploitation of scale economies in retailing.

Before proceeding to the next compartment, a listing of factors from the Act constituting "dominance" and constituting "abuse of dominance" has been reproduced herein below.

Dominance is determined by taking into account one or more of the following factors:

- market share of the enterprise;
- size and resources of the enterprise;

- size and importance of the competitors;
- economic power of the enterprise including commercial advantages over competitors;
- vertical integration of the enterprise, or sale or service network of such enterprise;
- dependence of consumers on the enterprise;
- monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
- entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
- countervailing buying power;
- market structure and size of market;
- social obligations and social costs;
- relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;
- any other factor which the Commission may consider relevant for the inquiry.

Abuse of dominance having an appreciable adverse effect on competition occurs if an enterprise,

a) directly or indirectly, imposes unfair or discriminatory-

   (i) condition in purchase or sale of goods or service; or

   (ii) price in purchase or sale (including predatory price) of goods or service,

b) limits or restricts-

   (i) production of goods or provision of services or market therefore; or

   (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

c) indulges in practice or practices resulting in denial of market access; or

d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

It may therefore be seen that the Act does not frown upon dominance as such but frowns upon abuse of dominance.

3. Combinations Regulation

Combinations, in terms of the meaning given to them in the Act, include mergers, amalgamations, acquisitions and acquisitions of control, but for the purposes of the discussion that follows, mergers regulation has been reckoned. As in the case of agreements, mergers are typically classified into horizontal and vertical mergers. In addition, mergers between enterprises operating in different markets are called conglomerate mergers. Mergers are a legitimate means by which firms can grow and are generally as much part of the natural process of industrial evolution and restructuring as new entry, growth and exit. From the point of view of competition policy, it is horizontal mergers that are generally the focus of attention. As in the case of horizontal agreements, such mergers have a potential for reducing competition. In rare cases, where an enterprise in a dominant position makes a vertical merger with another firm in an adjacent market to further entrench its position of dominance, the merger may provide cause for concern. Conglomerate mergers should generally be beyond the purview of any law on mergers.

A merger leads to a "bad" outcome only if it creates a dominant enterprise that subsequently abuses its dominance. To some extent, the issue is analogous to that of agreements among enterprises and also overlaps with the issue of dominance and its abuse, discussed earlier. Viewed in this way, there is probably no need to have a separate law on mergers. The reason that such a provision exists in most laws is to pre-empt the potential abuse of dominance where it is probable, as subsequent unbundling can be both difficult and socially costly.

Thus, the general principle, in keeping with the overall goal, is that mergers should be challenged only if they reduce or harm competition and adversely affect welfare.

The Act on Combinations Regulation

The Act makes it voluntary for the parties to notify their proposed agreement or combinations to the Mergers Commission, if the aggregate assets of the combining parties have a value in excess of Rs. 1000 crores (about US $ 220 million) or turnover in excess of Rs. 3000 crores

(about US $ 660 million). The combination as defined by the Act includes mergers, amalgamations, acquisitions of shares, voting rights or assets and acquisitions of control. In the event either of the combining parties is outside India or both are outside, the threshold limits are $500 million for assets and $1500 million for turnover.

If one of the merging parties belongs to a group, which controls it, the threshold limits are Rs. 4000 crores (about US $ 880 million) in terms of assets and Rs. 12000 crores (about US $ 2640 million) in terms of turnover. If the group has assets or turnover outside India also, the threshold limits are $2 billion for assets and $6 billion for turnover. For this purpose a group means two or more enterprises which directly or indirectly have:

- The ability to exercise 26% or more of the voting rights in the other enterprise; or
- The ability to appoint more than half the members of the Board of Directors in the other enterprise; or
- The ability to control the affairs of the other enterprise.

Control (which expression occurs in the third bullet defining 'group' above), has also been defined in the Act. Control includes controlling the affairs or management by

(i) one or more enterprises, either jointly or singly, over another enterprise or group;

(ii) one or more groups, either jointly or singly, over another group or enterprise.

The threshold limits of assets and of turnover would be revised every two years on the basis of the Wholesale Price Index or fluctuations in exchange rate of rupee or foreign currencies.

The Act has listed the following factors to be taken into account for the purpose of determining whether the combination would have the effect of or be likely to have an appreciable adverse effect on competition.

- ❖ The actual and potential level of competition through imports in the market;
- ❖ The extent of barriers to entry to the market;
- ❖ The level of combination in the market;
- ❖ The degree of countervailing power in the market;
- ❖ The likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
- ❖ The extent of effective competition likely to sustain in a market;
- ❖ The extent to which substitutes are available or are likely to be available in the market;

- The market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
- The likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
- The nature and extent of vertical integration in the market;
- The possibility of a failing business;
- The nature and extent of innovation;
- Relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;
- Whether the benefits of the combination outweigh the adverse impact of the combination, if any.

Before the Act was passed by the Parliament, the draft law was placed on the website and a number of suggestions were received particularly, on the provisions relating to combinations regulation. Many economists, experts and officials in the Government were of the view that at the present level of India's economic development, combinations control should not lead to the shying away of foreign direct investment and participation by major international companies in economic activities through the route of mergers and acquisitions. They suggested that combination approvals (above the specified threshold limits) may not be made mandatory. Notification of combinations may on the other hand be made voluntary, albeit with the risk of the discovery of anti-competitive mergers at a later date with the concomitant cost of demergers etc. Another suggestion was to increase the threshold limit by doubling the limits in the draft law. All these suggestions were given due consideration by the Government and the draft law refined before it was placed before the Parliament. The trigger cause in the aforesaid suggestions was the felt need for companies in India to grow in size in order to become globally competitive.

The Act has made the pre-notification of combinations voluntary for the parties concerned. However, if the parties to the combination choose not to notify the CCI, as it is not mandatory to notify, they run the risk of a post-combination action by the CCI, if it is discovered subsequently, that the combination has an appreciable adverse effect on competition. There is a rider that the CCI shall not initiate an inquiry into a combination after the expiry of one year from the date on which the combination has taken effect.

The Regulatory Authority, namely, the Mergers Bench of the Competition Commission of India is mandated by the Act to adjudicate on mergers by weighing potential efficiency losses against potential gains.

In order that the Competition Commission of India (Mergers Bench) should not delay its adjudication on whether a merger may pass through or may be stopped because of its anti-competitive nature, the Act admonishes the Regulatory Authority to hand in its adjudicatory decision within 90 working days, lest the merger will be deemed to have been approved. The Act also provides for limiting the Regulatory Authority's power to ask for information from the merging parties within a time frame of 15 working days with a corresponding obligation on the merging parties to furnish the information within a further 15 days. Thus by law, the sequencing of the adjudicatory exercise has been set within specific time frames, so that possible delays are avoided. Furthermore, mergers have to be approved by the State High Courts under the Companies Act, 1956. Such approvals take about 6 months to one year or even more and the 90 working days time limit for the Mergers Bench will be subsumed in that period.

4. Competition Advocacy

In line with the High Level Committee's recommendation, the Act extends the mandate of the Competition Commission of India beyond merely enforcing the law (High Level Committee, 2000). Competition advocacy creates a culture of competition. There are many possible valuable roles for competition advocacy, depending on a country's legal and economic circumstances. A recent OECD Report noted as follows:

"In virtually every member country where significant reform efforts have been undertaken, the competition agencies have been active participants in the reform process. This ‘advocacy’ … can include persuasion offered behind the scenes, as well as publicity outside of formal proceedings. Some competition agencies have the power, at least in theory, to bring formal challenges against anti-competitive actions by other agencies or official or quasi-official bodies. More indirect, but still visible, is formal participation in another agency's public hearings and deliberations. What is appropriate depends on the particular institutional setting" (OECD, 1997).

The Regulatory Authority under the Act, namely, Competition Commission of India (CCI), in terms of the advocacy provisions in the Act, is enabled to participate in the formulation of the country's economic policies and to participate in the reviewing of laws related to competition at the instance of the Central Government. The Central Government can make a reference to

the CCI for its opinion on the possible effect of a policy under formulation or of an existing law related to competition. The Commission is mandated to proffer its opinion to the Central Government within 60 days of receiving the reference. The Commission will therefore be assuming the role of competition advocate, acting pro-actively to bring about Government policies that lower barriers to entry, that promote deregulation and trade liberalization and that promote competition in the market place. The Act seeks to bring about a direct relationship between competition advocacy and enforcement of competition law. One of the main objectives of competition advocacy is to foster conditions that lead to a more competitive market structure and business behavior without the direct penalty loaded intervention of the CCI. Under the scheme of the Act, the CCI's opinion will constitute an important input for the Government to finalize its law or policy, in so far as it impacts on competition.

In order to promote competition advocacy and create awareness about competition issues and also to accord training to all concerned (including the Chairperson and Members of the CCI and its officials), the Act enjoins the establishment of a fund christened the Competition Fund. The Fund will be credited with the fees received for filing complaints and applications under the law, costs levied on the parties, grants and donations from the Government, and the interest accrued thereon.

The four main compartments having been discussed above, a description of how the CCI is designed, follows, which is an important part of the Act.

10.5 DIFFERENCE BETWEEN MRTP AND COMPETITION ACT

The following are the basic differences between MRTP and Competition Act:

S. no	MRTP ACT, 1969	COMPETITION ACT, 2002
1	It is based on the pre-liberalization and globalization era.	It is based on the post-reforms scenario.
2	The objective of the Act is to prevent concentration of economic power to common detriment to control of monopolies, prevention of monopolistic and restrictive trade practices.	The objective of the Act is prevent practices having adverse effect on competition and to promote as well as sustaining the competition to protect consumer interests at market place and ensuring freedom of trade.
3	It lists out 14 offences, which are against the principle of natural justice.	It recognizes only 4 offences, which are deemed to be against the principle of natural justice.

4	MRTP Commission has the power to pass only "Cease" and "Desist" orders.	The Competition Act can pass an order to prevent and punish such of those activities, which abuses competition.
5	The MRTP Act did not provide for the formation of fund for its activities.	The Competition Act provides competition fund for promotion of competition advocacy and creation of awareness about competitive issues and training as may be prescribed in its rules.
6	Entity having status of dominant position is itself considered as bad.	Entity having status of dominant position is not considered as bad. Whereas abuse of dominant position affecting consumer interest is considered as immoral.
7	In general registration of agreement was mandatory.	It does not lay down any such requirement for registration of agreements.
8	The definition of 'group' was wider.	The 'group' definition has been simplified.
9	The size of the firm, is the factor for determining dominance etc.	It focuses on the firm's structure not on the size factor.
10	MRTP Commission role was only advisory.	Competition Commission can initiate the suo motu proceedings and levy penalties.
11	MRTP Commission dealt with the unfair trade practices.	The cases relating to unfair trade practices will be transferred to consumer courts.
12	Focused on consumer interest at large.	Focuses on public at large.
13	The chairman of MRTP Commission was appointed by Central Government.	The chairman of the commission will be appointed by a committee consisting of retired judiciary, person having professional expertise in various fields of trade commerce, industry, finance etc.

10.6 SUMMARY

The message is loud yet clear that a well planned exhaustive competition compliance programme can be of great benefit to all enterprises irrespective of their size, area of operation, jurisdiction involved, nature of products supplied or services rendered and the same is essential for companies, its directors and the delegate key corporate executives to avoid insurmountable hardships of monetary fines, civil imprisonment, beside loss of hard-earned reputation when the Competition Authorities, the media and others reveal the

misdeeds in public. In the changed scenario, India do needs a fresh law for competition and a new regulatory authority, which under this policy is the Competition Commission of India. The law will serve the purpose only if it is made independently, runs independently and is less expensive.

10.7 GLOSSARY

Horizontal Agreements: Agreements between two or more enterprises that are at the same stage of the production chain and in the same market constitute the horizontal variety.

Per Se Illegality: A *per se* illegality would mean that there would be very limited scope for discretion and interpretation on the part of the prosecuting and adjudicating authorities.

Predatory price: It is defined in the Act to mean the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

10.8 Check Your Progress

Filling the blanks:

(a) The Competition Act, 2002 was enacted by Parliament of India in December 2002 and received the Presidential assent on_____, 2003.

(b) Competition Law for India was triggered by Articles _____of the Constitution of India.

(c) Vertical agreements are pernicious, if they are between firms in a position of _____.

(d) Geographic dimension involves identification of the geographical area within which _____takes place.

(e) Mergers between enterprises operating in different markets are called _____mergers.

(f) Competition Act focuses on the firm's structure not on the _____factor.

10.9 ANSWERS TO CHECK YOUR PROGRESS

1. (a) 13th January
   (b) 38 and 39
   (c) Dominance
   (d) Competition
   (e) Conglomerate
   (f) Size

10.10 TERMINAL QUESTIONS

1. Write about the history and establishment of Competition Act.

2. What are the salient features of new competition policy? Explain.
3. Critically evaluate the various components of Competition Act.
4. Distinguish between MRTP Act and Competition Act.

10.11 REFERENCES

1. Raviner Kumar, Legal Aspects of Business.
2. PPS Gogna, Mercantile Law
3. N D Kapoor, Elements of Mercantile Law.
4. M C Kuchhal, Mercantile Law including Company Law
5. B S Moshal, Mercantile Law
6. G K kapoor, Business Law

UNIT-11 AUTHORITIES UNDER COMPETITION ACT

STRUCTURE

11.1 Introduction

11.2 Objectives of The Competition Act

11.3 Competition Commission of India

11.4 Duties, Powers and Functions of Commission

11.5 Duties of Director General

11.6 Competition Appellate Authority

11.7 Summary

11.8 Glossary

11.9 Check Your Progress

11.10 Answers to Check Your Progress

11.11 Terminal and Questions

11.12 References

OBJECTIVES

After reading this lesson, you should be able to:

- Explain the objectives of The Competition Act
- Elucidate the procedure of establishment and composition of Competition Commission of India
- Discuss the duties, powers and functions of Commission
- Describe the duties of Director-General
- Explain the establishment, composition and appointment of Appellate Tribunal.

11.1 introduction

The Competition Act is an Act to provide, keeping in view the economic development of the country, for the establishment of a Commission (known as Competition Commission or just Commission) to prevent practices having an adverse effect on competition, to promote d sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India, and for matters connected therewith or incidental thereto. It was enacted by the Parliament in the Fifty-third Year of Republic of India (i.e., 2002) and extends to the whole of India except the State of Jammu and Kashmir – which is covered under a State-level law. It came into force on the date notified by the Central Government in the Official Gazette. The Monopolies and Restrictive Trade Practices Act, 1969, was repealed and the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of the said Act stood dissolved. The Competition Bill having been passed by the both Houses of parliament received the assent of the President on 13th January 2003. It came on the Statute Book as "The Competition Act, 2002".

11.2 OBJECTIVES OF THE COMPETITION ACT

The preamble of the Act while laying down the objectives states that, "An act to provide, keeping in view of the economic development of the country, for the establishment of a commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto".

The following are the objectives of the Act:

1. To prevent practices having adverse effect on competition;
2. To promote and sustain competition in market;
3. To protect the interest of consumers; and
4. To ensure freedom of trade carried on by other participants in markets in India.

11.3 COMPETITION COMMISSION OF INDIA

Establishment of Commission (Section 7)

With effect from such date as the Central Government may, by notification, appoint, there shall be established, for the purposes of this Act, a Commission to be called the "Competition Commission of India" hereinafter called 'Commission' or CCI) [Section 7(1)].

Corporate Body: The Commission shall be a body corporate by the name aforesaid having perpetual succession and a common seal with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract and shall, by the said name, sue or be sued [Section 7(2)].

Offices: The head office of the Commission shall be at such place as the Central Government may decide from time to time [Section 7(3)].

The Commission may establish offices at other places in India [Section 7(4)].

Composition of Commission [Section 8]

The Commission shall consist of a Chairperson and not less than two and not more than six other Members to be appointed by the Central Government [Section 8(1)].

Qualifications: The Chairperson and every other Member shall be a person of ability, integrity and standing and who has special knowledge of, and such professional experience of not less than fifteen years in, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters, including competition law and policy, which in the opinion of the Central Government, may be useful to the Commission.

The Chairperson and other Members shall be whole-time Members [Section 8(3)].

Selection Committee for Chairperson and Members of Commission (Section 9)

The Chairperson and other Members of the Commission shall be appointed by the Central Government from a panel of names recommended by a Selection Committee consisting of –

a)	the Chief Justice of India or his nominee	----	Chairperson;
b)	the Secretary in the Ministry of Corporate Affairs	----	Member;
c)	the Secretary in the Ministry of Law and Justice	----	Member;
d)	two experts of repute who have special knowledge of, and professional experience in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters including competition law and policy [Section 9(1)].	----	Members

The term of the Selection Committee and the manner of selection of panel of names shall be such as may be prescribed [Section 9(2)].

Term of office of Chairperson and other Members (Section 10)

The Chairperson and every other Member shall hold office as such for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment. However, no Chairperson or other Members shall not hold office as such after he has attained the age of sixty-five years [Section 10(1)].

Vacancy: A vacancy caused by the resignation or removal of the Chairperson or any other Member under section 11 or by death or otherwise shall be filled by fresh appointment in accordance with the provisions of Section 9 [Section 10(2)].

Oath of office: The Chairperson and every other Member shall, before entering upon his office, make and subscribe to an oath of office and of secrecy in such form, manner and before such authority, as may be prescribed [Section 10(3)].

In the event of the occurrence of a vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the senior-most Member shall act as the Chairperson, until the date on which a new Chairperson, appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office [Section 10(4)].

When the Chairperson is unable to discharge his functions owing to absence, illness or any other cause, the senior-most Member shall discharge the functions of the Chairperson until the date on which the Chairperson resumes the charge of his functions [Section 10(5)].

Resignation, removal and suspension of Chairperson and other members (Section 11)

Resignation: The Chairperson or any other Member may, by notice in writing under his hand addressed to the Central Government, resign his office provided that the Chairperson or a Member shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is the earliest [Section 11(1)].

Removal: Notwithstanding anything contained in Section 11(1), the Central Government may, by order, remove the Chairperson or any other Member from his office if such Chairperson or Member, as the case may be,—

(a) is, or at any time has been, adjudged as an insolvent; or

(b) has engaged at any time, during his term of office, in any paid employment; or

(c) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions as a Member; or

(e) has so abused his position as to render his continuance in office prejudicial to the public interest; or

(f) has become physically or mentally incapable of acting as a Member [Section 11(2)].

Restriction on employment of Chairperson and other Members in certain cases (Section 12)

The Chairperson and other Members shall not, for a period of two years from the date on which they cease to hold office, accept any employment in, or connected with the management or administration of, any enterprise which has been a party to a proceeding before the Commission under this Act.

Administrative powers of Chairperson (Section 13)

The Chairperson shall have the powers of general superintendence, direction and control in respect of all administrative matters of the Commission. However, the Chairperson may delegate such of his powers relating to administrative matters of the Commission, as he may think fit, to any other Member or officer of the Commission.

Salary and allowances and other terms and conditions of service of Chairperson and other Members (Section 14)

The salary, and the other terms and conditions of service, of the Chairperson and other members, including travelling expenses, house rent allowance and conveyance facilities, sumptuary allowance and medical facilities shall be such as may be prescribed [Section 14(1)].

The salary, allowances and other terms and conditions of service of the Chairperson or a Member shall not be varied to his disadvantage after appointment [Section 14(2)].

Vacancy, etc. not to invalidate proceedings of Commission (Section 15)

No act or proceeding of the Commission shall be invalid merely by reason of—

(a) any vacancy in, or any defect in the constitution of, the Commission; or

(b) any defect in the appointment of a person acting as a Chairperson or as a Member; or

(c) any irregularity in the procedure of the Commission not affecting the merits of the case.

Appointment of Director General, etc. (Section 16)

The Central Government may, by notification, appoint a Director General for the purposes of assisting the Commission in conducting inquiry into contravention of any of the provisions of this Act and for performing such other functions as are, or may be, provided by or under this Act [Section 16(1)].

The number of other Additional, Joint, Deputy or Assistant Directors General or such officers or other employees in the office of Director General and the manner of appointment of such Additional, Joint, Deputy or Assistant Directors General or such officers or other employees shall be such as may be prescribed [Section 16(1A)].

Every Additional, Joint, Deputy and Assistant Directors General or [such officers or other employees,] shall exercise his powers, and discharge his functions, subject to the general control, supervision and direction of the Director General [Section 16(2)].

Salary: The salary, allowances and other terms and conditions of service of the Director General and Additional, Joint, Deputy and Assistant Directors General or, such officers or other employees, shall be such as may be prescribed [Section 16(3)].

Appointment from persons of integrity and ability: The Director General and Additional, Joint, Deputy and Assistant Directors General or such officers or other employees, shall be appointed from amongst persons of integrity and outstanding ability and who have experience in investigation, and knowledge of accountancy, management, business, public administration, international trade, law or economics and such other qualifications as may be prescribed [Section 16(4)].

Appointment of Secretary, experts, professionals and officers and other employees of Commission (Section 17)

The Commission may appoint a Secretary and such officers and other employees as it considers necessary for the efficient performance of its functions under this Act [Section 17(1)].

The salaries and allowances payable to and other terms and conditions of service of the Secretary and officers and other employees of the Commission and the number of such officers and other employees shall be such as may be prescribed [Section 17(2)].

The Commission may engage, in accordance with the procedure specified by regulations, such number of experts and professionals of integrity and outstanding ability, who have special knowledge of, and experience in, economics, law, business or such other disciplines related to competition, as it deems necessary to assist the Commission in the discharge of its functions under this Act [Section 17(3)].

11.4 DUTIES, POWERS AND FUNCTIONS OF COMMISSION

Duties of Commission (Section 18)

Subject to the provisions of this Act, it shall be the duty of the Commission to

a. eliminate practices having adverse effect on competition.
b. promote and sustain competition.
c. protect the interests of consumers, and
d. ensure freedom of trade carried on by other participants, in markets in India.

Inquiry into certain agreements and dominant position of enterprise (Section 19)

Inquiry: The Commission may inquire into any alleged contravention of the provisions contained in subsection (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—

(a) receipt of any information, in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or

(b) a reference made to it by the Central Government or a State Government or a statutory authority [Section 19(1)].

The powers and functions of the Commission shall include the powers and functions specified in sub-sections (*3*) to (*7*) of Section 19 [Section 19(2)].

Consideration of factors which cause adverse effect on competition: The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under Section 3, have due regard to all or any of the following factors, namely:—

(a) creation of barriers to new entrants in the market;

(b) driving existing competitors out of the market;

(c) foreclosure of competition by hindering entry into the market;

(d) accrual of benefits to consumers;

(e) improvements in production or distribution of goods or provision of services;

(f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services [Section 19(3)].

Inquiry whether an enterprise enjoys dominant position: The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under Section 4, have due regard to all or any of the following factors, namely:—

(a) market share of the enterprise;

(b) size and resources of the enterprise;

(c) size and importance of the competitors;

(d) economic power of the enterprise including commercial advantages over competitors;

(e) vertical integration of the enterprises or sale or service network of such enterprises;

(f) dependence of consumers on the enterprise;

(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;

(h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;

(i) countervailing buying power;

(j) market structure and size of market;

(k) social obligations and social costs;

(/) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;

(m) any other factor which the Commission may consider relevant for the inquiry [Section 19(5)].

For determining whether a market constitutes a "relevant market" for the purposes of this Act, the Commission shall have due regard to the "relevant geographic market" and "relevant product market" [Section 19(5)].

Determination of relevant good market: The Commission shall, while determining the "relevant geographic market", have due regard to all or any of the following factors, namely:—

(a) regulatory trade barriers;

(b) local specification requirements;

(c) national procurement policies;

(d) adequate distribution facilities;

(e) transport costs;

(f) language;

(g) consumer preferences;

(h) need for secure or regular supplies or rapid after-sales services [Section 19(6)].

Determination of relevant product market: The Commission shall, while determining the "relevant product market", have due regard to all or any of the following factors, namely:—

(a) physical characteristics or end-use of goods;

(b) price of goods or service;

(c) consumer preferences;

(d) exclusion of in-house production;

(e) existence of specialized producers;

(f) classification of industrial products [Section 19(7)].

Inquiry into combination by Commission (Section 20)

Inquiry into acquisition, control and combination: The Commission may, upon its own knowledge or information relating to acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of section 5 or merger or amalgamation referred to in clause (c) of that section, inquire into whether such a combination has caused or is likely to cause an appreciable adverse effect on competition in India.

The Commission shall not initiate any inquiry under this sub-section after the expiry of one year from the date on which such combination has taken effect [Section 20(1)].

The Commission shall, on receipt of a notice under sub-section (2) of section 6, inquire whether a combination referred to in that notice or reference has caused or is likely to cause an appreciable adverse effect on competition in India [Section 20(2)].

Factors having effect on combination: For the purposes of determining whether a combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market, the Commission shall have due regard to all or any of the following factors, namely:—

(a) actual and potential level of competition through imports in the market;

(b) extent of barriers to entry into the market;

(c) level of combination in the market;

(d) degree of countervailing power in the market;

(e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;

(f) extent of effective competition likely to sustain in a market;

(g) extent to which substitutes are available or arc likely to be available in the market;

(h) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;

(i) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;

(j) nature and extent of vertical integration in the market;

(k) possibility of a failing business;

(/) nature and extent of innovation;

(m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;

(n) whether the benefits of the combination outweigh the adverse impact of the combination, if any [Section 20(4)].

Reference by Commission (Section 21A)

1. Where in the course of a proceeding before any statutory authority an issue is raised by any party that any decision which such statutory authority has taken or proposes to take is or would be, contrary to any of the provisions of this Act, then such statutory authority may make a reference in respect of such issue to the Commission.

However, the Commission, may, suo moto, make such a reference to the Statutory Authority.

2. On receipt of a reference under sub-section (*1*), the Commission shall give its opinion, within sixty days of receipt of such reference, to such statutory authority which shall consider the opinion of the Commission and thereafter, give its findings recording reasons thereof on the issues referred to in the said opinion.

Meetings of Commission (Section 22)

1. The Commission shall meet at such times and places, and shall observe such rules and procedure in regard to the transaction of business at its meetings as may be provided by regulations.
2. The Chairperson, if for any reason, is unable to attend a meeting of the Commission, the senior-most Member present at the meeting, shall preside at the meeting.
3. All questions which come up before any meeting of the Commission shall be decided by a majority of the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the Member presiding, shall have a second or/casting vote.

The quorum for such meeting shall be three Members.

Procedure for inquiry under Section 19

Section 26 lays down the procedure for conducting an inquiry under Section 19 of the Competition Act. Section 26 has been substituted by the Competition (Amendment) Act, 2006. The amended provisions for the conduct of inquiry are given as under:

On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter:

Provided that if the subject matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information [Section 26(1)].

Where on receipt of a reference from the Central Government or a State Government or a statutory authority or information received under section 19, the Commission is of the opinion that there exists no prima facie case, it shall close the matter forthwith and pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be [Section 26(2)].

The Director General shall, on receipt of direction under sub-section (*1*), submit a report on his findings within such period as may be specified by the Commission [Section 26(3)].

The Commission may forward a copy of the report referred to in sub section (*3*) to the parties concerned:

Provided that in case the investigation is caused to be made based on reference received from the Central Government or the State Government or the statutory authority, the Commission shall forward a copy of the report referred to in sub-section (*3*) to the Central Government or the State Government or the statutory authority, as the case may be [Section 26(4)].

If the report of the Director General referred to in sub-section (*3*) recommends that there is no contravention of the provisions of this Act, the Commission shall invite objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be, on such report of the Director General [Section 26(5)].

If, after consideration of the objections and suggestions referred to in sub section (*5*), if any, the Commission agrees with the recommendation of the Director General, it shall close the matter forthwith and pass such orders as it deems fit and communicate its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be [Section 26(6)].

If, after consideration of the objections or suggestions referred to in sub section (*5*), if any, the Commission is of the opinion that further investigations is called for, it may direct

further investigation in the matter by the Director General or cause further inquiry to be made by in the matter or itself proceed with further inquiry in the matter in accordance with the provisions of this Act [Section 26(7)].

If the report of the Director General referred to in sub-section (3) recommends that there is contravention of any of the provisions of this Act, and the Commission is of the opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of this Act [Section 26(8)].

Power to issue interim orders (Section 33)

Where during an inquiry, the Commission is satisfied that an act in contravention of sub-section (1) of section 3 or sub-section (1) of section 4 or section 6 has been committed and continues to be committed or that such act is about to be committed, the Commission may, by order, temporarily restrain any party from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to such party, where it deems it necessary.

Appearance before Commission (Section 35)

A person or an enterprise or the Director General may either appear in person or authorize one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of his or its officers to present his or its case before the Commission.

Power of Commission to regulate its own procedure (Section 36)

In the discharge of its functions, the Commission shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government, the Commission shall have the powers to regulate its own procedure.

The Commission shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:-

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavit;

(d) issuing commissions for the examination of witnesses or documents;

(e) requisitioning, subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), any public record or document or copy of such of record or document from any office [Section 36(2)]

The Commission may call upon such experts, from the field of economics, commerce, accountancy, international trade or from any other discipline as it deems necessary to assist the Commission in the conduct of any inquiry by it [Section 36(3)]

The Commission may direct any person:

(a) to produce before the Director General or the Secretary or an officer authorized by it, such books, or other documents in the custody or under the control of such person so directed as may be specified or described in the direction, being documents relating to any trade, the examination of which may be required for the purposes of this Act;

(b) to furnish to the Director General or the Secretary or any other officer authorized by it, as respects the trade or such other information as may be in his possession in relation to the trade carried on by such person, as may be required for the purposes of this Act [Section 36(3)]

Execution of orders of Commission imposing monetary penalty (Section 39)

If a person fails to pay any monetary penalty imposed on him under this Act, the Commission shall proceed to recover such penalty, in such manner as may be specified by the regulations [Section 39(1)]

In a case where the Commission is of the opinion that it would be expedient to recover the penalty imposed under this Act in accordance with the provisions of the Income-tax Act, 1961 (43 of 1961), it may make a reference to this effect to the concerned income-tax authority under that Act for recovery of the penalty as tax due under the said Act [Section 39(2)]

Where a reference has been made by the Commission under sub-section (2) for recovery of penalty, the person upon whom the penalty has been imposed shall be deemed to be the assesses in default under the Income Tax Act, 1961 (43 of 1961) and the provisions contained in sections 221 to 227, 228A, 229, 231 and 232 of the said Act and the Second Schedule to that Act and any rules made there under shall, in so far as may be, apply as if the said provisions were the provisions of this Act and referred to sums by way of penalty imposed under this Act instead of to income-tax and sums imposed by way of penalty, fine,

and interest under the Income–tax Act, 1961 (43 of 1961) and to the Commission instead of the Assessing Officer [Section 39(3)].

11.5 DUTIES OF DIRECTOR GENERAL

The Director General shall, when so directed by the Commission, assist the Commission in investigating into any contravention of the provisions of this Act or any rules or regulations made there under [Section 41(1)].

The Director General shall have all the powers as are conferred upon the Commission under subsection (2) of section 36 [Section 41(1)].

Without prejudice to the provisions of sub-section (2), sections 240 and 240A of the Companies Act, 1956 (1 of 1956), so far as may be, shall apply to an investigation made by the Director General or any other person investigating under his authority, as they apply to an inspector appointed under that Act [Section 41(1)].

Penalty for failure to comply with directions of Commission and director General: If any person fails to comply with a direction given by the Director-General while exercising powers referred to Section 41(2), the commission shall impose on such person a penalty of Rs. 1,00,000 for each day during which such failure continues.

11.6 COMPETITION APPELLATE TRIBUNAL

Establishment of Appellate Tribunal (Section 53A)

The Central Government shall, by notification, establish an Appellate Tribunal to be known as Competition Appellate Tribunal –

(a) to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under sub-sections (2) and (6) of section 26, section 27, section 28, section 31, section 32, section 33, section 38, section 39, section 43, section 43A, section 44, section 45 or section 46 of the Act;

(b) to adjudicate on claim for compensation that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any finding of the Commission or under section 42A or under sub-section(2) of section 53Q of this Act, and pass orders for the recovery of compensation under section 53N of this Act [Section 53A (1)].

The Headquarter of the Appellate Tribunal shall be at such place as the Central Government may, by notification, specify.

Appeal to Appellate Tribunal (Section 53B)

The Central Government or the State Government or a local authority or enterprise or any person, aggrieved by any direction, decision or order referred to in clause (a) of section 53A may prefer an appeal to the Appellate Tribunal [Section 53AB(1)].

Every appeal under sub-section (1) shall be filed within a period of sixty days from the date on which a copy of the direction or decision or order made by the Commission is received by the Central Government or the State Government or a local authority or enterprise or any person referred to in that sub-section and it shall be in such form and be accompanied by such fee as may be prescribed. However, the Appellate Tribunal may entertain an appeal after the expiry of the said period of sixty days if it is satisfied that there was sufficient cause for not filing it within that period [Section 53B (2)].

On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against [Section 53B (3)].

The Appellate Tribunal shall send a copy of every order made by it to the Commission and the parties to the appeal [Section 53B (4)].

The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavor shall be made by it to dispose of the appeal within six months from the date of receipt of the appeal [Section 53B (5)].

Composition of Appellate Tribunal (Section 53C)

The Appellate Tribunal shall consist of a Chairperson and not more than two other members to be appointed by the Central Government.

Qualifications for appointment of Chairperson and Members of Appellate Tribunal (Section 53D)

The Chairperson of the Appellate Tribunal shall be a person, who is, or has been a Judge of the Supreme Court or the Chief Justice of a High Court.

A member of the Appellate Tribunal shall be a person of ability, integrity and standing having special knowledge of, and professional experience of not less than twenty five years in, competition matters including competition law and policy, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public

affairs, administration or in any other matter which in the opinion of the Central Government, may be useful to the Appellate Tribunal.

Selection Committee (Section 53E)

The Chairperson and members of the Appellate Tribunal shall be appointed by the Central Government from a panel of names recommended by a Selection Committee consisting of –

(a) the Chief Justice of India or his nominee ……. Chairperson;

(b) the Secretary in the Ministry of Corporate Affairs……. Member;

(c) the Secretary in the Ministry of Law and Justice ……. Member.

The terms of the Selection Committee and the manner of selection of panel of names shall be such as may be prescribed.

Term of office of Chairperson and Members of Appellate Tribunal (Section 53F)

The Chairperson or a member of the Appellate Tribunal shall hold office as such for a term of five years from the date on which he enters upon his office, and shall be eligible for re-appointment. However, no Chairperson or other member of the Appellate Tribunal shall hold office as such after he has attained, -

(a) in the case of the Chairperson, the age of sixty-eight years;

(b) in the case of any other member of the Appellate Tribunal, the age of sixty-five years.

Staff of Appellate Tribunal (Section 53M)

The Central Government shall provide the Appellate Tribunal with such officers and other employees as it may think fit.

The officers and other employees of the Appellate Tribunal shall discharge their functions under the general superintendence and control of the Chairperson of the Appellate Tribunal.

The salaries and allowances and other conditions of service of the officers and other employees of the Appellate Tribunal shall be such as may be prescribed.

Awarding Compensation (Section 53N)

Without prejudice to any other provisions contained in this Act, the Central Government or a State Government or a local authority or any enterprise or any person may make an application to the Appellate Tribunal to adjudicate on claim for compensation that

may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any findings of the Commission or under section 42A or under sub-section(2) of section 53Q of the Act, and to pass an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by the Central Government or a State Government or a local authority or any enterprise or any person as a result of any contravention of the provisions of Chapter II, having been committed by enterprise.

Every application made under sub-section (1) shall be accompanied by the findings of the Commission, if any, and also be accompanied with such fees as may be prescribed.

The Appellate Tribunal may, after an inquiry made into the allegations mentioned in the application made under sub-section (1), pass an order directing the enterprise to make payment to the applicant, of the amount determined by it as realizable from the enterprise as compensation for the loss or damage caused to the applicant as a result of any contravention of the provisions of Chapter II having been committed by such enterprise provided that the Appellate Tribunal may obtain the recommendations of the Commission before passing an order of compensation.

Procedures and powers of Appellate Tribunal (Section 53 O)

1. The Appellate Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government, the Appellate Tribunal shall have power to regulate its own procedure including the places at which they shall have their sittings.
2. The Appellate Tribunal shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:-
    a) summoning and enforcing the attendance of any person and examining him on oath;
    b) requiring the discovery and production of documents;
    c) receiving evidence on affidavit;
    d) subject to the provisions of sections 123 and 124 of the Indian Evidence

Act, 1872 (1 of 1872), requisitioning any public record or document or copy of such record or document from any office;

e) issuing commissions for the examination of witnesses or documents;

f) reviewing its decisions;

g) dismissing a representation for default or deciding it exparte;

h) setting aside any order of dismissal of any representation for default or any order passed by it ex parte;

i) any other matter which may be prescribed.

Every proceedings before the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code (45 of 1860) and the Appellate Tribunal shall be deemed to be a civil court for the purposes of section 195 (2 of 1974) and Chapter XXVI of the Code or Criminal Procedure, 1973.

Execution of orders of Appellate Tribunal (Section 53P)

Every order made by the Appellate Tribunal shall be enforced by it in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Appellate Tribunal to send, in case of its inability to execute such order, to the court within the local limits of whose jurisdiction,-

a) in the case of an order against a company, the registered office of the company is situated; or

b) in the case of an order against any other person, place where the person concerned voluntarily resides or carries on business or personally works for gain, is situated.

Contravention of orders of Appellate Tribunal (Section 53Q)

Without prejudice to the provisions of this Act, if any person contravenes, without any reasonable ground, any order of the Appellate Tribunal, he shall be liable for a penalty of not exceeding rupees one crore or imprisonment for a term up to three years or with both as the Chief Metropolitan Magistrate, Delhi may deem fit provided that the Chief Metropolitan Magistrate, Delhi shall not take cognizance of any offence punishable under this sub-section, save on a complaint made by an officer authorized by the Appellate Tribubnal.

Without prejudice to the provisions of this Act, any person may make an application to the Appellate Tribunal for an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by such person as a result of the said enterprise contravening, without any reasonable ground, any order of the Appellate Tribunal or delaying in carrying out such orders of the Appellate Tribunal.

Appeal to Supreme Court (Section 53T)

The Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to them provided that the Supreme court may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed after the expiry of the said period of sixty days.

11.7 Summary

The Monopolies and restrictive Trade Practices Act 1969 which had become obsolete was replaced by Competition Act has many objectives. The Competition Act recognizes anti-competitive practices in a wider context and institutes a flexible but effective mechanism to product and promote competition. Much of the course will depend upon the spirit with which the new Act is being implemented. In particular, it avoids the pitfalls which characterized the implementation of its predecessor Act.

11.8 GLOSSARY

Goods: It means goods as defined in the Sale of Goods Act, 1930 (3 of 1930) and include (a)products manufactured, processed or mined; (b) debentures, stocks and shares after allotment; and (c) in relation to goods supplied, distributed or controlled in India, goods imported into India.

Practice: This includes any practice relating to the carrying on of any trade by a person or an enterprise;

Public financial institution: Means a public financial institution specified under section 4A of the Companies Act, 1956 (1 of 1956) and includes a State Financial, Industrial or Investment Corporation;

Relevant market: The market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets;

Relevant product market: This means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use;

Service: Service means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters

11.9 CHECK YOUR PROGRESS

Fill in the blanks:

a. The Chairperson and other members of the Commission shall be _____ members.

b. The Chairperson or any other member of the Commission may, be notice in writing under his hand addressed to the _____, resign his office.

c. It is the duty of the Commission to ensure freedom of _____ carried by other participants in markets in India.

d. If any person fails to comply with a direction given by the Director-General while exercising powers referred to Section 41(2), the commission shall impose on such person a penalty of _____ for each day during which such failure continues.

e. The Chairperson or a member of the Appellate Tribunal shall hold office as such for a term of _____ years from the date on which he enters upon his office, and shall be eligible for re-appointment.

11.10 ANSWERS TO CHECK YOUR PROGRESS

a. Whole-time

b. Central Government

c. Trade

d. Rs. 1,00,000

e. Five

11.11 TERMINAL QUESTIONS

1. Discuss the objectives of the Competition Act, 2002.

2. What are the duties of the Director-General? What is the procedure of enquiry under Section 197?

3. Write a note on the composition of Competition Commission of India.

4. Discuss the duties, powers and functions of Competition Commission of India.

5. Can Competitive Commission regulate act taking place outside India but having an effect on competition in India? Explain.

6. Write a note on the establishment and composition of Competition Appellate Tribunal.

11.12 REFERENCES

1. Raviner Kumar, Legal Aspects of Business.

2. N D Kapoor, Elements of Mercantile Law.

3. PPS Gogna, Mercantile Law

4. B S Moshal, Mercantile Law

5. M C Kuchhal, Mercantile Law including Company Law

6. G K kapoor, Business Law

UNIT-12 PENALTIES AND OTHER PROVISIONS OF COMPETITION ACT

STRUCTURE

12.1 Introduction

12.2 Penalties

12.3 Miscellaneous Provisions

12.4 Summary

12.5 Glossary

12.6 Check Your Progress

12.7 Answers to Check Your Progress

12.8 Terminal and Model Questions

12.9 Suggested Readings

OBJECTIVES

After reading this lesson, you should be able to:

- Explain the different penalties under Competition Act.
- Describe the miscellaneous provisions of Competition Act relating to powers of Central Govt. to issue directions, supersede Commission etc.

12.1 Introduction

Competition law refers to laws enacted by governments to regulate competitive markets for goods and services, leading up to the modern competition or antitrust laws around the world today. Since the twentieth century, competition law has become global. The two largest and most influential systems of competition regulation are United States antitrust law and European Community competition law. India's competition law is contained in the Competition Act 2002. The Competition Act, 2002 received assent of the President of India, on 13th January 2003 and was published in the gazette of India on 14th January 2003. Some of the sections of the Act were brought into force on March 31st, 2003, and majority of the other sections in 2007.

12.2 PENALTIES

Contravention of orders of Commission (Section 42)

Section 42 of the Act has been revised by the Competition (Amendment) Act, 2007 and provides for harsher penalties in case of contravention of the orders of Commission. The Commission may cause an inquiry to be made into compliance of its orders or directions made in exercise of its powers under the Act [Section 42(1)].

If any person, without reasonable clause, fails to comply with the orders or directions of the Commission issued under sections 27, 28, 31, 32, 33, 42A and 43A of the Act, he shall be punishable with fine which may extend to rupees one lakh for each day during which such non-compliance occurs, subject to a maximum of rupees ten crore, as the Commission may determine [Section 42(2)].

If any person does not comply with the orders or directions issued, or fails to pay the fine imposed under sub-section (2), he shall, without prejudice to any proceeding under section 39, be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to rupees twenty-five crore, or with both, as the Chief Metropolitan Magistrate, Delhi may deem fit. However, the Chief Metropolitan Magistrate, Delhi shall not take cognizance of any offence under this section save on a complaint filed by the Commission or any of its officers authorized by it [Section 42(3)].

Compensation in case of contravention of orders of Commission (Section 42A)

Section 42A is a new section and has been incorporated by the Competition (Amendment) Act, 2007. It provides for compensation to a person who has suffered on account of non-compliance or violation of direction of the Commission by an enterprise. It provides that any person may make an application of the Appellate Tribunal for an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by such person as a result of the said enterprise violating directions issued by the Commission or contravening, without any reasonable ground, any decision or order of the Commission issued under sections 27, 28, 31, 32 and 33 or any condition or restriction subject to which any approval, sanction, direction or exemption in relation to any matter has been accorded, given, made or granted under this Act or delaying in carrying out such orders or directions of the Commission.

Penalty for failure to comply with directions of Commission and Director General (Section 43)

If any person fails to comply, without reasonable cause, with a direction given by:

(a) the Commission under sub-sections (2) and (4) of section 36; or

(b) the Director General while exercising powers referred to in sub-section (2) of section 41, such person shall be punishable with fine which may extend to rupees one lakh for each day during which such failure continues subject to a maximum of rupees one crore, as may be determined by the Commission.

Power to impose penalty for non-furnishing of information on combinations (Section 43A)

If any person or enterprise who fails to give notice to the Commission under sub-section(2) of section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one per cent of the total turnover or the assets, whichever is higher, of such a combination.

Penalty for making false statement or omission to furnish material information (Section 44)

If any person, being a party to a combination:

(a) makes a statement which is false in any material particular, or knowing it to be false; or

(b) omits to state any material particular knowing it to be material, such person shall be liable to a penalty which shall not be less than rupees fifty lakhs but which may extend to rupees one crore, as may be determined by the Commission.

Penalty for offences in relation to furnishing of information (Section 45)

Without prejudice to the provisions of section 44, if a person, who furnishes or is required to furnish under this Act any particulars, documents or any information,

(a) makes any statement or furnishes any document which he knows or has reason to believe to be false in any material particular; or

(b) omits to state any material fact knowing it to be material; or

(c) willfully alters, suppresses or destroys any document which is required to be furnished as aforesaid, such person shall be punishable with fine which may extend to rupees one crore as may be determined by the Commission.

Power to impose lesser penalty (Section 46)

The Commission may, if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit, than leviable under this Act or the rules or the regulations.

But lesser penalty shall not be imposed by the Commission in cases where the report of investigation directed under section 26 has been received before making of such disclosure.

Further that lesser penalty shall be imposed by the Commission only in respect of a producer, seller, distributor, trader or service provider included in the cartel, who has] made the full, true and vital disclosures under this section.

The Commission may, if it is satisfied that such producer, seller, distributor, trader or service provider included in the cartel had in the course of proceedings,

(a) not complied with the condition on which the lesser penalty was imposed by the Commission; or

(b) had given false evidence; or

(c) the disclosure made is not vital, and thereupon such producer, seller, distributor, trader or service provider may be tried for the offence with respect to which the lesser penalty was imposed and shall also be liable to the imposition of penalty to which such person has been liable, had lesser penalty not been imposed.

Crediting sums realized by way of penalties to Consolidated Fund of India (Section 47)

All sums realized by way of penalties under this Act shall be credited to the Consolidated Fund of India.

Contravention by companies (Section 48)

Where a person committing contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued there under is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. But nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the contravention was committed without his

knowledge or that he had exercised all due diligence to prevent the commission of such contravention.

Where a contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued there under has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that contravention and shall be liable to be proceeded against and punished accordingly.

12.3 MISCELLANEOUS PROVISIONS

Power to exempt (Section 54)

The Central Government may, by notification, exempt from the application of this Act, or any provision thereof, and for such period as it may specify in such notification—

(a) any class of enterprises if such exemption is necessary in the interest of security of the State or public interest;

(b) any practice or agreement arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries;

(c) any enterprise which performs a sovereign function on behalf of the Central Government or a State Government:

Provided that in case an enterprise is engaged in any activity including the activity relatable to the sovereign functions of the Government, the Central Government may grant exemption only in respect of activity relatable to the sovereign functions.

Power of Central Government to issue directions (Section 55)

Without prejudice to the foregoing provisions of this Act, the Commission shall, in exercise of its powers or the performance of its functions under this Act, be bound by such directions on questions of policy, other than those relating to technical and administrative matters, as the Central Government may give in writing to it from time to time:

Provided that the Commission shall, as far as practicable, be given an opportunity to express its views before any direction is given under this sub-section. The decision of the Central Government whether a question is one of policy or not shall be final.

Power of Central Government to supersede Commission (Section 56)

If at any time the Central Government is of the opinion:

(a) that on account of circumstances beyond the control of the Commission, it is unable to discharge the functions or perform the duties imposed on it by or under the provisions of this Act; or

(b) that the Commission has persistently made default in complying with any direction given by the Central Government under this Act or in the discharge of the functions or performance of the duties imposed on it by or under the provisions of this Act and as a result of such default the financial position of the Commission or the administration of the Commission has suffered; or

(c) that circumstances exist which render it necessary in the public interest so to do, the Central Government may, by notification and for reasons to be specified therein, supersede the Commission for such period, not exceeding six months, as may be specified in the notification:

Provided that before issuing any such notification, the Central Government shall give a reasonable opportunity to the Commission to make representations against the proposed supersession and shall consider representations, if any, of the Commission.

Upon the publication of a notification under sub-section (1) superseding the Commission:

(a) the Chairperson and other Members shall as from the date of supersession, vacate their offices as such;

(b) all the powers, functions and duties which may, by or under the provisions of this Act, be exercised or discharged by or on behalf of the Commission shall, until the Commission is reconstituted under sub-section (3), be exercised and discharged by the Central Government or such authority as the Central Government may specify in this behalf;

(c) all properties owned or controlled by the Commission shall, until the Commission is reconstituted under sub-section (3), vest in the Central Government.

On or before the expiration of the period of supersession specified in the notification issued under subsection (1), the Central Government shall reconstitute the Commission by a fresh appointment of its Chairperson and other Members and in such case any person who

had vacated his office under clause (a) of sub-section (2) shall not be deemed to be disqualified for re-appointment.

The Central Government shall cause a notification issued under sub-section (1) and a full report of any action taken under this section and the circumstances leading to such action to be laid before each House of Parliament at the earliest.

Restriction on disclosure of information (Section 57)

No information relating to any enterprise, being an information which has been obtained by or on behalf of the Commission or the Appellate Tribunal for the purposes of this Act, shall, without the previous permission in writing of the enterprise, be disclosed otherwise than in compliance with or for the purposes of this Act or any other law for the time being in force.

Chairperson, Members, Director General, Secretary, officers and other employees, etc., to be public servants (Section 58)

The Chairperson and other Members and the Director General, Additional, Joint, Deputy or Assistant Directors General and Secretary and officers and other employees of the Commission and the Chairperson, Members, officers and other employees of the Appellate Tribunal shall be deemed, while acting or purporting to act in pursuance of any of the provisions of this Act, to be public servants within the meaning of section 21 of the Indian Penal Code (45 of 1860).

Protection of action taken in good faith (Section 59)

No suit, prosecution or other legal proceedings shall lie against the Central Government or Commission or any officer of the Central Government or the Chairperson or any Member or the Director- General, Additional, Joint, Deputy or Assistant Directors General or the Secretary or officers or other employees of the Commission or the Chairperson, Members, officers and other employees of the Appellate Tribunal for anything which is in good faith done or intended to be done under this Act or the rules or regulations made there under.

Act to have overriding effect (Section 60)

The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

Exclusion of jurisdiction of civil courts (Section 61)

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Commission or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

Application of other laws not barred (Section 62)

The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

Power to make rules (Section 63)

The Central Government may, by notification, make rules to carry out the provisions of this Act;

In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:

(a) the term of the Selection Committee and the manner of selection of panel of names under sub-section (*2*) of Section 9;

(b) the form and manner in which and the authority before whom the oath of office and of secrecy shall be made and subscribed to under sub-section (*3*) of section 10;

(c) the salary and the other terms and conditions of service including travelling expenses, house rent allowance and conveyance facilities, sumptuary allowance and medical facilities to be provided to the Chairperson and other Members under sub-section (*1*) of section 14;

(d) the number of Additional, Joint, Deputy or Assistant Directors General or such officers or other employees in the office of Director General and the manner in which such Additional, Joint, Deputy or Assistant Directors General or such officers or other employees may be appointed under sub-section (*1A*) of section 16;

(e) the salary, allowances and other terms and conditions of service of the Director General, Additional, Joint, Deputy or Assistant Directors General or such officers or other employees under sub-section (*3*) of section 16;

(f) the qualifications for appointment of the Director General, Additional, Joint, Deputy or Assistant Directors General or such officers or other employees under sub-section (*4*) of section 16;

(g) the salaries and allowances and other terms and conditions of service of the Secretary and officers and other employees payable, and the number of such officers and employees under sub-section (*2*) of section 17;

(k) the form in which the annual statement of accounts shall be prepared under sub-section (1) of section 52;

(/) the time within which and the form and manner in which the Commission may furnish returns, statements and such particulars as the Central Government may require under sub-section (*1*) of section 53;

(m) the form in which and the time within which the annual report shall be prepared under sub-section (*2*) of section 53;

(ma) the form in which an appeal may be filed before the Appellate Tribunal under sub-section (*2*) of section 53B and the fees payable in respect of such appeal;

(mb) the term of the Selection Committee and the manner of selection of panel of names under sub-section(*2*) of section 53E;

(mc) the salaries and allowances and other terms and conditions of service of the Chairperson and other Members of the Appellate Tribunal under sub-section (*1*) of section 53G;

(md) the salaries and allowances and other conditions of service of the officers and other employees of the Appellate Tribunal under sub-section (*3*) of section 53M;

(me) the fee which shall be accompanied with every application made under sub-section (*2*) of section 53N;

(mf) the other matters under clause (i) of sub-section(*2*) of section 53O in respect of which the Appellate Tribunal shall have powers under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit;

(n) the manner in which the monies transferred to the Competition Commission of India or the Appellate Tribunal shall be dealt with by the Commission or the Appellate Tribunal, as the case may be, under the fourth proviso to sub-section(2) of section 66 ;

(o) any other matter which is to be, or may be, prescribed, or in respect of which provision is to be, or may be, made by rules.

Every notification issued under sub-section(*3*) of section 20 and section 54 and every rule made under this Act by the Central Government shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session, or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the notification or rule, or both Houses agree that the notification should not be issued or rule should not be made, the notification or rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that notification or rule, as the case may be.

Power to make regulations (Section 64)

The Commission may, by notification, make regulations consistent with this Act and the rules made there under to carry out the purposes of this Act.

In particular, and without prejudice to the generality of the foregoing provisions, such regulations may provide for all or any of the following matters, namely:

(a) the cost of production to be determined under clause (b) of the Explanation to section 4;

(b) the form of notice as may be specified and the fee which may be determined under sub-section(*2*) of section 6;

(c) the form in which details of the acquisition shall be filed under subsection(*5*) of Section 6;

d) the procedures to be followed for engaging the experts and professionals under sub-section(*3*) of section 17;

(e) the fee which may be determined under clause (a) of sub-section(1) of section 19;

(f) the rules of procedure in regard to the transaction of business at the meetings of the Commission under sub-section(*1*) of section 22;

(g) the manner in which penalty shall be recovered under sub-section(*1*) of section 39;

(h) any other matter in respect of which provision is to be, or may be, made by regulations.

Every regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the regulation, or both Houses agree that the regulation should not be made, the regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that regulation.

Power to remove difficulties (Section 65)

If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act as may appear to it to be necessary for removing the difficulty:

Provided that no such order shall be made under this section after the expiry of a period of two years from the commencement of this Act.

Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

Repeal and saving (Section 66)

The Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) is hereby repealed and the Monopolies and Restrictive Trade Practices Commission established under sub-section(*1*) of section 5 of the said Act (hereinafter referred to as the repealed Act) shall stand dissolved:

Provided that, notwithstanding anything contained in this sub-section, the Monopolies and Restrictive Trade Practices Commission established under sub section(*1*) of section 5 of the repealed Act, may continue to exercise jurisdiction and power under the repealed Act for a period of two years from the date of the commencement of this Act in respect of all cases or proceedings (including complaints received by it or references or applications made to it) filed before the commencement of this Act as if the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) had not been repealed and all the provisions of the said Act

so repealed shall mutatis mutandis apply to such cases or proceedings or complaints or references or applications and to all other matters.

The repeal of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) shall, however, not affect,

(a) the previous operation of the Act so repealed or anything duly done or suffered thereunder; or

(b) any right, privilege, obligation or liability acquired, accrued or incurred under the Act so repealed; or

(c) any penalty, confiscation or punishment incurred in respect of any contravention under the Act so repealed; or

(d) any proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, confiscation or punishment as aforesaid, and any such proceeding or remedy may be instituted, continued or enforced, and any such penalty, confiscation or punishment may be imposed or made as if that Act had not been repealed.

On the dissolution of the Monopolies and Restrictive Trade Practices Commission, the person appointed as the Chairman of the Monopolies and Restrictive Trade Practices Commission and every other person appointed as Member and Director General of Investigation and Registration, Additional, Joint, Deputy, or Assistant Directors General of Investigation and Registration and any officer and other employee of that Commission and holding office as such immediately before such dissolution shall vacate their respective offices and such Chairman and other Members shall be entitled to claim compensation not exceeding three months' pay and allowances for the premature termination of term of their office or of any contract of service:

Provided that the Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee who has been, immediately before the dissolution of the Monopolies and Restrictive Trade Practices Commission appointed on deputation basis to the Monopolies and Restrictive Trade Practices Commission, shall, on such dissolution, stand reverted to his parent cadre, Ministry or Department, as the case may be:

Provided further that the Director-General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or

any officer or other employee who has been, immediately before the dissolution of the Monopolies and Restrictive Trade Practices Commission, employed on regular basis by the Monopolies and Restrictive Trade Practices Commission, shall become, on and from such dissolution, the officer and employee, respectively, of the Competition Commission of India or the Appellate Tribunal, in such manner as may be specified by the Central Government, with the same rights and privileges as to pension, gratuity and other like matters as would have been admissible to him if the rights in relation to such Monopolies and Restrictive Trade Practices Commission had not been transferred to, and vested in, the Competition Commission of India or the Appellate Tribunal, as the case may be, and shall continue to do so unless and until his employment in the Competition Commission of India or the Appellate Tribunal, as the case may be, is duly terminated or until his remuneration, terms and conditions of employment are duly altered by the Competition Commission of India or the Appellate Tribunal, as the case may be.

Provided also that notwithstanding anything contained in the Industrial Disputes Act, 1947(14 of 1947), or in any other law for the time being in force, the transfer of the services of any Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee, employed in the Monopolies and Restrictive Trade Practices Commission, to [the Competition Commission of India or the Appellate Tribunal], as the case may be, shall not entitle such Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee any compensation under this Act or any other law for the time being in force and no such claim shall be entertained by any court, tribunal or other authority:

Provided also that where the Monopolies and Restrictive Trade Practices Commission has established a provident fund, superannuation, welfare or other fund for the benefit of the Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or the officers and other employees employed in the Monopolies and Restrictive Trade Practices Commission, the monies relatable to the officers and other employees whose services have been transferred by or under this Act to [the Competition Commission of India or the Appellate Tribunal, as the case may be, shall, out of the monies standing] on the dissolution of the Monopolies and Restrictive Trade Practices Commission to the credit of such provident fund, superannuation, welfare or other fund, stand transferred to, and vest in, the Competition Commission of India

or the Appellate Tribunal as the case may be, and such monies which stand so transferred shall be dealt with by the said Commission or the Tribunal, as the case may be, in such manner as may be prescribed.]

All cases pertaining to monopolistic trade practices or restrictive trade practices pending (including such cases, in which any unfair trade practice has also been alleged), before the Monopolies and Restrictive Trade Practices Commission shall , after the expiry of two years referred to in the proviso to sub-section (*1*) stand transferred to the Appellate Tribunal and shall be adjudicated by the Appellate Tribunal in accordance with the provisions of the repealed Act as if that Act had not been repealed.

Subject to the provisions of sub-section(*3*), all cases pertaining to unfair trade practices other than those referred to in clause (x) of sub-section(*1*) of section 36A of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) and pending before the Monopolies and Restrictive Trade Practices Commission on or before the expiry of two years referred to in the proviso to sub-section (*1*)], shall, stand transferred to he National Commission constituted under the Consumer Protection Act, 1986 (68 of 1986) and the National Commission shall dispose of such cases as if they were cases filed under that Act:

Provided that the National Commission may, if it considers appropriate, transfer any case transferred to it under this sub-section, to the concerned State Commission established under section 9 of the Consumer Protection Act, 1986 (68 of 1986) and that State Commission shall dispose of such case as if it was filed under that Act.

All cases pertaining to unfair trade practices referred to in clause (x) of sub-section(*1*) of section 36A of the Monopolies and Restrictive Trade Practices Act, 1969 and pending before the Monopolies and Restrictive Trade Practices Commission shall, after the expiry of two years referred to in the proviso to sub-section(*1*) stand transferred to the Appellate Tribunal and the Appellate Tribunal shall dispose of such cases as if they were cases filed under that Act.

All investigations or proceedings, other than those relating to unfair trade practices, pending before the Director General of Investigation and Registration on or before the commencement of this Act shall, on such commencement, stand transferred to the Competition Commission of India, and the Competition Commission of India may conduct or order for conduct of such investigation or proceedings in the manner as it deems fit.

All investigations or proceedings, relating to unfair trade practices, other than those referred to in clause (x) of sub-section (1) of section 36A of the Monopolies and Restrictive Trade Practices Act, 1969(54 of 1969) and pending before the Director General of Investigation and Registration on or before the commencement of this Act shall, on such commencement, stand transferred to the National Commission constituted under the Consumer Protection Act, 1986 (68 of 1986) and the National Commission may conduct or order for conduct of such investigation or proceedings in the manner as it deems fit.

All investigations or proceedings relating to unfair trade practices referred to in clause (x) of subsection (1) of section 36A of the Monopolies and Restrictive Trade Practices Act, 1969(54 of 1969), and pending before the Director General of Investigation and Registration on or before the commencement of this Act shall, on such commencement, stand transferred to the Competition Commission of India and the Competition Commission of India may conduct or order for conduct of such investigation in the manner as it deems fit.

Save as otherwise provided under sub-sections (3) to (8), all cases or proceedings pending before the Monopolies and Restrictive Trade Practices Commission shall abate.

The mention of the particular matters referred to in sub-sections (3) to (8) shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 (10 of 1897) with regard to the effect of repeal.

12.4 SUMMARY

The Competition Act provides for harsher penalties in case of contravention of the orders of Commission. The Commission may cause an inquiry to be made into compliance of its orders or directions made in exercise of its powers under the Act. If any person, without reasonable clause, fails to comply with the orders or directions of the Commission issued under sections 27, 28, 31, 32, 33, 42A and 43A of the Act, he shall be punishable with fine which may extend to rupees one lakh for each day during which such non-compliance occurs, subject to a maximum of rupees ten crore, as the Commission may determine. The Central Government may, by notification, exempt from the application of this Act, or any provision thereof, and for such period as it may specify in such notification. No information relating to any enterprise, being an information which has been obtained by or on behalf of the Commission or the Appellate Tribunal for the purposes of this Act, shall, without the previous permission in writing of the enterprise, be disclosed otherwise than in compliance with or for the purposes of this Act or any other law for the time being in force.

12.5 GLOSSARY

Practice: It includes any practice relating to the carrying on of any trade by a person or an enterprise.

Appellate Tribunal: It means the Competition Appellate Tribunal established under sub-section (*1*) of Section 53A.

Commission: Commission means the Competition Commission of India established under sub-section(*1*) of section 7.

Trade: This means any trade, business, industry, profession or occupation relating to the production, supply, distribution, storage or control of goods and includes the provision of any services.

12.6 CHECK YOUR PROGRESS

1. Fill in the blanks:

(a) _____provides for compensation to a person who has suffered on account of non-compliance or violation of direction of the Commission by an enterprise.

(b) All sums realized by way of penalties under section 47 shall be credited to the _____.

(c) The Chairperson and other Members of the Commission and the Chairperson, Members, officers and other employees of the Appellate Tribunal shall be deemed, while acting or purporting to act in pursuance of any of the provisions of this Act, to be public servants within the meaning of section 21 of the _____.

(d) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the_____-, make such provisions, not inconsistent with the provisions of this Act as may appear to it to be necessary for removing the difficulty.

12.7 ANSWERS TO CHECK YOUR PROGRESS

(a) Section 42A

(b) Consolidated Fund of India

(c) Indian Penal Code

(d) Official Gazette

12.8 TERMINAL QUESTIONS

1. What are the consequences for a person who contravenes the orders of Competition?
2. Enumerate the penalties provided for (a) making false statement or for omission to furnish material information, (b) offences relating to furnishing of information, (c) failure to comply the directions of the Commission and the Director General.
3. Can a person aggrieved by any decision or the order of the Commission file an appeal? If so, with whom?
4. Enumerate the powers of the Central Govt. under the Competition Act in general and in particular as to its powers to (a) exempt (b) issue directions (c) make rules (d) remove difficulties arising in giving effect to the provisions of the Act.
5. Describe the powers of the Commission to (a) grant interim relief (b) regulate its own procedure (c) review its own decisions (d) rectify its order.

12.9 REFERENCES

1. Raviner Kumar, Legal Aspects of Business.
2. PPS Gogna, Mercantile Law
3. N D Kapoor, Elements of Mercantile Law.
4. M C Kuchhal, Mercantile Law including Company Law
5. B S Moshal, Mercantile Law
6. G K kapoor, Business Law

Unit – 13: SEBI Act 1992- Functions and Powers

13.1 Introduction

13.2 Meaning and Objectives of SEBI

13.3 Management and Organization of SEBI

13.4 Functions of SEBI

13.5 Role of SEBI

13.5.1 Primary Market

13.5.2 Secondary Market

13.5.3 Reforms in the Secondary Market

13.5.4 Insider Trading

13.5.5 Regulations for Corporate Debt Securities

13.6 Powers to SEBI

13.7 Registration of Stock brokers, Sub-brokers, Share transfer agents, etc.

13.8 Mutual Funds and SEBI

13.9 Critical Review of SEBI

13.10 Summary

13.11 Glossary

13.12 Check your progress

13.13 Answers to check your progress/SAQ

13.14 Terminal Questions

13.15 References/Bibliography

Objectives

After reading this unit you will be able to:

- Explain SEBI Act 1992, its management, organization and objectives.
- Describe the role of SEBI in primary and secondary market.
- Discuss the functions and powers of SEBI.
- Explain the role of SEBI in controlling insider trading and organization of mutual funds.
- Analyze the critical review of SEBI

13.1 Introduction

In 1988 the Securities and Exchange Board of India (SEBI) was established by the Government of India through an executive resolution, and was subsequently upgraded as a fully autonomous body (a statutory Board) in the year 1992 with the passing of the Securities and Exchange Board of India Act (SEBI Act) on 30th January 1992. In place of Government Control, a statutory and autonomous regulatory board with defined responsibilities, to cover both development & regulation of the market, and independent powers has been set up. Paradoxically this is a positive outcome of the Securities Scam of1990-91. Controller of Capital Issues was the regulatory authority before SEBI came into existence; it derived authority from the Capital Issues (Control) Act, 1947. Initially SEBI was a non statutory body without any statutory power. However in 1995, the SEBI was given additional statutory power by the Government of India through an amendment to the Securities and Exchange Board of India Act 1992. In April, 1998 the SEBI was constituted as the regulator of capital markets in India under a resolution of the Government of India.

SEBI has introduced the comprehensive regulatory measures, prescribed registration norms, the eligibility criteria, the code of obligations and the code of conduct for different intermediaries like, bankers to issue, merchant bankers, brokers and sub-brokers, registrars, portfolio managers, credit rating agencies, underwriters and others. It has framed bye-laws, risk identification and risk management systems for Clearing houses of stock exchanges, surveillance system etc. which has made dealing in securities both safe and transparent to the end investor.

13.2 Meaning and Objectives of SEBI

The regulatory body for the investment market in India. The purpose of this board is to maintain stable and efficient markets by creating and enforcing regulations in the marketplace. SEBI is the regulator for the securities market in India. It was formed officially by the Government of India in 1992 with SEBI Act 1992.

Since its inception SEBI has been working targeting the securities and is attending to the fulfillment of its objectives with commendable zeal and dexterity. The improvements in the securities markets like capitalization requirements, margining, establishment of clearing

corporations etc. reduced the risk of credit and also reduced the market. According to the preamble of the SEBI,

The main objectives are

- To protect the interests of investors in securities;
- To promote the development of Securities Market;
- To regulate the securities market and
- For matters connected therewith or incidental thereto.

In spite of various laws and bye laws another significant event from the side of SEBI is the approval of trading in stock indices (like S&P CNX Nifty & Sensex) in 2000. A market Index is a convenient and effective product because of the following reasons:

- It acts as a barometer for market behavior;
- It is used to benchmark portfolio performance;
- It is used in derivative instruments like index futures and index options;

It can be used for passive fund management as in case of Index Funds.

13.3Management and Organization SEBI

The SEBI is managed by six members, i.e. by the chairman who is nominated by central government & two members, i.e. officers of central ministry, one member from the RBI & the remaining two are nominated by the central government. The Chairman and the other members shall be persons of ability, integrity and standing who have shown capacity in dealing with problems relating to securities market or have special knowledge or experience of law, finance, economics, accountancy, administration or in any other discipline which, in the opinion of the Central Government, shall be useful to the Board. The office of SEBI is situated at Mumbai with its regional offices at Kolkata, Delhi & Chennai.

Organization of SEBI

The organization of the SEBI is structured in such a manner to fulfill its objectives. To suit its scope of activities, it is divided into several departments. They are as given below:

1. **Primary Department:** It deals with policy matters related to primary market, intermediaries and self regulatory organizations, redressal of investor's grievances and guidance.
2. **Issue Management and intermediaries Department:** It deals with registration, regulation and monitoring of the intermediaries and scrutiny of offer documents.
3. **Secondary Market Department:** Policy matters related to major stock exchanges, price monitoring market surveillance, prevention of insider trading and broker's registration.
4. **Institutional Investment:** Mutual Funds, FIIs, Mergers, Acquisitions.

13.4 Functions of SEBI

The main functions entrusted with SEBI are:

- Regulating the business in stock exchanges and any other securities markets.
- Registering and regulating the working of stock brokers, sub-brokers, share transfer agents, bankers to an issue, trustees of trust deeds, registrars to an issue, merchant bankers, underwriters, portfolio managers, investment advisers and such other intermediaries who may be associated with securities markets in any manner.
- Registering and regulating the working of the depositories participants, custodians of securities, foreign institutional investors, credit rating agencies and such other intermediaries as the Board may, by notification, specify in this behalf.
- Registering and regulating the working of venture capital funds and collective investment schemes, including mutual funds;
- Promoting and regulating self-regulatory organizations;
- Prohibiting fraudulent and unfair trade practices relating to securities markets;
- Promoting investors' education and training of intermediaries of securities markets;
- Prohibiting insider trading in securities;
- Regulating substantial acquisition of shares and take-over of companies;
- Calling for information from, undertaking inspection, conducting inquiries and audits of the stock exchanges, mutual funds, other persons associated with the securities market intermediaries and self- regulatory organizations in the securities market;

- Performing such functions and exercising such powers under the provisions of the Securities Contracts (Regulation) Act, 1956(42 of 1956), as may be delegated to it by the Central Government;
- Levying fees or other charges for carrying out the purposes of this section;
- Conducting research for the above purposes;
- Performing such other functions as may be prescribed.

13.5 Role of SEBI

The role of SEBI in various markets discussed as under:

13.5.1 Primary Market

A market that issues new securities on an exchange. Companies, governments and other groups obtain financing through debt or equity based securities. Primary markets are facilitated by underwriting groups, which consist of investment banks that will set a beginning price range for a given security and then oversee its sale directly to investors.

To protect the interest of the investors and to bring back the small investors to the market several measures have been undertaken by SEBI. Entry and disclosure norms are tightened to prevent the exploitation of investors by the unscrupulous promoters. Allocation of shares and promoters contribution is regulated.

1. Entry Norms: SEBI has issued guidelines to tighten the entry norms for companies accessing the capital market.

(a) A company should have a track record of dividend payments for a minimum period of 3 years preceding the issue.

(b) A company whose shares are already listed would fulfill the entry level requirement only if the post issue net worth becomes more than five times the pre issue net worth.

(c) If a manufacturing company does not have such a track record, it could access the public issue market, provided its project is appraised by a public financial institution or a scheduled commercial bank. The appraising entity should also participate in the project fund.

(d) It would be necessary for a corporate body making a public issue to have at least five public shareholders' for every Rs. I lakhs of the net capital offer made to the public.

(e) SEBI would not vet offer documents of companies having a track record of 3 years consistent dividend payment. Likewise, offer documents of companies seeking listing on OTCEI would not be vetted by SEBI. Further banks are required to satisfy the criteria of two years of profitability for issue above par.

2. Promoters Contribution: It means contribution by those described in the prospectus as promoters, directors, friends, relatives and associates.

(a) Promoters contribution should not be less than 20% of the issued capital irrespective of the issue size.

(b) The entire promoters' contribution should be received before the public issue. If the issue size exceeds Rs 100 crores, the promoters can bring in not less than 50% of their contribution before opening of the issue and bring in the balance before the calls are made on the shareholders.

(c) SEBI announced that not more than 20% of the entire contribution brought in by promoters cumulatively in public or preferential issue would be locked in for 5 years. SEBI lifted the provision of lock in period for promoters, contribution in case of listed companies with 3 years of track record of dividend payment.

(d) According to the decision taken by the SEBI Board, in case of non-underwritten public issue promoters could bring their own money or procure subscription elsewhere within 60 days of the closure of the issue subject to such disclosures in the offer document.

3. Disclosure: The draft prospectus filed with SEBI is made as a public document to enhance transparency. The draft prospectus should provide all the needed information to the investor regarding the present position of the company, the future prospectus and the risk factor associated with the investment of the company.

4. Book Building: Book building has been accepted as one of the mode of the public issue. SEBI issued guidelines related to 100 percent book building in an issue of security to the public through prospectus. It recommended a two tier underwriting and the book runners

would take on their liability in case of default. SEBI also stipulated that there should be at least 30 book building centers with the syndicate members being present at each centre.

5. Allocation of Shares: To bring back the small investors to the primary market, the minimum application of shares has been reduced from 500 to 200. Proportionate allotment of shares is made. A reservation of minimum 50% of net offers to the small investors is being made. Small investors mean those who have applied for 1000 or fewer shares or securities. The companies were required to complete the allotment of securities within 30 days of the closure of the public issue. Thereafter, they would be required to pay an interest of at the rate of 15 percent per annum, if refund of application money is not made within the specific period.

6. Market Intermediaries: licensing of merchant bankers or authorisation by SEBI was the first step undertaken to regulate the intermediaries. This licensing of merchant bankers is based on the capital adequacy as well as the track record of the capital market related activities. In course of time other financial intermediaries such as underwriters, registrars and transfer agents came to be licensed. SEBI has the right to inspect the records of the intermediaries.

13.5.2 Secondary Market

Secondary Market refers to a market where securities are traded after being initially offered to the public in the primary market and/or listed on the Stock Exchange. Majority of the trading is done in the secondary market. Secondary market comprises of equity markets and the debt markets.

For the general investor, the secondary market provides an efficient platform for trading of his securities. For the management of the company, Secondary equity markets serve as a monitoring and control conduit—by facilitating value-enhancing control activities, enabling implementation of incentive-based management contracts, and aggregating information (via price discovery) that guides management decisions.

What are the products dealt in the secondary markets?

Following are the main financial products/instruments dealt in the secondary market:

Equity: The ownership interest in a company of holders of its common and preferred stock. The various kinds of equity shares are as follows:-

- **Equity Shares**: An equity share, commonly referred to as ordinary share also represents the form of fractional ownership in which a shareholder, as a fractional owner, undertakes the maximum entrepreneurial risk associated with a business venture. The holders of such shares are members of the company and have voting rights.
- **Rights Issue / Rights Shares**: The issue of new securities to existing shareholders at a ratio to those already held.
- **Bonus Shares**: Shares issued by the companies to their shareholders free of cost by capitalization of accumulated reserves from the profits earned in the earlier years.
- **Preferred Stock / Preference shares**: Owners of these kinds of shares are entitled to a fixed dividend or dividend calculated at a fixed rate to be paid regularly before dividend can be paid in respect of equity share. They also enjoy priority over the equity shareholders in payment of surplus. But in the event of liquidation, their claims rank below the claims of the company's creditors, bondholders / debenture holders.
- **Cumulative Preference Shares**: A type of preference shares on which dividend accumulates if remains unpaid. All arrears of preference dividend have to be paid out before paying dividend on equity shares.
- **Cumulative Convertible Preference Shares**: A type of preference shares where the dividend payable on the same accumulates, if not paid. After a specified date, these shares will be converted into equity capital of the company.
- **Participating Preference Share**: The right of certain preference shareholders to participate in profits after a specified fixed dividend contracted for is paid. Participation right is linked with the quantum of dividend paid on the equity shares over and above a particular specified level.

Security Receipts: Security receipt means a receipt or other security, issued by a securitisation company or reconstruction company to any qualified institutional buyer pursuant to a scheme, evidencing the purchase or acquisition by the holder thereof, of an undivided right, title or interest in the financial asset involved in securitisation.

Government Securities (G-Secs): These are sovereign (credit risk-free) coupon bearing instruments which are issued by the Reserve Bank of India on behalf of Government of India, in lieu of the Central Government's market borrowing programme. These securities have a fixed coupon that is paid on specific dates on half-yearly basis. These securities are available in wide range of maturity dates, from short dated (less than one year) to long date (up to twenty years).

Debentures: Bonds issued by a company bearing a fixed rate of interest usually payable half yearly on specific dates and principal amount repayable on particular date on redemption of the debentures. Debentures are normally secured / charged against the asset of the company in favour of debenture holder.

Bond: A negotiable certificate evidencing indebtedness. It is normally unsecured. A debt security is generally issued by a company, municipality or government agency. A bond investor lends money to the issuer and in exchange, the issuer promises to repay the loan amount on a specified maturity date. The issuer usually pays the bond holder periodic interest payments over the life of the loan. The various types of Bonds are as follows-

- **Zero Coupon Bond**: Bond issued at a discount and repaid at a face value. No periodic interest is paid. The difference between the issue price and redemption price represents the return to the holder. The buyer of these bonds receives only one payment, at the maturity of the bond.
- **Convertible Bond:** A bond giving the investor the option to convert the bond into equity at a fixed conversion price.

Commercial Paper: A short term promise to repay a fixed amount that is placed on the market either directly or through a specialized intermediary. It is usually issued by companies with a high credit standing in the form of a promissory note redeemable at par to the holder on maturity and therefore, doesn't require any guarantee. Commercial paper is a money market instrument issued normally for tenure of 90 days.

Treasury Bills: Short-term (up to 91 days) bearer discount security issued by the Government as a means of financing its cash requirements.

13.5.3 Reforms in the Secondary Market

1. **Governing Board:** Governing Board of the stock exchanges was reconstituted according to the SEBI's directives. Broker and non broker representation are made 50:50. Sixty percent of non- broker representation was given in the arbition, disciplinary and default committees of the exchanges. Regulations regarding the public representatives and the government nominees on the government board of stock exchanges were issued. As non participants in the market, they have to ensure impartial and fair governance in the stock exchanges. As per the new guidelines of SEBI, trading members will be given only 40% representation in the governing council of derivatives.
2. **Infrastructure:** To sophisticate the trade on stock exchange NSE was established with the screen based trading. Then SEBI has allowed the stock exchanges to expand its on line screen based trading terminals to locations outside their jurisdiction subjected to certain criteria. SEBI decided that recognition to new stock exchanges would be allowed subject to the conditions of On Line Screen based trading for trade purpose.
3. **Settlement and clearing:** Carry forward transactions were withdrawn and reintroduced by SEBI with modified regulations. SEBI notified all stock exchanges to introduce weekly settlement. Besides auctions have to be conducted by stock exchanges within eight days of the settlement in case members fail to deliver the shares. The renewal of the contract in cash groups from one settlement in case members fail to deliver the shares. The renewal of contract in cash groups from one settlement to another is not permitted.

   In the case of short sales, in terms of recommendation of the B.D. Shaw committee, SEBI issued directives to all stock exchanges to submit script wise information on net short sales position at the end of each trading for dissemination of information to the public.

4. **Debt market Segment:** Wholesale debt market segment in the NSE enables the 1996 has been amended. It allowed dematerialization of govt securities. SEBI has allowed the listing of debt instrument on the stock exchange even if the company' equity was not listed earlier. FIIs were allowed to invest up to 100 percent of the funds in debt instruments of Indian Companies through 100 percent dedicated debt fund.

5. **Price Stabilization:** SEBI has set up a division to monitor the unusual movements in prices, in coordination with the stock exchanges. SEBI has asked to stock exchanges to monitor the prices of newly listed permitted scripts from the first day of trading. In case of newly listed scrips, when there is abnormal price variation, the exchange would impose a special margin of 25 percent or more on purchase in addition to regular margin. To prevent circular trading and price rigging, SEBI has introduced a host of price filters. Intraday price band permits the stock to be traded within a range during a trading session. It aims at prevent intraday price swings.
6. **Delisting:** SEBI tightened the delisting norms by permitting delisting only in accordance with norms specified by Chandratre Committee. The norms are
    - On voluntary delisting from delisting from regional stock exchanges the company would have to make a buy offer to all the shareholders in particular region.
    - The promoters would have to buy or arrange buyers for the security and
    - The listing fee for three years should be taken from the companies at the time of delisting and be kept in Escrow account with the stock exchange.

13.6.4 Insider Trading: The most profitable technique employed in the stock market is using one's access to price sensitive information ahead of others. To prevent this SEBI has come out with the SEBI Insider Trading Regulation 1992. The act has defined the insider and the price sensitive information as:

- Who is or was connected with the company
- Who is deemed to have been connect with the company and is reasonably expected to have access by virtue of such connection to unpublished price information or
- Who have received or has had access to unpublished price sensitive information
- Who is a director or is deemed to be a director as per the definition of the companies act.
- Who is an officer or employee of the company
- Who holds a position involving a professional or business relationship with the company and who may reasonably be expected to have access to unpublished price sensitive information?
- An official or member of a stock exchange
- A dealer in securities or an employee of such dealer member

- A director or employee of a financial institution
- An official or employee of a self regulatory organization
- A relative of any of the above
- Banker to the company

Unpublished price sensitive information areas are given below

- Financial results of the company
- Intended declaration of dividends
- Rights or bonus share offers
- Major expansion plans or execution of new project
- Amalgamation, mergers and takeovers
- Disposal of the whole of the undertaking
- Such other information as may affect the earnings of the company
- Any changes in policies, plans or operations of the company

13.5.5 Regulations for Corporate Debt Securities

The term Corporate Bonds referred here includes all debt securities issued by institutions such as Banks, Public Sector Undertakings, Municipal Corporations, bodies corporate and companies having a tenure of more than 365 days. Such an issue of bonds, if offered to the public shall be required to comply with the SEBI (Disclosure and Investor Protection Guidelines), 2000. Also, a private placement of corporate bonds made by a listed company shall be required to comply with provisions contained in SEBI Circulars in this regard.

The SEBI Circulars dated September 30, 2003 and December 22, 2003 have laid out norms pertaining to the disclosure norms on issuance of such securities, which include compliance with Chapter VI of the SEBI (Disclosure and Investor Protection) Guidelines, 2000, Companies Act, 1956, listing agreement for debentures with the stock exchanges, rating to be obtained from a Credit Rating Agency registered with SEBI, requirement for appointing a debenture trustee registered with SEBI, mandatory trading in dematerialized form, etc.

In order to develop an exchange traded market for corporate bonds SEBI vide circulars dated December 12, 2006 and March 01, 2007 has authorized BSE and NSE to set up and maintain corporate bond reporting platforms to capture all information related to trading in corporate

bonds as accurately and as close to execution as possible. Subsequently, FIMMDA has also been permitted to operate a reporting platform. As per the circulars, all issuers, intermediaries and contracting parties are granted access to the reporting platform for the purpose and transactions shall be reported within 30 minutes of closing the deal. The data reported on the platform is disseminated on websites of BSE, NSE and FIMMDA.

As a second phase of development, SEBI vide Circular dated April 13, 2007 has permitted BSE and NSE to have in place corporate bond trading platforms to enable efficient price discovery and reliable clearing and settlement in a gradual manner. To begin with, BSE and NSE have launched an order driven trade matching platform which retains essential features of OTC market where trades are executed through brokers. OTC trades however continue to be reported on the exchange reporting platforms. In order to encourage wider participation, the lot size for trading in bonds has been reduced to Rs.1lakh. Subsequently BSE and NSE may move towards anonymous order matching with clearing and settlement.

13.6 Powers to SEBI

To protect the interest of the investors the SEBI has the following powers:

1. **Power to make rules for controlling stock exchange**

SEBI has power to make new rules for controlling stock exchange in India. For example, SEBI fixed the time of trading 9 AM and 5 PM in stock market.

2. To provide license to dealers and brokers

SEBI has power to provide license to dealers and brokers of capital market. If SEBI sees that any financial product is of capital nature, then SEBI can also control to that product and its dealers. One of main example is ULIPs case. SEBI said, “It is just like mutual funds and all banks and financial and insurance companies who want to issue it, must take permission from SEBI."

3. To stop fraud in Capital Market

SEBI has many powers for stopping fraud in capital market. It can ban on the trading of those

brokers who are involved in fraudulent and unfair trade practices relating to stock market. It can impose the penalties on capital market intermediaries if they involve in insider trading.

4. To Control the Merger, Acquisition and Takeover the companies

Many big companies in India want to create monopoly in capital market. So, these companies buy all other companies or deal of merging. SEBI sees whether this merger or acquisition is for development of business or to harm capital market.

5. To audit the performance of stock market

SEBI uses his powers to audit the performance of different Indian stock exchange for bringing transparency in the working of stock exchanges.

6. To make new rules on carry - forward transactions

Share trading transactions carry forward cannot exceed 25% of broker's total transactions and there is a limit of 90 days for carry forward.

7. To create relationship with ICAI

ICAI is the authority for making new auditors of companies. SEBI creates good relationship with ICAI for bringing more transparency in the auditing work of company accounts because audited financial statements are mirror to see the real face of company and after these investors can decide to invest or not to invest. Moreover, investors of India can easily trust on audited financial reports. After Satyam Scam, SEBI is investigating with ICAI, whether CAs are doing their duty by ethical way or not.

8. Introduction of derivative contracts on Volatility Index

For reducing the risk of investors, SEBI has now been decided to permit Stock Exchanges to introduce derivative contracts on Volatility Index, subject to the condition that;

a. The underlying Volatility Index has a track record of at least one year.

b. The Exchange has in place the appropriate risk management framework for such derivative contracts.

Before introduction of such contracts, the Stock Exchanges shall submit the following:

i. Contract specifications

ii. Position and Exercise Limits

iii. Margins

iv. The economic purpose it is intended to serve

v. Likely contribution to market development

vi. The safeguards and the risk protection mechanism adopted by the exchange to ensure market integrity, protection of investors and smooth and orderly trading.

vii. The infrastructure of the exchange and the surveillance system to effectively monitor trading in such contracts, and

viii. Details of settlement procedures & systems

ix. Details of back testing of the margin calculation for a period of one year considering a call and a put option on the underlying with a delta of 0.25 & -0.25 respectively and actual value of the underlying.

9. To require report of Portfolio Management Activities

SEBI has also power to require report of portfolio management to check the capital market performance. Recently, SEBI sent the letter to all Registered Portfolio Managers of India for demanding report.

10. To educate the investors

Time to time, SEBI arranges scheduled workshops to educate the investors.

11. Power to issue directions

The board has the power to issue directions:

(i) In the interest of investors, orderly development of securities market; or

(ii) To prevent the affairs of any intermediary or other persons being conducted in a manner detrimental to the interest of investors or securities market; or

(iii) To secure the proper management of any such intermediary or person, it may issue such directions,-

(a) To any person or class of persons referred to in section 12, or associated with the securities market; or

(b) To any company in respect of matters specified in section 11A, as may be appropriate in the interests of investors in securities and the securities market.

12. Power to investigate

It may, at any time by order in writing, direct any person specified in the order to investigate the affairs of such intermediary or persons associated with the securities market and to report thereon to the Board regarding any intermediary or any person associated with the securities market has violated any of the provisions of this Act or the rules or the regulations made or directions issued by the Board there under.

13. Power to Cease and desist proceedings

If the Board finds, after causing an inquiry to be made, that any person has violated, or is likely to violate, any provisions of this Act, or any rules or regulations made there under, it may pass an order requiring such person to cease and desist from committing or causing such violation.

13.7 Registration of Stock brokers, Sub-brokers, Share transfer agents, etc.

- No stock-broker, sub- broker, share transfer agent, banker to an issue, trustee of trust deed, registrar to an issue, merchant banker, underwriter, portfolio manager, investment adviser and such other intermediary who may be associated with securities market shall buy, sell or deal in securities except under, and in accordance with, the conditions of a certificate of registration obtained from the Board in accordance with the regulations made under this Act.
- No depository, participant, custodian of securities, foreign institutional investor, credit rating agency or any other intermediary associated with the securities market as the Board may by notification in this behalf specify, shall buy or sell or deal in securities except under and in accordance with the conditions of a certificate of registration obtained from the Board in accordance with the regulations made under this Act.
- No person shall sponsor or cause to be sponsored or carry on or cause to be carried on any venture capital funds or collective investment schemes including mutual funds, unless he obtains a certificate of registration from the Board in accordance with the regulations.
- Every application for registration shall be in such manner and on payment of such fees as may be determined by regulations.

- The Board may, by order, suspend or cancel a certificate of registration in such manner as may be determined by regulations.

13.8 Mutual Fund and SEBI

What is a Mutual Fund?

Mutual fund is a mechanism for pooling the resources by issuing units to the investors and investing funds in securities in accordance with objectives as disclosed in offer document. Investments in securities are spread across a wide cross-section of industries and sectors and thus the risk is reduced. Diversification reduces the risk because all stocks may not move in the same direction in the same proportion at the same time. Mutual fund issues units to the investors in accordance with quantum of money invested by them. Investors of mutual funds are known as unit holders.

The profits or losses are shared by the investors in proportion to their investments. The mutual funds normally come out with a number of schemes with different investment objectives which are launched from time to time. A mutual fund is required to be registered with Securities and Exchange Board of India (SEBI) which regulates securities markets before it can collect funds from the public.

Role of SEBI in Mutual funds industry

Unit Trust of India was the first mutual fund set up in India in the year 1963. In early 1990s, Government allowed public sector banks and institutions to set up mutual funds.

In the year 1992, Securities and exchange Board of India (SEBI) Act was passed. The objectives of SEBI are – to protect the interest of investors in securities and to promote the development of and to regulate the securities market.

As far as mutual funds are concerned, SEBI formulates policies and regulates the mutual funds to protect the interest of the investors. SEBI notified regulations for the mutual funds in 1993. Thereafter, mutual funds sponsored by private sector entities were allowed to enter the capital market. The regulations were fully revised in 1996 and have been amended thereafter from time to time. SEBI has also issued guidelines to the mutual funds from time to time to protect the interests of investors.

All mutual funds whether promoted by public sector or private sector entities including those promoted by foreign entities are governed by the same set of Regulations. There is no distinction in regulatory requirements for these mutual funds and all are subject to monitoring and inspections by SEBI. The risks associated with the schemes launched by the mutual funds sponsored by these entities are of similar type.

13.9 Critical Review of SEBI

SEBI has made progress in many areas, but there are quite a few other areas within the SEBI's domain which needs much more attention, for example the vetting of the issues by SEBI left much to be desired and allowed large number of issues of dubious pedigree to mobilize money between 1994 and 1996, led to a dull primary market.

1. **Disclosures**: Even though SEBI has taken enormous pains to make the disclosures more transparent the quality of information flow leaves much to be desired. Timeliness of disclosure is another area of concern. Despite the time limit of 48 hours to inform SEBI about any deal that would affect the shareholders interest, it is not adhered to. There is a need for SEBI to ensure the timely dissemination of information.
2. **Dissemination process**: The list of information specified for disclosure is exhaustive. But the mode is through SEBI. The companies have to provide the information to the SEBI and SEBI to the investing public. Considerable delay is involved in this process. To avoid delay, web sites can be created to download the information material.
3. **Settlement**: The NSE has Wednesday- Tuesday settlement cycle while BSE has Monday- Friday cycle. This creates more arbitrage opportunities. The prices of the securities experience fluctuations on the opening and closing days. Implementation of uniform settlement cycle would improve the quality of price formation and reduce cost imposed on investors due to arbitrage related trades. The rolling settlement with T + 5 would reduce the arbitrage.
4. **Government approval**: The Central Government has authorized SEBI to frame its rules and regulation for actively monitoring capital markets. These rules and regulations will have to be approved by the government first. This will cause unnecessary delay and interference by the Finance Minister. SEBI will have to seek

prior approval for filling criminal complaints for violations for the regulations. This will again cause delay at government level.

5. **No Autonomy**: SEBI has not been given autonomy. Its Board of Directors is dominated by government nominees. Out of 5 directors only 2 can be from outside and these are to represent the Ministries of Finance, Law and Reserve Bank of India.
6. **Badla Trade**: The carry forward system is mainly used by the speculative brokers and large traders. Speculative deal may lead to abnormal price rise and payment crisis. This would affect the investor's confidence. Badla should be considered as a lending and borrowing system with suitable checks and balances. Index futures offer an opportunity for hedgers and speculators.

13.10 Summary

In this unit we studied about the SEBI and its role in security market. Securities and Exchange Board of India (SEBI) was established by the Government of India through an executive resolution, and was subsequently upgraded as a fully autonomous body (a statutory Board) in the year 1992 with the passing of the Securities and Exchange Board of India Act (SEBI Act) on 30th January 1992. SEBI has introduced the comprehensive regulatory measures, prescribed registration norms, the eligibility criteria, the code of obligations and the code of conduct for different intermediaries like, bankers to issue, merchant bankers, brokers and sub-brokers, registrars, portfolio managers, credit rating agencies, underwriters and others. The main objectives of the SEBI are to control and regulate the securities market for protecting the interest of investors. Time to time, SEBI arranges scheduled workshops to educate the investors. SEBI has many powers for stopping fraud in capital market. It can ban on the trading of those brokers who are involved in fraudulent and unfair trade practices relating to stock market. It can impose the penalties on capital market intermediaries if they involve in insider trading. SEBI uses his powers to audit the performance of different Indian stock exchange for bringing transparency in the working of stock exchanges. SEBI has made progress in many areas, but there are quite a few other areas within the SEBI's domain which needs much more attention.

13.11 Glossary

"Intermediary' means any person who is registered with the Board under section 12 of the Act, but does not include Foreign Institutional Investors and Foreign Venture Capital Investors.

'Investor' means an investor in securities and includes a Foreign Institutional Investor and a Foreign Venture Capital Investor.

"Market participants' means intermediaries, other entities, investors, listed companies and companies who intend to get their securities listed.

FIMMDA: Fixed Income, Money Market and Derivatives Association

'**Other entity'** means any recognised stock exchange, clearing corporation, approved intermediary under the Securities Lending Scheme, 1997, investor associations and includes any other person granted recognition by the Board, any person required to obtain any license or approval from any self-regulatory organization and any other person associated with the securities market in any manner as may be notified by the Board in the official gazette.

13.2 Check your progress

1. Mutual funds are regulated in India by which among the following?

   a) RBI
   b) SEBI
   c) Stock exchanges
   d) RBI and SEBI both

2. The head office of SEBI is situated at:

   a) Mumbai
   b) Calcutta
   c) New Delhi
   d) Chennai

3. Warehousing facility means

   a) Storing the stocks with merchant bankers
   b) Storing the stock with brokers

c) Issuing separate contract notes for different trade

d) Issuing one contract note for a large quantity traded in parts

4. The first mutual fund established in India was

a) GIC

b) LIC

c) UTI

d) SBI

5. SEBI would not vet offer documents seeking listing on

a) OTCEI

b) NSE

c) BSE

d) ISE

13.13 Answers to check your progress/SAQ

1. b) 2. b) 3. b) 4. c) 5. a)

13.14 Terminal Questions

1. What are the objectives and functions of SEBI? Explain the organisation of SEBI.
2. What is primary market? How does SEBI regulate primary market?
3. State the major areas controlled and reforms by SEBI in secondary market.
4. Explain the powers of SEBI to regulate the securities market and protect the interest of investors.
5. Critically examine the role of SEBI in Indian stock market.

13.15 References/Bibliography

Kevin S, "Security Analysis and Portfolio Management", PHI Learning, New Delhi, 2009

Gupta, Shashi K "Security analysis and portfolio management" Kalyani Publisher, New Delhi

Sridharan K, Mathew's k Alex (2011), "Security analysis and portfolio management", Tata McGraw Hill.

Pandian, Punithavathy (2011), "Security analysis and portfolio management" Vikas publishing house pvt. ltd.

William F. Sharpe, Gordon J.Alexander and Jeffery V.Bailey: Investments, Prentice Hall

http://www.sebi.gov.in/sebiweb/stpages/about_sebi.jsp

http://www.sebi.gov.in/cms/sebi_data/about_us/act15ac.html#ch4

http://www.svtuition.org/2010/05/role-of-sebi-in-indian-capital-market.html

Unit-14: Guidelines for Securities Market

14.1 Introduction

14.2 Securities Market and its Segments

14.3 Elements of Securities Markets

14.4 Regulatory and Legislative Framework

14.5 Role of NSE in Indian Securities Market

14.6 Different types of Securities

14.7 Guidelines for Listing of Securities on BSE

14.8 Listing of Securities on NSE

14.9 Benefits of Listing

14.10 Limitations of listing

14.11 Summary

14.12 Glossary

14.13 Check your progress

14.14 Answers to check your progress

14.15 Terminal Questions

14.16 References/Bibliography

Objectives

After reading this unit you will be able to:

- Explain securities market and various securities market segment.
- Describe the elements of securities market.
- Discuss the regulatory and legislative framework of securities market.
- Explain the different types of securities and role of NSE in Indian securities market.
- Explain the procedure of listing of securities on BSE and NSE.
- Know about different types of securities, their benefits and limitations.

14.1 Introduction

The securities markets in India have made enormous progress in developing sophisticated instruments and modern market mechanisms. The key strengths of the Indian capital market

include a fully automated trading system on all stock exchanges, a wide range of products, an integrated platform for trading in both cash and derivatives, and a nationwide network of trading through over 4,618 corporate brokers. A significant feature of the Indian securities market is the quality of regulation. The market regulator, Securities and Exchange Board of India (SEBI) is an independent and effective regulator. It has put in place sound regulations in respect of intermediaries, trading mechanism, settlement cycles, risk management, derivative trading and takeover of companies. There is a well designed disclosure based regulatory system. Information technology is extensively used in the securities market. The stock exchanges in India have the most advanced and scientific risk management systems.

The growing number of market participants, the growth in volume of securities transactions, the reduction in transaction costs, the significant improvements in efficiency, transparency and safety, and the level of compliance with international standards have earned for the Indian securities market a new respect in the world.

14.2 Securities Market and its Segments

A security is an investment instrument, other than an insurance policy or fixed annuity, issued by a corporation, government, or other organization which offers evidence of debt or equity.

The securities market has two interdependent and inseparable segments, **the new issues (primary) market and the stock (secondary) market**. The primary market provides the channel for creation and sale of new securities, while the secondary market deals in securities previously issued. The securities issued in the primary market are issued by public limited companies or by government undertakings. The resources in this kind of market are mobilized either through the public issue or through private placement route. It is a public issue if anyone can subscribe it, whereas if the issue is made available to a selected group of persons it is termed as private placement. There are two major types of issuers of securities, the corporate entities who issue mainly debt and equity instruments and the government (central as well as state) who issue debt securities (dated securities and treasury bills).

The secondary market enables participants who hold securities to adjust their holdings in response to changes in their assessment of risks and returns. Once the new securities are issued in the primary market they are traded in the stock (secondary) market. The secondary market operates through two mediums, namely, the over-the-counter (OTC) market and the

exchange-traded market. OTC markets are informal markets where trades are negotiated. Most of the trades in the government securities are in the OTC market. All the spot trades where securities are traded for immediate delivery and payment take place in the OTC market. The other option is to trade using the infrastructure provided by the stock exchanges. The exchanges in India follow a systematic settlement period. All the trades taking place over a trading day (day=T) are settled together after a certain time (T+2 day). The trades executed on exchanges are cleared and settled by a clearing corporation. The clearing corporation acts as a counterparty and guarantees settlement. A variant of the secondary market is the forward market, where securities are traded for future delivery and payment. A variant of the forward market is Futures and Options market. Currently only two exchanges viz., National Stock Exchange of India Ltd. (NSE) and Bombay Stock Exchange (BSE) provide trading in the equity futures & options in India.

14.3 Elements of Securities Markets

The four important elements of securities markets are the investors, the issuers, the intermediaries and regulators:

- **Investors**

An investor is the backbone of the capital market of any economy as he is the one lending his surplus resources for funding the setting up or expansion of companies, in return for financial gain.

- **Issuers**

The term issuer means “every person who issues or proposes to issue any security, or has outstanding any security which it has issued.” The term person means “a natural person or a company.” The term company in turn, is defined as a corporation, a partnership, an association, a joint-stock company, a trust, a fund, or any organized group of persons whether incorporated or not; or any receiver, trustee in a case under title 11 of the United States Code or similar official or any liquidating agent for any of the foregoing, in his capacity as such.

- **Intermediaries**

The term "market intermediary" refers to those who are in the business of managing individual portfolios, executing orders, dealing in or distributing securities and providing information relevant to the trading of securities. The market mediators play an important role in the stock exchanges; they put together the demands of the buyers with the offers of the security sellers. A large variety and number of intermediaries provide intermediation services in the Indian securities markets. The market intermediary has a close relationship with the investor with whose protection the regulator is primarily tasked. As a consequence a large portion of the regulation of a securities industry is directed towards the market intermediary. Regulations address entry criteria, capital and prudential requirements, ongoing supervision and discipline of entrants, and the consequences of default and failure. One of the issue concerning brokers is the need to encourage them to corporatize. Currently, 46.10% of the brokers are corporate. Corporatization of their business would help them compete with global players in capital markets at home and abroad. Corporatization brings better standards of governance and better transparency hence increasing the confidence level of customers.

- **Regulators**

The absence of conditions of perfect competition in the securities market makes the role of regulator extremely important. The regulator ensures that the market participants behave in a desired manner so that securities markets continue to be a major source of finance for corporate and government and the interest of investors are protected. The responsibility for regulating the securities market is shared by Department of Economic Affairs (DEA), Ministry of Corporate Affairs (MCA), Reserve Bank of India (RBI) and SEBI. The orders of SEBI under the securities laws are appeal able before a Securities Appellate Tribunal (SAT). Most of the powers under the SCRA are exercisable by DEA while a few others by SEBI. The powers of the DEA under the SCRA are also concurrently exercised by SEBI. The powers in respect of the contracts for sale and purchase of securities, gold related securities, money market securities and securities derived from these securities and ready forward contracts in debt securities are exercised concurrently by RBI. The SEBI Act and the Depositories Act are mostly administered by SEBI. The rules under the securities laws are framed by government and regulations by SEBI. All these rules are administered by SEBI. The powers under the Companies Act relating to issue and transfer of securities and non-payment of dividend are administered by SEBI in case of listed companies and companies proposing to get their securities listed.

14.4 Regulatory and Legislative Framework

At present, the five main Acts governing the securities markets are (a) the SEBI Act, 1992; (b) the Companies Act, 1956, which sets the code of conduct for the corporate sector in relation to issuance, allotment and transfer of securities, and disclosures to be made in public issues; (c) the Securities Contracts (Regulation) Act, 1956, which provides for regulation of transactions in securities through control over stock exchanges (d) the Depositories Act, 1996 which provides for electronic maintenance and transfer of ownership of demat shares and (e) Prevention of Money Laundering Act, 2002.

- **SEBI Act, 1992:** The SEBI Act, 1992 was enacted to empower SEBI with statutory powers for (a) protecting the interests of investors in securities, (b) promoting the development of the securities market, and (c) regulating the securities market. Its regulatory jurisdiction extends over corporates in the issuance of capital and transfer of securities, in addition to all intermediaries and persons associated with securities market. It can conduct enquiries, audits and inspection of all concerned and adjudicate offences under the Act. It has powers to register and regulate all market intermediaries and also to penalize them in case of violations of the provisions of the Act, Rules and Regulations made there under. SEBI has full autonomy and authority to regulate and develop an orderly securities market.
- **Securities Contracts (Regulation) Act, 1956**: It provides for direct and indirect control of virtually all aspects of securities trading and the running of stock exchanges and aims to prevent undesirable transactions in securities. It gives Central Government regulatory jurisdiction over (a) stock exchanges through a process of recognition and continued supervision, (b) contracts in securities, and (c) listing of securities on stock exchanges. As a condition of recognition, a stock exchange complies with conditions prescribed by Central Government. Organised trading activity in securities takes place on a specified recognized stock exchange. The stock exchanges determine their own listing regulations which have to conform to the minimum listing criteria set out in the Rules.
- **Depositories Act, 1996**: The Depositories Act, 1996 provides for the establishment of depositories in securities with the objective of ensuring free transferability of securities with speed, accuracy and security by (a) making securities of public limited companies freely transferable subject to certain exceptions; (b) dematerializing the

securities in the depository mode; and (c) providing for maintenance of ownership records in a book entry form. In order to streamline the settlement process, the Act envisages transfer of ownership of securities electronically by book entry without making the securities move from person to person. The Act has made the securities of all public limited companies freely transferable, restricting the company's right to use discretion in effecting the transfer of securities, and the transfer deed and other procedural requirements under the Companies Act have been dispensed with.

- **Companies Act, 1956**: It deals with issue, allotment and transfer of securities and various aspects relating to company management. It provides for standard of disclosure in public issues of capital, particularly in the fields of company management and projects, information about other listed companies under the same management, and management perception of risk factors. It also regulates underwriting, the use of premium and discounts on issues, rights and bonus issues, payment of interest and dividends, supply of annual report and other information.
- **Prevention of Money Laundering Act, 2002**: The primary objective of the Act is to prevent money-laundering and to provide for confiscation of property derived from or involved in money-laundering. The term money-laundering is defined as whoever acquires, owns, possess or transfers any proceeds of crime; or knowingly enters into any transaction which is related to proceeds of crime either directly or indirectly or conceals or aids in the concealment of the proceeds or gains of crime within India or outside India commits the offence of money-laundering. Besides providing punishment for the offence of money-laundering, the Act also provides other measures for prevention of Money Laundering. The Act also casts an obligation on the intermediaries, banking companies etc to furnish information, of such prescribed transactions to the Financial Intelligence Unit- India, to appoint a principal officer, to maintain certain records etc.

14.5 Role of NSE in Indian Securities Market

National Stock Exchange of India (NSE) was given recognition as a stock exchange in April 1993. NSE was set up with the objectives of (a) establishing a nationwide trading facility for all types of securities, (b) ensuring equal access to all investors all over the country through an appropriate communication network, (c) providing a fair, efficient and transparent securities market using electronic trading system, (d) enabling shorter settlement cycles and

book entry settlements and (e) meeting the international benchmarks and standards. Within a short span of time, above objectives have been realized and the Exchange has played a leading role in transforming the Indian Capital Market to its present form.

NSE has set up infrastructure that serves as a role model for the securities industry in terms of trading systems, clearing and settlement practices and procedures. The standards set by NSE in terms of market practices, products, technology and service standards have become industry benchmarks and are being replicated by other market participants. It provides screen-based automated trading system with a high degree of transparency and equal access to investors irrespective of geographical location. The high level of information dissemination through on-line system has helped in integrating retail investors on a nation-wide basis.

NSE has been playing the role of a catalytic agent in reforming the market in terms of microstructure and market practices. Right from its inception, the exchange has adopted the purest form of demutualised set up whereby the ownership, management and trading rights are in the hands of three different sets of people. This has completely eliminated any conflict of interest and helped NSE to aggressively pursue policies and practices within a public interest framework. It has helped in shifting the trading platform from the trading hall in the premises of the exchange to the computer terminals at the premises of the trading members located country-wide and subsequently to the personal computers in the homes of investors. Settlement risks have been eliminated with NSE's innovative endeavors in the area of clearing and settlement viz., reduction of settlement cycle, professionalization of the trading members, fine-tuned risk management system, dematerialization and electronic transfer of securities and establishment of clearing corporation.

As a consequence, the market today uses the state-of-art information technology to provide an efficient and transparent trading, clearing and settlement mechanism.

NSE provides a trading platform for all types of securities-equity, debt and derivatives. On its recognition as a stock exchange under the Securities Contracts (Regulation) Act, 1956 in April 1993, it commenced operations in the Wholesale www.nseindia.com19 Securities Market in India: An Overview I S M R Debt Market (WDM) segment in June 1994, in the Capital Market (CM) segment in November 1994, and in Equity Derivatives segment in June

2000. The Exchange started providing trading in retail debt of Government Securities in January 2003 and trading in currency futures in August 2008.

The Wholesale Debt Market segment provides the trading platform for trading of a wide range of debt securities. Its product, which is now disseminated jointly with FIMMDA, the FIMMDA NSE MIBID/MIBOR is used as a benchmark rate for majority of deals struck for Interest Rate Swaps, Forwards Rate Agreements, Floating Rate Debentures and Term Deposits in the country. Its 'Zero Coupon Yield Curve' as well as NSE-VaR for Fixed Income Securities have also become very popular for valuation of sovereign securities across all maturities irrespective of its liquidity and facilitated the pricing of corporate papers and GOI Bond Index.

NSEs Capital Market segment offers a fully automated screen based trading system, known as the National Exchange for Automated Trading (NEAT) system, which operates on a strict price/time priority. It enables members from across the country to trade simultaneously with enormous ease and efficiency.

NSEs Equity Derivatives segment provides trading of a wide range of derivatives like Index Futures, Index Options, Stock Options and Stock Futures.

NSEs Currency Derivatives segment provides trading on currency futures contracts on the USD-INR which commenced on August 29, 2008. In February 2010, trading on additional pairs such as GBP-INR, EUR-INR and JPY-INR was allowed while trading in USD-INR currency options were allowed for trading on October 29, 2010. The interest rate futures trade on the currency derivatives segment of NSE and they were allowed for trading segment on August 31, 2009.

The NSE yet again registered as the market leader with 87.64% of total turnover (volumes in cash market, equity derivatives and currency derivatives) in 2009-10. NSE proved itself as the market leader contributing a share of 74.98% in the equity trading and nearly 100% share in the equity derivatives segment in the year 2009-10. Not only in Indian Markets, but also in the global Markets, NSE has created a niche for itself in terms of derivatives trading in various instruments.

14.6 Different types of Securities

Equity shares

Equity shares or ordinary shares are those shares which are not preference shares. Dividend on these shares is paid after the fixed rate of dividend has been paid on preference shares. The rate of dividend on equity shares is not fixed and depends upon the profits available and the intention of the board. In case of winding up of the available and the intention of the board. In case of winding up of the company, equity capital can be paid back only after every other claim including the claim of preference shareholders has been settled. The most outstanding feature of equity capital is that its holders control the affairs of the company and have an unlimited interest in the company's profits and assets. They enjoy voting right on all matters relating to the business of the company. They may earn dividend at a higher rate and have the risk of getting nothing. the importance of issuing ordinary shares is that no organization for profit can exist without equity share capital. This is also known as risk capital.

Sweat equity

Sweat equity is a term that refers to a party's contribution to a project in the form of effort as opposed to financial equity, which is a contribution in the form of capital. In a partnership, some partners may contribute to the firm only capital and others only sweat equity. Similarly, in a startup company formed as a corporation, employees may receive stock or stock options, becoming thus part-owners of the firm, in return for accepting salaries that are below their respective market values (this includes zero wages). The term used to refer to a form of compensation by businesses to their owners or employees.

The term is sometimes used to describe the efforts put into a start-up company by the founders in exchange for ownership shares of the company. This concept, also called stock for services and sometimes equity compensation.

Non-voting stock

Non-voting stock is stock that provides the shareholder very little or no vote on corporate matters, such as election of the board of directors or mergers. This type of share is usually implemented for individuals who want to invest in the company’s profitability and success at the expense of voting rights in the direction of the company. Preferred stock typically has nonvoting qualities.

Rights issue

A rights issue is an issue of additional shares by a company to raise seasoned equity offering. The rights issue is a special form of shelf offering or shelf registration. With the issued rights, existing shareholders have the privilege to buy a specified number of new shares from the firm at a specified price within a specified time. A rights issue is in contrast to an initial public offering, where shares are issued to the general public through market exchanges. Closed-end companies cannot retain earnings, because they distribute essentially all of their realized income, and capital gains each year. They raise additional capital by rights offerings. Companies usually opt for a rights issue either when having problems raising capital through traditional means or to avoid interest charges on loans.

Bonus share

A bonus share is a free share of stock given to current shareholders in a company, based upon the number of shares that the shareholder already owns. While the issue of bonus shares increases the total number of shares issued and owned, it does not change the value of the company. Although the total number of issued shares increases, the ratio of number of shares held by each shareholder remains constant.

Preference stock

Preferred stock, also called preferred shares, preference shares, or simply preferred, is a special equity security that has properties of both equity and a debt instrument and is generally considered a hybrid instrument. Preferred are senior (i.e. higher ranking) to common stock, but are subordinate to bonds in terms of claim or rights to their share of the assets of the company.

Preferred stock usually carries no voting rights, but may carry a dividend and may have priority over common stock in the payment of dividends and upon liquidation. Terms of the preferred stock are stated in a "Certificate of Designation".

Debenture

A debenture is a document that either creates a debt or acknowledges it, and it is a debt without collateral. In corporate finance, the term is used for a medium- to long-term debt instrument used by large companies to borrow money. In some countries the term is

used interchangeably with bond, loan stock or note. A debenture is thus like a certificate of loan or a loan bond evidencing the fact that the company is liable to pay a specified amount with interest and although the money raised by the debentures becomes a part of the company's capital structure, it does not become share capital. Senior debentures get paid before subordinate debentures, and there are varying rates of risk and payoff for these categories.

Bond

A bond is a debt security, in which the authorized issuer owes the holders a debt and, depending on the terms of the bond, is obliged to pay interest (the coupon) to use and/or to repay the principal at a later date, termed maturity. A bond is a formal contract to repay borrowed money with interest at fixed intervals (semi annual, annual, sometimes monthly).

Warrant

A warrant is a security that entitles the holder to buy the underlying stock of the issuing company at a fixed exercise price until the expiry date. Warrants are frequently attached to bonds or preferred stock as a sweetener, allowing the issuer to pay lower interest rates or dividends. They can be used to enhance the yield of the bond, and make them more attractive to potential buyers. Warrants can also be used in private equity deals. Frequently, these warrants are detachable, and can be sold independently of the bond or stock.

14.7 Guidelines for Listing of Securities on BSE

Meaning

Listing means admission of securities to dealings on a recognized stock exchange. The securities may be of any public limited company, Central or State Government, quasi governmental and other financial institutions/corporations, municipalities etc.

The objectives of listing are mainly to:

- Provide liquidity to securities;
- Mobilize savings for economic development;
- Protect interest of investors by ensuring full disclosures.

The BSE Limited has a dedicated Listing Department to grant approval for listing of securities of companies in accordance with the provisions of the Securities Contracts (Regulation) Act, 1956, Securities Contracts (Regulation) Rules, 1957, Companies Act, 1956, Guidelines issued by SEBI and Rules, Bye-laws and Regulations of BSE.

BSE has set various guidelines and forms that need to be adhered to and submitted by the companies. These guidelines will help companies to expedite the fulfillment of the various formalities and disclosure requirements that are required at various stages of

1. Public Issues
    - Initial Public Offering
    - Further Public Offering
2. Preferential Issues
3. Indian Depository Receipts
4. Amalgamation
5. Qualified Institutions Placements

A company intending to have its securities listed on BSE has to comply with the listing requirements prescribed by it. Some of the requirements are as under:

1. Minimum Listing Requirements for New Companies

The following eligibility criteria have been prescribed for listing of companies on BSE, through Initial Public Offerings (IPOs) & Follow-on Public Offerings (FPOs):

- The minimum post-issue paid-up capital of the applicant company (hereinafter referred to as "the Company") shall be Rs. 10 crore for IPOs & Rs.3 crore for FPOs; and
- The minimum issue size shall be Rs. 10 crore; and
- The minimum market capitalization of the Company shall be Rs. 25 crore (market capitalization shall be calculated by multiplying the post-issue paid-up number of equity shares with the issue price).

Futher:

- In respect of the requirement of paid-up capital and market capitalization, the issuers shall be required to include in the disclaimer clause forming a part of the offer document that in the event of the market capitalization (product of issue price and the post issue number of shares) requirement of BSE not being met, the securities of the issuer would not be listed on BSE.
- The applicant, promoters and/or group companies, shall not be in default in compliance of the listing agreement.
- The above eligibility criteria would be in addition to the conditions prescribed under SEBI (Issue of Capital & Disclosure Requirements) Regulations, 2009.
- The Issuer shall comply to the guidance/ regulations applicable to listing as bidding inter alia from:
    1. Securities Contracts (Regulations) Act 1956
    2. Securities Contracts (Regulation) Rules 1957
    3. Companies Act 1956
    4. Securities and Exchange Board of India Act 1992
    5. And any other circular, clarifications, guidelines issued by the appropriate authority.

2. Minimum Requirements for Companies Delisted by BSE seeking Relisting on BSE

Companies delisted by BSE and seeking relisting at BSE are required to make a fresh public offer and comply with the extant guidelines of SEBI and BSE regarding initial public offerings.

3. Permission to Use the Name of BSE in an Issuer Company's Prospectus

Companies desiring to list their securities offered through a public issue are required to obtain prior permission of BSE to use the name of BSE in their prospectus or offer for sale documents before filing the same with the concerned office of the Registrar of Companies. BSE has a Listing Committee, comprising of market experts, which decides upon the matter of granting permission to companies to use the name of BSE in their prospectus/offer documents. This Committee evaluates the promoters, company, project , financials, risk factors and several other aspects before taking a decision in this regard. Decision with regard to some types/sizes of companies has been delegated to the Internal Committee of BSE.

4. Submission of Letter of Application

As per Section 73 of the Companies Act, 1956, a company seeking listing of its securities on BSE is required to submit a Letter of Application to all the stock exchanges where it proposes to have its securities listed before filing the prospectus with the Registrar of Companies.

5. Allotment of Securities

As per the Listing Agreement, a company is required to complete the allotment of securities offered to the public within 30 days of the date of closure of the subscription list and approach the Designated Stock Exchange for approval of the basis of allotment. In case of Book Building issues, allotment shall be made not later than 15 days from the closure of the issue, failing which interest at the rate of 15% shall be paid to the investors.

6. Trading Permission

As per SEBI Guidelines, an issuer company should complete the formalities for trading at all the stock exchanges where the securities are to be listed within 7 working days of finalization of the basis of allotment.

A company should scrupulously adhere to the time limit specified in SEBI (Disclosure and Investor Protection) Guidelines 2000 for allotment of all securities and dispatch of allotment letters/share certificates/credit in depository accounts and refund orders and for obtaining the listing permissions of all the exchanges whose names are stated in its prospectus or offer document. In the event of listing permission to a company being denied by any stock exchange where it had applied for listing of its securities, the company cannot proceed with the allotment of shares. However, the company may file an appeal before SEBI under Section 22 of the Securities Contracts (Regulation) Act, 1956.

7. Requirement of 1% Security

Companies making public/rights issues are required to deposit 1% of the issue amount with the Designated Stock Exchange before the issue opens. This amount is liable to be forfeited in the event of the company not resolving the complaints of investors regarding delay in sending refund orders/share certificates, non-payment of commission to underwriters, brokers, etc.

8. Payment of Listing Fees

All companies listed on BSE are required to pay to BSE the Annual Listing Fees by 30th April of every financial year as per the Schedule of Listing Fees prescribed from time to time.

The schedule of Listing Fees for the year 2011-12, is given here under:

S Securities *other than Privately Placed Debt Securities and Mutual Funds

Sr. No.	Particulars	Amount
1	Initial Listing Fees	Rs. 20,000/-
2	Annual Listing Fees	
(i)	Upto Rs. 5 Crs.	Rs. 15,000/-
(ii)	Rs.5 Crs. To Rs.10 Crs.	Rs. 25,000/-
(iii)	Rs.10 Crs. To Rs.20 Crs.	Rs. 40,000/-
(iv)	Rs.20 Crs. To Rs.30 Crs.	Rs. 60,000/-
(v)	Rs.30 Crs. To Rs.100 Crs.	Rs. 70,000/- plus Rs. 2,500/- for every increase of Rs. 5 crs or part thereof above Rs. 30 crs.
(vi)	Rs.100 Crs. to Rs.500 Crs.	Rs. 125,000/- plus Rs. 2,500/- for every increase of Rs. 5 crs or part thereof above Rs. 100 crs.
(vii)	Rs.500 Crs. to Rs.1000 Crs.	Rs. 375,000/- plus Rs. 2,500/- for every increase of Rs. 5 crs or part thereof above Rs. 500 crs.
(vi)	Above Rs. 1000 Crs.	Rs. 625,000/- plus Rs. 2,750/- for every increase of Rs. 5 crs or part thereof above Rs. 1000 crs.
	Note: In case of debenture capital (not convertible into equity shares), the fees will be 75% of the above fees.	
* includes equity shares, preference shares, indian depository receipts, fully convertible debentures, partly		

convertible debentures and any other security convertible into equity shares.

Privately Placed Debt Securities

Sr. No.	Particulars	Amount
1	Initial Listing Fees	NIL
2	Annual Listing Fees	
(i)	Issue size up to Rs.5 Crs.	Rs. 2,500/-
(ii)	Above Rs.5 Crs. and up to Rs.10 Crs.	Rs. 3,750/-
(iii)	Above Rs.10 Crs. and up to Rs.20 Crs.	Rs. 7,500/-
(iv)	Above Rs.20 Crs.	Rs.7,500/- plus Rs.200/- for every increase Rs.1Cr.or part thereof above Rs.20crs. Subject to a maximum of Rs.30,000/- per instrument.
Note: Cap on the annual listing fee of debt instruments per issuer is Rs.5, 00,000/- per annum.		

Mutual Funds

Sl. No.	Particulars	Amount (Rs.)
1	Initial Listing Fees	NIL
2	Annual Listing Fee for tenure of the scheme	Payable per 'month or part thereof'
i.	Issue size up to Rs.50 Crs.	Rs.1,000/-
ii.	Above Rs.50 Crs.and up to Rs.100 Crs.	Rs.2,000/-
iii.	Above Rs.100 Crs.and up to Rs.300 Crs.	Rs.3,600/-
iv.	Above Rs.300 Crs.and up to Rs.500 Crs.	Rs.5,900/-

v.	Above Rs.500 Crs.and up to Rs. 1000 Crs.	Rs.9,800/-
Vi	Above 1000 Crs.	Rs.15,600/-

9. Compliance with the Listing Agreement

Companies desirous of getting their securities listed at BSE are required to enter into an agreement with BSE called the Listing Agreement, under which they are required to make certain disclosures and perform certain acts, failing which the company may face some disciplinary action, including suspension/delisting of securities. As such, the Listing Agreement is of great importance and is executed under the common seal of a company. Under the Listing Agreement, a company undertakes, amongst other things, to provide facilities for prompt transfer, registration, sub-division and consolidation of securities; to give proper notice of closure of transfer books and record dates, to forward 6 copies of unabridged Annual Reports, Balance Sheets and Profit and Loss Accounts to BSE, to file shareholding patterns and financial results on a quarterly basis; to intimate promptly to the Exchange the happenings which are likely to materially affect the financial performance of the Company and its stock prices, to comply with the conditions of Corporate Governance, etc.

The Listing Department of BSE monitors the compliance by the companies with the provisions of the Listing Agreement, especially with regard to timely payment of annual listing fees, submission of results, shareholding patterns and corporate governance reports on a quarterly basis. Penal action is taken against the defaulting companies.

10. Cash Management Services (CMS) - Collection of Listing Fees

In order to simplify the system of payment of listing fees, BSE has entered into an arrangement with HDFC Bank for collection of listing fees from 141 locations all over the country. Details of the HDFC Bank branches are available on our website site www.bseindia.com as well as on the HDFC Bank website www.hdfcbank.com This facility is being provided free of cost.

Companies intending to utilize this facility for payment of listing fee should furnish the information (as mentioned below) in the Cash Management Cash Deposit Slip. These slips are available at all the HDFC Bank branches.

14.8 Listing of Securities on NSE

NSE plays an important role in helping Indian companies' access equity capital, by providing a liquid and well-regulated market. As of March 2010, there were 1,470 companies listed on NSE. The companies listed on the Exchange are from various sectors of the economy such as - heavy industry, software, refinery, public sector units, infrastructure, and financial services. Wide range of securities such as stocks, bonds and other securities can be listed in the Capital Market (Equities) segment and its Wholesale Debt Market segment. Listing means formal admission of a security to the trading platform of the Exchange. It provides liquidity to investors without compromising the need of the issuer for capital and ensures effective monitoring of conduct of the issuer and trading of the securities in the interest of investors. The issuer wishing to have trading privileges for its securities satisfies listing requirements prescribed in the relevant statutes and in the listing regulations of the Exchange. It also agrees to pay the listing fees and comply with listing requirements on a continuous basis. All the issuers who list their securities have to satisfy the corporate governance requirement framed by regulators.

Listing Criteria

The Exchange has laid down criteria for listing of new issues by companies through IPOs, companies listed on other exchanges etc. in conformity with the Securities Contracts (Regulation) Rules, 1957, SEBI Guidelines and other relevant guidelines/acts. The criteria include minimum paid-up capital and market capitalisation, company/promoter's track record, etc. The issuers of securities are required to adhere to provisions of the Securities Contracts (Regulation) Act, 1956, the Companies Act, 1956, the Securities and Exchange Board of India Act, 1992 and the rules, circulars, notifications, guidelines, etc. prescribed there under.

Listing Agreement

All companies seeking listing of their securities on the Exchange are required to enter into a formal listing agreement with the Exchange. The agreement specifies all the quantitative and qualitative requirements to be continuously complied with by the issuer for continued listing. The Exchange monitors such compliance and companies who do not comply with the

provisions of the listing agreement may be suspended from trading on the Exchange. The agreement is being increasingly used as a means to improve corporate governance.

Compliance by Listed Companies

NSE has institutionalized a process of verifying compliance of various conditions of the listing agreement. It conducts a periodic review for compliance on account of announcement of book closure/record date, announcement of quarterly results, submission of shareholding pattern, annual reports, appointment of compliance officer, corporate governance report, investor grievances and various disclosures etc.

Disclosures by Listed Companies

It is essential that all critical price sensitive/material information relating to securities is made available to the market participants and the investors immediately to enable them to take informed decisions in respect of their investments in securities. The Exchange therefore ensures certain important timely disclosures by listed companies and disseminates them to market through the NEAT terminals and through its website. These disclosures include corporate actions, quarterly/half yearly results, decisions at board meeting, non-promoters' holding, announcements / press releases etc.

De-listing

There are two kinds of delisting which can be done from the Exchanges as per the SEBI (Delisting of Securities) Guidelines, 2003 in the following manner:

- Voluntary De-listing of Companies

Any promoter or acquirer desirous of delisting securities of the company under the provisions of these guidelines shall obtain the prior approval of shareholders of the company by a special resolution passed through postal ballot, make a public announcement in the manner provided in these guidelines, make an application to the delisting exchange for seeking in-principle approval in the form specified by the exchange, and comply with such other additional conditions as may be specified by the concerned stock exchanges from where securities are to be de-listed. Any promoter of a company which desires to de-list from the stock exchange shall also determine an exit price for delisting of securities in accordance with

the book building process as stated in the guidelines. The stock exchanges shall provide the infrastructure facility for display of the price at the terminal of the trading members to enable the investors to access the price on the screen to bring transparency to the delisting process.

- Compulsory De-listing of Companies

The stock exchanges may de-list companies which have been suspended for a minimum period of six months for non-compliance with the listing agreement. The stock exchanges have to give adequate and wide public notice through newspapers and also give a show cause notice to a company. The exchange shall provide a time period of 15 days within which representation may be made to the exchange by any person who may be aggrieved by the proposed delisting. The Stock Exchanges may, after consideration of the representation received from the aggrieved persons, delist the securities of such companies. The stock exchange shall ensure that adequate and wide public notice is given through newspaper and on the notice boards/trading systems of the stock exchanges and shall ensure disclosure in all such notices of the fair value of such securities.

The stock exchange shall display the name of such company on its website. Where the securities of the company are de-listed by an exchange, the promoter of the company shall be liable to compensate the security holders of the company by paying them the fair value of the securities held by them and acquiring their securities, subject to their option to remain security-holders with the company.

14.9 Benefits of Listing:

The following are the benefits of listing of securities in a Stock Exchange:

1. A premier marketplace: The sheer volume of trading activity ensures that the impact cost is lower on the Exchange which in turn reduces the cost of trading to the investor. The automated trading system ensures consistency and transparency in the trade matching which enhances investor's confidence and visibility of our market.

2. Visibility: The trading system provides unparallel level of trade and post-trade information. The best 5 buy and sell orders are displayed on the trading system and the total number of securities available for buying and selling is also displayed. This helps the investor to know the depth of the market. Further, corporate announcements, results, corporate actions etc are also available on the trading system.

3. Unprecedented reach: Stock exchanges provide a trading platform that extends across the length and breadth of the country. Investors from number of centers can avail of trading facilities. The Exchange uses the latest in communication technology to give instant access from every location.

4. Value addition: A listing can also be anticipated to attach importance to a company's Employee Share Ownership Scheme. In addition, a listing on a stock exchange can add value to a company. A listing could press forward brand awareness of company products and can augment a company's corporate standing. Furthermore, the superior profile, tied with larger lucidity, could add to the company's capacity to have access to traditional sources of capital.

5. Increasing capital: The Stock Exchange makes available access to a collection of institutional and retail investors and to the capital market. A registration on the exchange allows a company to raise capital and use it to sponsor investment and expansion. Even after a company is listed, it can boost up capital from the market, through the issue of fresh securities such as Rights issues or through the issue of a new nature of securities.

6. Access to a widespread shareholder base: The stock exchange puts forward companies a right of entry to a wide-ranging and mounting investor base, which contains both entity investors and plentiful local and international institutional investors.

7. Price Detection: A listing facilitates companies to ascertain a price for their shares.

8. Low cost capital: The primary gain of raising capital from the market is that it eschews a number of the intermediation expenses apparent in the other forms of capital rising. Consequently, the market endows companies with capital at a cheaper cost.

9. Corporate Information: The stock exchanges used to disseminate information and company announcements across the country. Important information regarding the company is announced to the market through the Broadcast Mode through the web sides of the stock exchanges. Corporate developments such as financial results, book closure, announcements of bonus, rights, takeover, mergers etc. are disseminated across the country thus minimizing scope for price manipulation or misuse.

14.10 Limitations of listing

1. Control - An IPO automatically implies a change in the structure of ownership. A private business owner may have complete control over a business but as soon as it becomes a public company, other organizations and individuals have the right to express an interest and in

some cases, to direct decision making. For business people more used to giving rather than taking orders, it can be a galling prospect.

2. Director's responsibilities - Holding office in a publicly listed company carries duties and responsibilities, and transgressions can result in severe penalties, including a stint in the 'big house'. However, mandatory sentencing certainly hasn't reached the world of white-collar crime just yet. Nevertheless, the regulations are designed to ensure company directors understand and act in the interests appropriate to the company's ownership structure and its shareholders.

3. Disclosure - A public company has an obligation to inform the public, through the authorities, of what's going on although this doesn't always work as well in practice as it does in theory. Any developments that may affect the share price must be disclosed. While this means the market is kept informed, it can be a pain in the posterior for a company. For a small, under-resourced business it can be an unhealthy distraction from day-to-day management. And being a listed company means it's more difficult to hide information from competitors.

4. Cost - Listing a company isn't cheap either. There's the extra cost of disclosure, the annual and other reports to shareholders, not to mention the costs involved with listing. These additional expenses need to be carefully considered when analyzing a prospectus as they can consume a substantial portion of the amount being raised.

14.11 Summary

In this unit we studied about various types of securities and guidelines issued by SEBI regarding listing of securities on BSE and NSE. The securities markets in India have made enormous progress in developing sophisticated instruments and modern market mechanisms. Securities and Exchange Board of India (SEBI) is an independent and effective regulator. It has put in place sound regulations in respect of intermediaries, trading mechanism, settlement cycles, risk management, derivative trading and takeover of companies. There is a well designed disclosure based regulatory system. Information technology is extensively used in the securities market. The stock exchanges in India have the most advanced and scientific risk management systems. The securities market has two interdependent and inseparable segments, the new issues market and the stock market. The four important elements of

securities markets are the investors, the issuers, the intermediaries and regulators. The Listing Department of BSE monitors the compliance by the companies with the provisions of the Listing Agreement, especially with regard to timely payment of annual listing fees, submission of results, shareholding patterns and corporate governance reports on a quarterly basis. All companies seeking listing of their securities on the Exchange are required to enter into a formal listing agreement with the Exchange. A listing facilitates companies to ascertain a price for their shares.

14.12 Glossary

"Business Day" Any day on which the Exchange is open for the business of dealing in securities.

"Depository" The entity appointed and authorised by an issuer or cancel depositary receipts representing the shares of the issuer deposited that entity.

"Depository Receipts" Instruments issued by a depositary on behalf of an issuer which are listed or are the subject of an application for listing on the Exchange and which evidence the interests and rights in shares of the issuer as provided by the deposit agreement.

"Equity Capital Ratio" The nominal value of the listed issuer's equity capital issued as consideration divided by the nominal value of the listed issuer's issued equity capital immediately before the transaction.

"IPO" Initial Public Offering.

"Issuer" Any company or other legal person any of whose equity securities are the subject of an application for listing on the Exchange or some of whose equity securities are already listed, which includes a company whose shares are represented by depositary receipts that are listed or are the subject of an application for listing but not including the depositary.

"Listing Document" A prospectus, a circular and any equivalent document (including a scheme of arrangement and introduction document) issued or proposed to be issued in connection with an application for listing.

14.13 Check your progress

1. In India futures on individual securities have been introduced by

(a) NSE
(b) BSE
(c) OTCEI
(d) BSE & NSE

2. The main objective of NSE is

(a) Establishing a nationwide trading facility for all types of securities
(b) Ensuring equal access to all investors
(c) Providing a fair, efficient and transparent securities market
(d) Enabling shorter settlement cycles and book entry settlements
(e) All of the above

3. Five paisa.com is an example of online trading portal. True/ False

4. With use of diversification an investor can minimize the risk in security market. True/ False

5. The risk associated to get the required rate of return on the stock is measured by Beta. True/ False

6. In case of fixed income securities like debentures, you get the return in the form of dividend. True/ False

7. The stock exchanges may de-list companies which have been suspended for a minimum period ---------- for non-compliance with the listing agreement.

e) 3 months
f) 6 months
g) 8 months
h) 4months

8. When a listing facilitates companies ascertain a price for their shares is known as……

14.14 Answers to check your progress

1. d) 2. e) 3.True 4.True 5. True 6. False 7. b) 8. Price detection

14.15 Terminal Questions

1. Define securities. Give a brief account of different types of securities.
2. What is listing? Why do companies get their shares listed on the stock exchange?
3. Explain the procedure adopted for listing of securities on BSE.
4. Discuss the regulatory and legislative framework of securities market in India.
5. What are the benefits and limitations of listing of securities on stock exchange?
6. Why do companies become delisted? Explain different kinds of delisting of securities from stock exchange?

14.16 References/Bibliography

Kevin S, "Security Analysis and Portfolio Management", PHI Learning, New Delhi, 2009.

Gupta, Shashi K "Security analysis and portfolio management" Kalyani Publisher, New delhi, 2011.

Sridharan K, Mathew's k Alex (2011), "Security analysis and portfolio management", Tata McGraw Hill.

Pandian, Punithavathy (2011), "Security analysis and portfolio management" Vikas publishing house pvt ltd.

William F. Sharpe, Gordon J.Alexander and Jeffery V.Bailey, "Investments", Prentice Hall, 2010.

http://www.bseindia.com/about/abintrobse/listsec.asp

http://www.sebi.gov.in/bylaws/ch4.pdf

http://www.sebi.gov.in/sebiweb/stpages/about_sebi.jsp

Unit – 15: Foreign Exchange Regulation Act (FERA)

15.1 Introduction

15.2 Meaning, Features and Objectives of FERA

15.3 Extent of FERA

15.4 Important Terminology of the Act

15.5 Appointment and powers of officers of Enforcement

15.6 Important Regulation of FERA

15.7 Powers of the Government under FERA

15.8 Adjudication and Appeals

15.9 Summary

15.10 Glossary

15.11 Check your progress

15.12 Answers to check your progress

15.13 Terminal Questions

15.14 References/Bibliography

Objectives

After reading this unit you will be able to:

- Explain FERA, its Features and objectives
- Describe extent and important terminology of FERA
- Explain important regulation of FERA
- Explain powers of the government under FERA
- Know about adjudication and appeals procedure

15.1 Introduction

The Foreign Exchange Regulation Act (FERA) was legislation, passed by the Indian Parliament in 1973 by the government of India and came into force with effect from January 1, 1974. FERA imposed stringent regulations on certain kinds of payments, the dealings in

foreign exchange and securities and the transactions which had an indirect impact on the foreign exchange and the import and export of currency.

The purpose of the act, inter alia, was to "regulate certain payments, dealings in foreign exchange and securities, transactions indirectly affecting foreign exchange and the import and export of currency, for the conservation of foreign exchange resources of the country"

Coca-Cola was India's leading soft drink until 1977 when it left India after a new government ordered the company to turn over its secret formula for Coca-Cola and dilute its stake in its Indian unit as required by the Foreign Exchange Regulation Act (FERA). In 1993, the company (along with PepsiCo) returned after the introduction of India's Liberalization policy. FERA was repealed in 1999 by the government of Atal Bihari Vajpayee and replaced by the Foreign Exchange Management Act, which liberalised foreign exchange controls and restrictions on foreign investment.

15.2 Meaning, Features and Objectives of FERA:

An Act to consolidate and amend the law regulating certain payments, dealings in foreign exchange and securities, transactions indirectly affecting foreign exchange and the import and export of currency, for the conservation of the foreign exchange resources of the country and the proper utilisation thereof in the interests of the economic development of the country.

FERA has the following features:

- Regulated in India by the Foreign Exchange Regulation Act (FERA), 1973.
- Consisted of 81 sections.
- FERA Emphasized strict exchange control.
- Control everything that was specified, relating to foreign exchange.
- Law violators were treated as criminal offenders.
- Aimed at minimizing dealings in foreign exchange and foreign securities.

FERA was introduced at a time when foreign exchange (Forex) reserves of the country were low, Forex being a scarce commodity. FERA therefore proceeded on the Government of India and had to be collected and surrendered to the Reserve bank of India (RBI). FERA primarily prohibited all transactions, except one’s permitted by RBI.

The main objectives of FERA were:

- To regulate certain payments.
- To regulate dealings in foreign exchange and securities.
- To regulate transactions, indirectly affecting foreign exchange.
- To regulate the import and export of currency.
- To conserve precious foreign exchange.
- The proper utilization of foreign exchange so as to promote the economic development of the country.

15.3 Extent of FERA

FERA extends to the whole of India. It applies also to all citizens of India outside India and to branches and agencies outside India of companies or bodies corporate, registered or incorporated in India. It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint in this behalf and Provided that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

15.4 Important Terminology of the Act

1.**"Appellate Board"** means the Foreign Exchange Regulation Appellate Board constituted by the Central Government under sub-section (1) of section 52;

2.**"Authorised Dealer"** means a person for the time being authorised under section 6 to deal in foreign exchange;

3. **"Bearer Certificate"** means a certificate of title to securities by the delivery of which (with or without endorsement) the title to the securities is transferable;

4**. "Certificate of title to a Security"** means any document used in the ordinary course of business as proof of the possession or control of the security, or authorising or purporting to authorise, either by an endorsement or by delivery, the possessor of the document to transfer or receive the security thereby represented;

5. **"Coupon"** means a coupon representing dividends or interest on a security;

The provisions of F.E.R. (Amendment) Act, 1993 (hereafter referred to as Act 29 of 1993) came into force on the 8th day of January 1993.

6. **"Currency"** includes all coins, currency notes, banks notes, postal notes, postal orders, money orders, cheques, drafts, traveler's cheques, letters of credit, bills of exchange and promissory notes;

7**. "Foreign Currency"** means any currency other than Indian currency;

8. **"Foreign exchange"** means foreign currency and includes -

(i) All deposits, credits and balances payable in any foreign currency, and any drafts, traveler's cheques, letters of credit and bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency;

(ii) Any instrument payable, at the option of the drawee or holder thereof or any other party thereto, either in Indian currency or in foreign currency or partly in one and partly in the other;

9**. "Indian Currency"** means currency which is expressed or drawn in Indian rupees but does not include special bank notes and special one-rupee notes issued under section 28A of the Reserve Bank of India Act, 1934;

10. **"Money-Changer"** means a person for the time being authorised under section 7 to deal in foreign currency;

11. **"Overseas Market",** in relation to any goods, means the market in the country outside India and in which such goods are intended to be sold;

12. **"Owner",** in relation to any security, includes any person who has power to sell or transfer the security, or who has the custody thereof or who receives, whether on his own behalf or on behalf of any other person, dividends or interest thereon, and who has any interest therein, and in a case where any security is held on any trust or dividends or interest thereon are paid into a trust fund.

13. **"Person Resident in India"** means -

(i) a citizen of India, who has, at any time after the 25th day of March, 1947, been staying in India but does not include a citizen of India who has gone out of, or stays outside, India, in either case-- (a) for or on taking up employment outside India, or (b) for carrying on outside India a business or vocation outside India, or (c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;

(ii) a citizen of India, who having ceased by virtue of paragraph (a) or paragraph (b) or paragraph (c) of sub-clause (I) to be resident in India.

(iii) a person, not being a citizen of India, who has come to, or stays in, India, in either case - (a) for or on taking up employment in India, or (b) for carrying on in India a business or vocation in India, or (c) for staying with his or her spouse, such spouse being a person resident in India, or (d) for any other purposes, in such circumstances as would indicate his intention to stay in India for an uncertain period;

14. **"Person Resident outside India"** means a person who is not resident in India;

15. **"Reserve Bank"** means the Reserve Bank of India.

16. **"Security"** means shares, stocks, bonds, debentures, debenture stock, Government securities as defined in the Public Debt Act, 1944, savings certificates to which the Government Savings Certificates Act, 1959 applies, deposit receipts in respect of deposits of securities, and units or sub-units of unit trusts and includes certificates of title to securities, but does not include bills of exchange or promissory notes other than Government promissory notes;

17. **"Transfer",** in relation to any security, includes transfer by way of loan or security.

18. **"Blocked Account"** means an account opened, whether before or after the commencement of this Act, as a blocked account at any office or branch in India of a bank authorised in this behalf by the Reserve Bank, or an account blocked, whether before or after such commencement, by order of the Reserve Bank.

15.5 Appointment and powers of officers of Enforcement [Sec 4]

The Central Government may appoint such persons as it thinks fit to be officers of Enforcement. The Central Government may authorize a Director of Enforcement or an Additional Director of Enforcement or a Deputy Director of Enforcement or an Assistant Director of Enforcement to appoint officers of Enforcement below the rank of an Assistant Director of Enforcement. Subject to such conditions and limitations as the Central Government may impose, an officer of Enforcement may exercise the powers and discharge the duties conferred or imposed on him under this Act.

The Central Government may, by order and subject to such conditions and limitations as it thinks fit to impose, authorize any officer of customs or any Central Excise Officer or any police officer or any other officer of the Central Government or a State Government to

exercise such of the powers and discharge such of the duties of the Director of Enforcement or any other officer of Enforcement under this Act as may be specified in the order.

15.6 Important Regulation of FERA

1. Dealing in Foreign Exchange [Sec 6]

- The Reserve Bank may, on an application made to it in this behalf, authorize any person to deal in foreign exchange.
- An authorization under this section shall be in writing.
- May authorize transactions of all descriptions in foreign currencies or may be restricted to authorising dealings in specified foreign currencies only.
- May authorize dealings in all foreign currencies or may be restricted to authorising specified transactions only.
- May be granted to be effective for a specified period, or within specified amounts.
- Except with the previous permission of the Reserve Bank, an authorised dealer shall not engage in any transaction involving any foreign exchange which is not in conformity with the terms of his authorization under this section.
- An authorised dealer shall, before undertaking any transaction in foreign exchange on behalf of any person, require that person to make such declarations and to give such information as will reasonably satisfy him that the transaction will not involve, and is not designed for the purpose of, any contravention or evasion of the provisions of this Act.

2. Money-Changers [Sec 7]

- The Reserve Bank may, on an application made to it in this behalf, authorize any person to deal in foreign currency.
- An authorization under this section shall be in writing
- May authorize dealings in all foreign currencies or may be restricted to authorising dealings in specified foreign currencies only;
- May authorize transactions of all descriptions in foreign currencies or may be restricted to authorising specified transactions only;

- May be granted with respect to a particular place where alone the money changer shall carry on his business;
- May be granted to be effective for a specified period, or within specified amounts;
- May be granted subject to such conditions as may be specified therein.
- Any authorization granted under sub-section (1) may be revoked by the Reserve Bank at any time if the Reserve Bank is satisfied that
    1. it is in the public interest to do so;
    2. The money-changer has not complied with the conditions subject to which the authorization was granted.

3. Restrictions on dealing in foreign exchange [Sec 8]

Except with the previous general or special permission of the Reserve Bank, no person other than an authorised dealer shall in India, and no person resident in India other than an authorised dealer shall outside India, purchase or otherwise acquire or borrow from, or sell, or otherwise transfer or lend to or exchange with, any person not being an authorised dealer, any foreign exchange:

Provided that nothing in this sub-section shall apply to any purchase or sale of foreign currency effected in India between any person and a money-changer.

4. Restrictions on payments [Sec 9]

Save as may be provided in and in accordance with any general or special exemption from the provisions of this sub-section which may be granted conditionally or unconditionally \by the Reserve Bank, no person in, or resident in, India shall –

- make any payment to or for the credit of any person resident outside India;
- Receive, otherwise than through an authorised dealer, any payment by order or on behalf of any person resident outside in India.
- draw, issue or negotiate any bill of exchange or promissory note or acknowledge any debt, so that a right (whether actual or contingent) to receive a payment is created or transferred in favor of any person resident outside India;
- make any payment to, or for the credit of, any person by order or on behalf of any person resident outside India;

- place any sum to the credit of any person resident outside India;
- draw, issue or negotiate any bill of exchange or promissory note, transfer any security or acknowledge any debt, so that a right (whether actual or contingent) to receive a payment is created or transferred in favour of any person.

5. Blocked accounts [Sec 10]

Where an exemption from the provisions of section 9 is granted by the Reserve Bank in respect of payment of any sum to any person resident outside India and the exemption is made subject to the condition that the payment is made to a blocked account –

- The payment shall be made to a blocked account in the name of that person in such manner as the Reserve Bank may, by general or special order, direct;
- The crediting of that sum to that account shall, to the extent of the sum credited, be a good discharge to the person making the payment.
- No sum standing at the credit of a blocked account shall be drawn on except in accordance with any general or special permission which may be granted conditionally or otherwise by the Reserve Bank.

6. Restrictions on import and export of certain currency [Sec 13]

The Central Government may, by notification in the Official Gazette, order that, subject to such exemption, if any, as may be specified in the notification, no person shall, except with the general or special permission of the Reserve Bank and on payment of the fee, if any, prescribed, bring or send into India any foreign exchange or any Indian currency.

7. Acquisition by Central Government of foreign exchange [Sec 14]

The Central Government may, by notification in the Official Gazette, order every person in, or resident in, India –

- who owns or holds such foreign exchange as may be specified in the notification, to offer it, or cause it to be offered, for sale to the Reserve Bank on behalf of the Central Government or to such person, as the Reserve Bank may authorise for the purpose, at

such price as the Central Government may fix, being a price which is not less than the price calculated at the rate of exchange for the time being authorised by the Reserve Bank;

- who is entitled to assign any right to receive such foreign exchange as may be specified in the notification, to transfer that right to the Reserve Bank on behalf of the Central Government on payment of such consideration therefore as the Central Government may fix having regard to the rate for the time being authorised by the Reserve Bank in pursuance of sub-section

8. **Duty of persons entitled to receive foreign exchange [Sec 16]**

No person who has a right to receive any foreign exchange or to receive from a person resident outside India a payment in rupees shall, except with the general or special permission of the Reserve Bank, do or refrain from doing anything, or take or refrain from taking any action, which has the effect of securing –

- That the receipt by him of the whole or part of that foreign exchange or payment is delayed, or
- That the foreign exchange or payment ceases in whole or in part to be receivable by him
- Where a person has failed to comply with the requirements of sub-section (1) in relation to any foreign exchange or payment in rupees, the Reserve Bank may give to him such directions as appear to be expedient for the purposes of securing the receipt of the foreign exchange or payment, as the case may be.

9. Payment for exported goods [Sec 18]

- The Central Government may, by notification in the Official Gazette, prohibit the taking or sending out by land, sea or air (hereafter in this section referred to as export) of all goods or of any goods or class of goods specified in the notification from India directly or indirectly to any place so specified unless the exporter furnishes to the prescribed authority a declaration in the prescribed form supported by such evidence as may be prescribed or so specified and true in all material particulars which, among others, shall include the amount representing –

(i) The full export value of the goods; or

(ii) if the full export value of the goods is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions, expects to receive on the sale of the goods in the overseas market, and affirms in the said declaration that the full export value of the goods (whether ascertainable at the time of export or not) has been, or will within the prescribed period be, paid in the prescribed manner.

- If the Central Government is of opinion that it is necessary or expedient in the public interest so to do, it may, by notification in the Official Gazette, specify any goods, from among those goods to which a notification under clause (a) applies, and direct that in respect of the goods so specified, where an exporter makes a declaration under sub-clause (ii) of clause (a) of the value which he, having regard to the prevailing market conditions expects to receive on the sale of such goods in the overseas market, he shall not, except with the permission of the Reserve Bank on an application made to the Reserve Bank by the exporter in this behalf, authorize or permit or allow or in any manner be a party to, the sale of such goods for a value less than that declared:
- Provided that no permission shall be refused by the Reserve Bank under this clause unless the exporter has been given a reasonable opportunity for making a representation in the matter:
- Provided further that where the exporter makes an application to the Reserve Bank for permission under this clause and the Reserve Bank does not, within a period of twenty days from the date of receipt of the application, communicate to the exporter that permission applied for has been refused, it shall be presumed that Reserve Bank has granted such permission.

10. Payment for lease, hire or other arrangement [Sec 18]

No person shall, except with the general or special permission of the Reserve Bank, take or send out by land, sea or air any goods from India to any place on lease or hire or under any arrangement other than sale or disposal in any other manner of such goods.

11. Regulation of export and transfer of securities [Sec 19]

Notwithstanding anything contained in section 81 of the Companies Act, 1956, no person shall, except with the general or special permission of the Reserve Bank, --

- Take or send any security to any place outside India;
- Transfer any security, or create or transfer any interest in a security, to or in favour of a person resident outside India;
- Deleted by Act 29 of 1993;
- Issue, whether in India or elsewhere, any security which is registered or to be registered in India, to a person resident outside India;
- Acquire, hold or dispose of any foreign security.

12. **Restrictions on issue of bearer securities** **[Sec 22]**

Except with the general or special permission of the Reserve Bank, no person shall, in India, and no person resident in India shall, outside India, create or issue any bearer certificate or coupon or so alter any document that it becomes a bearer certificate or coupon.

13. Restriction on settlement etc. **[Sec 24]**

No person resident in India shall, except with the general or special permission of the Reserve Bank, settle, or make a gift of, any property so that a person who at the time of the settlement or the making of the gift is resident outside India, elsewhere than in the territories notified in this behalf by the Reserve Bank, will have an interest in the property, or exercise any power for payment in favour of a person who at the time of the exercise of the power is resident outside India elsewhere than in such notified territories:

Provided that any settlement or gift made or any power exercised as aforesaid without the permission of the Reserve Bank shall not be invalid merely on the ground that such permission has not been obtained.

14. Restriction on holding of immovable property outside India **[Sec 25]**

No person resident in India shall, except with the general or special permission of the Reserve Bank, acquire or hold or transfer or dispose of by sale, mortgage, lease, gift, settlement or otherwise, any immovable property situate outside India:

- Provided that nothing in this sub-section shall apply to the acquisition or transfer of any such immovable property by way of lease for a period not exceeding five years.
- Any person resident in India and holding any immovable property outside India at the commencement of this Act shall, before the expiry of a period of three months from such commencement or such further period as the Reserve Bank may allow in this behalf, declare such holding to the Reserve Bank in such form and containing such particulars as may be specified by the Reserve Bank.
- Nothing in this section shall apply to a national of a foreign State.

15. Certain provisions as to guarantee in respect of debt or other obligation [Sec 26]

Except with the general or special permission of the Central Government, or the Reserve Bank, no person resident in India shall give a guarantee in respect of any debt or other obligation or liability-(i) of a person resident in India, and due or owing to a person resident outside India, or (ii) of a person resident outside India.

16. Restrictions on establishment of place of business in India [Sec 28]

Without prejudice to the provisions of section 28 and section 47 and notwithstanding anything contained in any other provisions of this Act or the provisions of the Companies Act, 1956, a person resident outside India (whether a citizen of India or not) or a person who is not a citizen of India but is resident in India or a company (other than a banking company) which is not incorporated under any law in force in India or any branch of such company, shall not, except with the general or special permission of the Reserve Bank-

- Carry on in India, or establish in India a branch, office or other place of business for carrying on any activity of a trading, commercial or industrial nature, other than an activity for the carrying on of which permission of the Reserve Bank has been obtained under Section 28; or

- Acquire the whole or any part of any undertaking in India of any person or company carrying on any trade, commerce or industry or purchase the shares in India of any such company.

17. **Prior permission of Reserve Bank required for practicing profession, etc. in India by nationals of foreign States [Sec 30]**

- No national of a foreign State shall, without the previous permission of the Reserve Bank practice any profession or carry on any occupation, trade or business in India in a case where such national desires to acquire any foreign exchange (such foreign exchange being intended for remittance outside India) out of any moneys received by him in India by reason of the practicing of such profession or the carrying on of such occupation, trade or business, as the case may be.
- Where any national of a foreign State desires to obtain the permission of the Reserve Bank under sub-section (1), he may make an application to the Reserve Bank in such form, in such manner and containing such particulars as may be prescribed.
- On receipt of an application under sub-section (2), the Reserve Bank may, after making such inquiry as it deems fit, allow the application subject to such conditions, if any, as it may think fit to impose or reject the application:
- Provided that no application shall be rejected under this sub-section unless the applicant has been given a reasonable opportunity for making a representation in the matter.

18. Restriction on acquisition, holding, etc., of immovable property in India [Sec 31]

- No person who is not a citizen of India and no company (other than a banking company) which is not incorporated under any law in force in India shall, except with the previous general or special permission of the Reserve Bank, acquire or hold or transfer or dispose of by sale, mortgage, lease, gift, settlement or otherwise any immovable property situate in India:

Provided that nothing in this sub-section shall apply to the acquisition or transfer of any such immovable property by way of lease for a period not exceeding five years.

- Any person or company referred to in sub-section (1) and requiring a special permission under that sub-section for acquiring, or holding, or transferring, or disposing of, by sale, mortgage, lease, gift, settlement or otherwise any immovable property situate in India may make an application to the Reserve Bank in such form and containing such particulars as may be specified by the Reserve Bank.
- On receipt of an application under sub-section (2), the Reserve Bank may, after making such inquiry as it deems fit, either grant or refuse to grant the permission applied for:

Provided that no permission shall be refused unless the applicant has been given a reasonable opportunity for making a representation in the matter.

15.7 Powers of the Government under FERA

1. Power to call for information [Sec 33]

- The Central Government may, at any time by notification in the Official Gazette, direct the owners, subject to such exceptions, if any, as may be specified in the notification, of such foreign exchange or foreign securities or immovable properties held outside India as may be so specified, to submit a return, or from time to time returns, thereof to the Reserve Bank within such period, and giving such particulars, as may be so specified.
- Where for the purposes of this Act the Central Government or the Reserve Bank or any officer of Enforcement, not below the rank of a Chief Enforcement Officer, considers it necessary or expedient to obtain and examine any information, book or other document in the possession of any person or which in the opinion of the Central Government or the Reserve Bank or such officer it is possible for such person to obtain and furnish, the Central Government or the Reserve Bank or, as the case may be, such officer may, by order in writing, require any such person (whose name shall be specified in the order) to furnish, or to obtain and furnish, to the Central Government or the Reserve Bank or such officer or any person specified in the order with such information, book or other document and thereupon such person shall be bound to comply with such requisition.

2. Power to search suspected persons and to seize documents [Sec 34]

- If any officer of Enforcement authorised in this behalf by the Central Government, by general or special order, has reason to believe that any person has secreted about his person or in anything under his possession, ownership or control any documents which will be useful for, or relevant to, any investigation or proceeding under this Act, he may search that person or such thing and seize such documents.
- When any officer of Enforcement is about to search any person under the provisions of this section, the officer of Enforcement shall, if such person so requires, take such person without unnecessary delay to the nearest gazetted officer of Enforcement superior in rank to him or a magistrate.
- If such requisition is made, the officer of Enforcement may detain the person making it until he can bring him before the gazetted officer of Enforcement or the magistrate referred to in sub-section (2).
- No female shall be searched by any one excepting a female.

3. Power to arrest [Sec 35]

- If any officer of Enforcement authorised in this behalf by the Central Government, by general or special order, has reason to believe that any person in India or within the Indian customs waters has been guilty of an offence punishable under this Act, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.
- Every person arrested under sub-section (1) shall, without unnecessary delay, be taken to a magistrate.
- Where any officer of Enforcement has arrested any person under sub-section (1), he shall, for the purpose of releasing such person on bail or otherwise, have the same powers and be subject to the same provisions as the officer-in-charge of a police station has, and is subject to, under the Code of Criminal Procedure, 1973.

4. Power to stop and search conveyances [Sec 36]

If any officer of Enforcement authorised in this behalf by the Central Government, by general or special order, has reason to believe that any document which will be useful for, or relevant to, any investigation or proceeding under this Act is secreted in any aircraft or vehicle or on any animal in India or in any vessel in India or within the Indian customs waters, he may at any time stop any such vehicle or animal or vessel or, in the case of an aircraft, compel it to stop or land, and -

- Rummage and search any part of the aircraft, vehicle or vessel;
- Examine and search any goods in the aircraft, vehicle or vessel or on the animal;
- Seize any such document as is referred to above;
- Break opens the lock of any door or package for exercising the powers conferred by clauses (a), (b) and (c), if the keys are withheld.

5. Power to search premises [Sec 37]

- If any officer of Enforcement, not below the rank of an Assistant Director of Enforcement, has reason to believe that any documents which, in his opinion, will be useful for, or relevant to, any investigation or proceeding under this Act, are secreted in any place, he may authorise any officer of Enforcement to search for and seize or may himself search for and seize such documents.
- The provisions of the Code of Criminal Procedure, 1973, relating to searches, shall, so far as may be, apply to searches under this section subject to the modification that sub-section (5) of section 165 of the said Code shall have effect as if for the word "Magistrate", wherever it occurs, the words "Director of Enforcement or other officer exercising his powers" were substituted.

6. Power to seize documents, etc. [Sec 38]

Without prejudice to the provisions of section 34 or section 36 or section 37, if any officer of Enforcement authorised in this behalf by the Central Government, by general or special order, has reason to believe that any document or thing will be useful for, or relevant to, any investigation or proceeding under this Act or in respect of which a contravention of any of the provisions of this Act or of any rule, direction or order made there under has taken place, he may seize such document or thing.

7. Power to examine persons [Sec 39]

The Director of Enforcement or any other officer of Enforcement authorised in this behalf by the Central Government, by general or special order, may, during the course of any investigation or proceeding under this Act,-

(a) Require any person to produce or deliver any document relevant to the investigation or proceeding;

(b) Examine any person acquainted with the facts and circumstances of the case.

8. Power to summon persons to give evidence and produce documents [Sec 40]

- Any gazetted officer of Enforcement shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document during the course of any investigation or proceeding under this Act.
- A summons to produce documents may be for the production of certain specified documents or for the production of all documents of a certain description in the possession or under the control of the person summoned.
- All persons so summoned shall be bound to attend either in person or by authorised agents, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents as may be required:
- Provided that the exemption under section 132 of the Code of Civil Procedure, 1908, shall be applicable to any requisition for attendance under this section.
- Every such investigation or proceeding as aforesaid shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code.

9. Custody of documents etc. [Sec 41]

Where in pursuance of an order made under sub-section (2) of section 33 or of the provisions of section 34 or section 36 or section 37 or of a requisition or summons under section 39 or section 40, any document is furnished or seized and any officer of Enforcement has reason to believe that the said document would be evidence of the contravention of any of the

provisions of this Act or of any rule, direction or order made there under, and that it would be necessary to retain the document in his custody, he may so retain the said document for a period not exceeding six months or if, before the expiry of the said period of six months, any proceedings -.(i) under section 51 have been commenced, until the disposal of those proceedings, including the proceedings, if any, before the Appellate Board and the High Court: or (ii) under section 56 have been commenced before a court, until the document has been filed in the court:

Provided that the aforesaid period of six months may, for reasons to be recorded in writing, be extended by the Director of Enforcement for a further period not exceeding six months.

10. Inspection [Sec 42]

Any officer of Enforcement not below the rank of an Assistant Director of Enforcement specially authorised in writing by the Director of Enforcement in this behalf, or any officer of the Reserve Bank specially authorised in writing by the Reserve Bank in this behalf, may inspect the books and accounts and other documents of any authorised dealer.

11. Penalty [Sec 50]

If any person contravenes any of the provisions of this Act [other than section 13, clause (a) of sub-section (1) of section 18, section 18A and clause (a) of sub-section (1) of section 19] or of any rule, direction or order made there under, he shall be liable to such penalty not exceeding five times the amount or value involved in any such contravention or five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement or any other officer of Enforcement not below the rank of an Assistant Director of Enforcement specially empowered in this behalf by order of the Central Government (in either case hereinafter referred to as the adjudicating officer).

12. Power to adjudicate [Sec 51]

For the purpose of adjudging under section 50 whether any person has committed a contravention of any of the provisions of this Act (other than those referred to in that section) or of any rule, direction or order made there under, the adjudicating officer shall hold an inquiry in the prescribed manner after giving that person a reasonable opportunity for making

a representation in the matter and if, on such inquiry, he is satisfied that the person has committed the contravention, he may impose such penalty as he thinks fit in accordance with the provisions of that section.

15.8 Adjudication and Appeals

1. Appeal to Appellate Board [Sec 52]

- The Central Government may, by notification in the Official Gazette, constitute an Appellate Board to be called the Foreign Exchange Regulation Appellate Board consisting of a Chairman and such number of other members, not exceeding four, to be appointed by the Central Government for hearing appeals against the orders of the adjudicating officer made under section 51.
- Any person aggrieved by such order may, on payment of such fee as may be prescribed and after depositing the sum imposed by way of penalty under section 50 and within forty-five days from the date, on which the order is served on the person committing the contravention, prefers an appeal to the Appellate Board.
- The Appellate Board may, for the purpose of examining the legality, propriety or correctness of any order made by the adjudicating officer under section 50 read with section 51 in relation to any proceeding, on its own motion or otherwise, call for the records of such proceeding and make such order in the case as it thinks fit.
- The powers and functions of the Appellate Board may be exercised and discharged by Benches consisting of two members and constituted by the Chairman of the Appellate Board.

2. Appeal to High Court [Sec 54]

An appeal shall lie to the High Court only on questions of law from any decision or order of the Appellate Board under sub-section (3) or sub-section (4) of section 52:

Provided that the High Court shall not entertain any appeal under this section if it is filed after the expiry of sixty days of the date of communication of the decision or order of the Appellate Board, unless the High Court is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

3. **Penalty for contravention of order made by adjudicating officer, Appellate Board and High Court [Sec 57]**

If any person fails to pay the penalty imposed by the adjudicating officer or the Appellate Board or the High Court or fails to comply with any of his or its directions or orders, he shall, upon conviction by a court, be punishable with imprisonment for a term which may extend to two years or with fine or with both.

4. Confiscation of currency, security etc. [Sec 63]

Any court trying a contravention under section 56 and the adjudicating officer adjudging any contravention under section 51 may, if it or he thinks fit and in addition to any sentence or penalty which it or he may impose for such contravention, direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any, of the person committing the contravention or any part thereof, shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf.

5. Correction of clerical errors etc. [Sec 65]

Clerical or arithmetical mistakes in any decision or order passed by the Appellate Board or the adjudicating officer under this Act, or errors arising therein from any accidental slip or omission may, at any time, be corrected by the Appellate Board or the adjudicating officer or his successor in office, as the case may be:

Provided that where any correction proposed to be made under this section will have the result of prejudicially affecting any person no such correction shall be made -(i) after the expiry of a period of two years from the date of such decision or order; and

(ii) Unless the person affected thereby is given a reasonable opportunity for making a representation in the matter.

6. Power to remove difficulties [Sec 80]

If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order, do anything not inconsistent with such provisions for the purpose of removing

the difficulty. Provided that no such order shall be made after the expiration of two years from the commencement of this Act.

7. Repeal and saving **[Sec 81]**

(1) The Foreign Exchange Regulation Act, 1947 is hereby repealed

(2) Not withstanding such repeal -

- anything done or any action taken or purported to have been done or taken (including any rule, notification, inspection, order or notice made or issued, or any appointment, confirmation or declaration made or any license, permission, authorization or exemption granted or any document or instrument executed or any direction given or any proceedings taken or any confiscation adjudged or any penalty or fine imposed) under the Act hereby repealed shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act;
- the provisions of section 60 of this Act shall apply in relation to the contravention of any of the provisions of the Act hereby repealed or of any rule, direction or order made there under;
- any appeal preferred to the Foreign Exchange Regulation Appellate Board under sub-section (2) of section 23E of the Act hereby repealed but not disposed of before the commencement of this Act and any appeal that may be preferred to the said Board against any order made or to be made under section 23 of the Act hereby repealed may be disposed of by any member of the Appellate Board constituted under this Act in accordance with the provisions of sub-section (6) of section 52 of this Act:
- every appeal from any decision or order of the Foreign Exchange Regulation Appellate Board under sub-section (3) or sub-section (4) of Section 23E of the Act hereby repealed shall, if not filed before the commencement of this Act, be filed before the High Court within a period of sixty days of such commencement;

Provided that the High Court may entertain any such appeal after the expiry of the said period of sixty days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period (3) The mention of particular matters in sub-section (2) shall

not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 with regard to the effect of repeal.

15.10 Summary

In this unit we studied about the FERA, its objectives, important regulations and powers. The Foreign Exchange Regulation Act (FERA) was passed by the Indian Parliament in 1973 by the government of India and came into force with effect from January 1, 1974. FERA imposed stringent regulations on certain kinds of payments, the dealings in foreign exchange and securities and the transactions which had an indirect impact on the foreign exchange and the import and export of currency. It extends to the whole of India. FERA was introduced at a time when foreign exchange (Forex) reserves of the country were low, Forex being a scarce commodity. FERA therefore proceeded on the Government of India and had to be collected and surrendered to the Reserve Bank of India (RBI). Central Government may appoint, an officer of Enforcement who exercise the powers and discharge the duties conferred or imposed on him under this Act. This act provides various powers to the central government like Power to call for information, Power to search suspected persons and to seize documents, Power to stop and search conveyances, Power to search premises and seize documents etc. in case of not following the provisions of this act.

15.10 Glossary

1.**"Appellate Board"** means the Foreign Exchange Regulation Appellate Board constituted by the Central Government under sub-section (1) of section 52;

2.**"Authorised Dealer**" means a person for the time being authorised under section 6 to deal in foreign exchange;

3. **"Bearer Certificate"** means a certificate of title to securities by the delivery of which (with or without endorsement) the title to the securities is transferable;

4**. "Certificate of title to a Security"** means any document used in the ordinary course of business as proof of the possession or control of the security, or authorising or purporting to authorize, either by an endorsement or by delivery, the possessor of the document to transfer or receive the security thereby represented;

5. **"Coupon"** means a coupon representing dividends or interest on a security;

The provisions of F.E.R. (Amendment) Act, 1993 (hereafter referred to as Act 29 of 1993) came into force on the 8th day of January 1993.

6. **"Currency"** includes all coins, currency notes, banks notes, postal notes, postal orders, money orders, cheques, drafts, traveller's cheques, letters of credit, bills of exchange and promissory notes;

7**. "Foreign Currency"** means any currency other than Indian currency;

8. **"Foreign exchange"** means foreign currency and includes -

(i) All deposits, credits and balances payable in any foreign currency, and any drafts, traveller's cheques, letters of credit and bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency;

(ii) Any instrument payable, at the option of the drawee or holder thereof or any other party thereto, either in Indian currency or in foreign currency or partly in one and partly in the other;

9**. "Indian Currency"** means currency which is expressed or drawn in Indian rupees but does not include special bank notes and special one-rupee notes issued under section 28A of the Reserve Bank of India Act, 1934;

10. **"Money-Changer"** means a person for the time being authorised under section 7 to deal in foreign currency;

15.11 Check your progress

1 The Foreign Exchange Regulation Act (FERA) was passed by the Indian Parliament in ----------

(a) 1975

(b) 1973

(c) 1978

(d) 1976

2. Financial market activities affect

(a) Personal wealth.

(b) Spending decisions by individuals and business firms.

(c) The economy’s location in the business cycle.

(d) all of the above.

3**.** Which of the following markets is sometimes organized as an over-the-counter market?

(a) The stock market

(b) The bond market

(c) The foreign exchange market

(d) The federal funds market

(e) All of the above

4. The most active stock exchange in the world is the

(a) Nikkei Stock Exchange.

(b) London Stock Exchange.

(c) Shanghai Stock Exchange.

(d) New York Stock Exchange.

5. What was the purpose of reviewing FERA 1973 in the year 1993?

15.12 Answers to check your progress/SAQ

1. b) 2. d) 3. e) 4.a) **5.** Economic Liberalization relating to foreign trade and foreign investments.

15.13 Terminal Questions

1. Explain in brief main provisions of the Foreign exchange management act.

2. State the penalty system for contravention of provisions, rules and regulations of FERA. State the power of Adjudicating Authority to realize the amount of penalty.

3. Write short notes on the followings:

(a) Directorate of enforcement and its power

(b) Power of RBI to issue direction and inspect the authorized person.

(c) Repeal and Savings

(d) Review of FERA in 1993

4. Explain the various provisions and regulations of payment for export goods under the FERA.

5. Define FERA. Explain its features and objectives.

15.14 References/Bibliography

Garg Richa, "Foreign exchange management", Vrinda publications private ltd, 2010

Bharat, "Foreign Exchange Management Act: Rules and Regulations", Bharat law house pvt ltd, 2007

Sharan V, "International Financial Management", prentice Hall of India, N. Delhi, 2009

Seth A K, "International Financial Management" Galgotia Publishing Company, 2009.

http://exim.indiamart.com/act-regulations/fera-1993.html

http://en.wikipedia.org/wiki/Fera

http://www.cabible.com/forum/showthread.php/6677-Difference-between-FERA-and-FEMA

Unit – 16: Foreign Exchange Management Act (FEMA)

16.1 Introduction

16.2 Meaning and Features of FEMA

16.3 Need, Objectives and Extent of FEMA

16.4 Difference between FERA and FEMA

16.5 Important Terminology of the Act

16.6 Regulation and Management of Foreign Exchange

16.7 Contraventions and penalties

16.8 Adjudication and Appeals

16.9 Repeal and saving

16.10 Summary

16.11 Glossary

16.12 Check your progress

16.13 Answers to check your progress

16.14 Terminal Questions

16.15 References/Bibliography

Objectives

After reading this unit you will be able to:

- Explain FEMA, its Features, need and objectives
- Describe extent and important terminology of FEMA
- Difference between FERA and FEMA
- Explain important regulation and management of FEMA
- Know about adjudication and appeals procedure under FEMA

16.1 Introduction

The **Foreign Exchange Management Act** (FEMA) was an act passed in the winter session of Parliament in 1999 which replaced Foreign Exchange Regulation Act. This act seeks to make offenses related to foreign exchange civil offenses. It extends to the whole of India. FEMA, which replaced Foreign Exchange Regulation Act (FERA), had become the need of the hour since FERA had become incompatible with the pro-liberalization policies of the Government of India. The introduction of Foreign Exchange Regulation Act was done in 1974, a period when India's foreign exchange reserve position wasn't at its best. A new control in place to improve this position was the need of the hour. FERA did not succeed in restricting activities, especially the expansion of TNCs (Transnational Corporations). The concessions made to FERA in 1991-1993 showed that FERA was on the verge of becoming redundant. After the amendment of FERA in 1993, it was decided that the act would become the FEMA. This was done in order to relax the controls on foreign exchange in India, as a result of economic liberalization. FEMA served to make transactions for external trade (exports and imports) easier – transactions involving current account for external trade no longer required RBI's permission.

The deals in Foreign Exchange were to be 'managed' instead of 'regulated'. The switch to FEMA shows the change on the part of the government in terms of foreign capital. FEMA has brought a new management regime of Foreign Exchange consistent with the emerging framework of the World Trade Organization (WTO). It is another matter that the enactment of FEMA also brought with it the Prevention of Money Laundering Act 2002, which came into effect from 1 July 2005.

Unlike other laws where *everything is permitted unless specifically prohibited*, under this act *everything was prohibited unless specifically permitted*. Hence the tenor and tone of the Act was very drastic. It required imprisonment even for minor offences. Under FERA *a person was presumed guilty unless he proved himself innocent*, whereas under other laws *a person is presumed innocent unless he is proven guilty*.

16.2 Meaning and Features of FEMA

Meaning: An Act to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India.

FEMA has the following features:

1. Activities such as payments made to any person outside India or receipts from them, along with the deals in foreign exchange and foreign security is restricted that gives the central government the power to impose the restrictions.

2. Restrictions are imposed on people living in India who carry out transactions in foreign exchange, foreign security or who own or hold immovable property abroad.

3. Without general or specific permission of the Reserve Bank of India, FEMA restricts the transactions involving foreign exchange or foreign security and payments from outside the country to India – the transactions should be made only through an authorised person.

4. Deals in foreign exchange under the current account by an authorised person can be restricted by the Central Government, based on public interest.

5. Although selling or drawing of foreign exchange is done through an authorised person, the RBI is empowered by this Act to subject the capital account transactions to a number of restrictions.

6. People living in India will be permitted to carry out transactions in foreign exchange, foreign security or to own or hold immovable property abroad if the currency, security or property was owned or acquired when he/she was living outside India, or when it was inherited to him/her by someone living outside India.

7. Exporters are needed to furnish their export details to RBI. To ensure that the transactions are carried out properly, RBI may ask the exporters to comply with its necessary requirements.

16.3 Need, Objectives and Extent of FEMA

The Foreign Exchange Management Act (1999) or in short FEMA has been introduced as a replacement for earlier Foreign Exchange Regulation Act (FERA). FEMA became an act on the 1st day of June, 2000. FEMA was introduced because the FERA didn't fit in with post-liberalization policies. A significant change that the FEMA brought with it was that it made all offenses regarding foreign exchange civil offenses, as opposed to criminal offenses as dictated by FERA. .

The main objective behind the Foreign Exchange Management Act (1999) is to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments. It was also formulated to promote the orderly development and maintenance of foreign exchange market in India.

FEMA is applicable to all parts of India. The act is also applicable to all branches, offices and agencies outside India owned or controlled by a person who is a resident of India. The FEMA head-office, also known as Enforcement Directorate is situated in New Delhi and is headed by a Director. The Directorate is further divided into 5 zonal offices in Delhi, Mumbai, Kolkata, Chennai and Jalandhar and each office is headed by a Deputy Director. Each zone is further divided into 7 sub-zonal offices headed by the Assistant Directors and 5 field units headed by Chief Enforcement Officers.

Need for FEMA

The buying and selling of foreign currency and other debt instruments by businesses, individuals and governments happens in the foreign exchange market. Apart from being very competitive, this market is also the largest and most liquid market in the world as well as in India. It constantly undergoes changes and innovations, which can either be beneficial to a country or expose them to greater risks. The management of foreign exchange market becomes necessary in order to mitigate and avoid the risks. Central banks would work towards an orderly functioning of the transactions which can also develop their foreign exchange market.

Whether under FERA or FEMA's control, the need for the management of foreign exchange is important. It is necessary to keep adequate amount of foreign exchange reserves, especially when India has to go in for imports of certain goods. By maintaining sufficient reserves,

India's foreign exchange policy marked a shift from Import Substitution to Export Promotion.

16.4 Difference between FERA and FEMA

1. Objective of FERA and FEMA

The object of FERA 1973 was to conserve foreign exchange and prevention of leakage of it due to adverse position of foreign exchange balance in India. After liberalization in 1992, various sectors for opened for FDI time to time which radically changed the foreign exchange position? Instead of negative balance, there was substantial foreign exchange reserve so it was felt necessary to drop out the draconian law of FERA.

2. Criminal Vs Civil Offence in FERA or FEMA

The violation of FERA was criminal offence while it is civil offence under FEMA. The Offences were not compoundable under FERA while it is permitted under FEMA.

Several provisions for payments viz. Basic Travel Quota (BTQ), business travel, export commission, gifts, donations, liberalized remittance scheme are the very friendly measures for easy movement of foreign exchange under FEMA. FEMA is a civil law while FERA was a very-2 draconian police or criminal law.

3. Difference between approval and permission

In case, an approval is required, an action holds good. Only if it is disapproved, it loses its force. But when permission is required, the decision does not become effective till permission is obtained .

4. Difference between Rule and regulations under FEMA

Rules covering practical aspects are made by Central Government. Regulations for implementation of the provisions of the act and rules are prescribed by RBI. Directions are also issued time to time by RBI which have statutory force and can be termed as law.

5. Legal Framework of FEMA 1999 as at July 1, 2010

- FEMA is administered through various provisions as under:

1. FEMA 1999 (total 49 sections)
2. Rules prescribed by Central Government (six set of rules)
3. Regulations made by RBU (22 sets of regulations issued so far)
4. Master circulars and circulars issued by RBI
5. RBI instructions to authorised persons (A I P series) directions
6. Industrial Policy issued by Ministry of Industry
7. External Commercial Borrowings (ECB)/GDR/ADR policy announced by Ministry of Finance
8. Certain other relevant provisions under Income Tax, Custom law, FCRA,

6. Difference between circulars and regulations

Practically and oftenly, the circulars issued by RBI overrides the regulations and are treated as amendment to the regulations. In such cases amended regulations are issued later on with retrospective effect. Most of these circulars are consolidated in master circulars.

16.5 Important Terminology of this Act

1. **"Adjudicating Authority"** means an officer authorised under sub-section (1) of section 16;

2. **"Appellate Tribunal"** means the Appellate Tribunal for Foreign Exchange established under section 18;(c) "authorised person" means an authorised dealer, money changer, off-shore banking unit or any other person for the time being authorised under sub-section (1) of section 10 to deal in foreign exchange or foreign securities;

3. **"Bench"** means a Bench of the Appellate Tribunal;

4. **"Capital Account Transaction"** means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India, and includes transactions referred to in sub-section (3) of section 6;

5. **"Chairperson"** means the Chairperson of the Appellate Tribunal;

6. **"Chartered Accountant"** shall have the meaning assigned to it in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 (38 of 1949);

7. **"Currency"** includes all currency notes, postal notes, postal orders, money orders, cheques, drafts, travelers' cheques, letters of credit, bills of exchange and promissory notes, credit cards or such other similar instruments, as may be notified by the Reserve Bank.

8**. "Director of Enforcement"** means the Director of Enforcement appointed under sub-section (1) of section 36;

9. **"Export",** with its grammatical variations and cognate expressions, means—

- the taking out of India to a place outside India any goods,
- provision of services from India to any person outside India;

10. **"Foreign Currency"** means any currency other than Indian currency;

11. **"Foreign Exchange"** means foreign currency and includes,—

- deposits, credits and balances payable in any foreign currency,
- drafts, travelers cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency,
- drafts, travelers cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency;

12. **"Foreign Security"** means any security, in the form of shares, stocks, bonds, debentures or any other instrument denominated or expressed in foreign currency and includes securities expressed in foreign currency, but where redemption or any form of return such as interest or dividends is payable in Indian currency;

13. **"Import",** with its grammatical variations and cognate expressions, means bringing into India any goods or services;

14. **"Indian currency"** means currency which is expressed or drawn in Indian rupees but does not include special bank notes and special one rupee notes issued under section 28A of the Reserve Bank of India Act, 1934 (2 of 1934);

15. **"Person Resident in India"** means—

- a person residing in India for more than one hundred and eighty-two days during the course of the preceding financial year but does not include—

(A) A person who has gone out of India or who stays outside India, in either case
(B) A person who has come to or stays in India, in either case

- any person or body corporate registered or incorporated in India,
- an office, branch or agency in India owned or controlled by a person resident outside India,
- an office, branch or agency outside India owned or controlled by a person resident in India;

16. **"Person resident outside India"** means a person who is not resident in India;

17. **"Reserve Bank"** means the Reserve Bank of India constituted under sub-section (1) of section 3 of the Reserve Bank of India Act, 1934 (2 of 1934);

18. **"Security"** means shares, stocks, bonds and debentures, Government securities as defined in the Public Debt Act, 1944 (18 of 1944), savings certificates to which the Government Savings Certificates Act, 1959 (46 of 1959) applies, deposit receipts in respect of deposits of securities and units of the Unit Trust of India established under sub-section (1) of section 3 of the Unit Trust of India Act, 1963 (52 of 1963) or of any mutual fund and includes certificates of title to securities, but does not include bills of exchange or promissory notes other than Government promissory notes or any other instruments which may be notified by the Reserve Bank as security for the purposes of this Act;

19. **"Service"** means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, medical assistance, legal assistance, chit fund, real estate, transport, processing, supply of electrical or other energy, boarding or lodging or both, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;

20. **"Transfer"** includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien.

16.6 Regulation and Management of Foreign Exchange

1**. Dealing in foreign exchange, etc. (Sec. 3)**

Save as otherwise provided in this Act, rules or regulations made there under, or with the general or special permission of the Reserve Bank, no person shall—

- deal in or transfer any foreign exchange or foreign security to any person not being an authorised person;
- make any payment to or for the credit of any person resident outside India in any manner;
- receive otherwise through an authorised person, any payment by order or on behalf of any person resident outside India in any manner;
- enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person.

2. Holding of foreign exchange, etc. (Sec. 4)

Save as otherwise provided in this Act, no person resident in India shall acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India.

3. Current account transactions (Sec. 5)

Any person may sell or draw foreign exchange to or from an authorised person if such sale or drawl is a current account transaction:

Provided that the Central Government may, in public interest and in consultation with the Reserve Bank, impose such reasonable restrictions for current account transactions as may be prescribed.

4. Capital account transactions (Sec. 6)

Subject to the provisions of sub-section (2), any person may sell or draw foreign exchange to or from an authorised person for a capital account transaction.

The Reserve Bank may, in consultation with the Central Government, specify—

- any class or classes of capital account transactions which are permissible;
- the limit up to which foreign exchange shall be admissible for such transactions

Without prejudice to the generality of the provisions of sub-section (2), the Reserve Bank may, by regulations, prohibit, restrict or regulate the following—

- transfer or issue of any foreign security by a person resident in India;
- transfer or issue of any security by a person resident outside India;
- transfer or issue of any security or foreign security by any branch, office or agency in India of a person resident outside India;
- any borrowing or lending in foreign exchange in whatever form or by whatever name called;
- any borrowing or lending in rupees in whatever form or by whatever name called between a person resident in India and a person resident outside India;
- deposits between persons resident in India and persons resident outside India;
- export, import or holding of currency or currency notes;

5. Export of goods and services (Sec. 7)

Every exporter of goods shall—

- Furnish to the Reserve Bank or to such other authority a declaration in such form and in such manner as may be specified, containing true and correct material particulars, including the amount representing the full export value.
- Furnish to the Reserve Bank such other information as may be required by the Reserve Bank for the purpose of ensuring the realization of the export proceeds by such exporter.

6. Realization and repatriation of foreign exchange (Sec. 8)

Save as otherwise provided in this Act, where any amount of foreign exchange is due or has accrued to any person resident in India, such person shall take all reasonable steps to realize and repatriate to India such foreign exchange within such period and in such manner as may be specified by the Reserve Bank.

7. Authorised Person (Sec. 10)

- The Reserve Bank may, on an application made to it in this behalf, authorize any person to be known as authorised person to deal in foreign exchange or in foreign securities, as an authorised dealer, money changer or off-shore banking unit or in any other manner as it deems fit.
- An authorization under this section shall be in writing and shall be subject to the conditions laid down therein.
- An authorised person shall, in all his dealings in foreign exchange or foreign security, comply with such general or special directions or orders as the Reserve Bank may, from time to time, think fit to give, and, except with the previous permission of the Reserve Bank, an authorised person shall not engage in any transaction involving any foreign exchange or foreign security which is not in conformity with the terms of his authorization under this section.

16.7 Contravention and Penalties

- **Penalties**

In the event of contravention of the provisions of this act, following penalties are provided such as:

1. If any person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorization is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakhs rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every

day after the first day during which the contravention continues. **[Sec 13(1)]**

2. Any Adjudicating Authority adjudging any contravention under sub-section (1), may, if he thinks fit in addition to any penalty which he may impose for such contravention direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any of the persons committing the contraventions or any part thereof, shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf. **[Sec 13(2)]**

Enforcement of the orders of Adjudicating Authority

Provisions regarding enforcement of orders of Adjudicating Authority are as under:

(A) Subject to the provisions of sub-section (2) of section 19, if any person fails to make full payment of the penalty imposed on him under section 13 within a period of ninety days from the date on which the notice for payment of such penalty is served on him, he shall be liable to civil imprisonment under this section. **[Sec 14(1)]**

(B) No order for the arrest and detention in civil prison of a defaulter shall be made unless the Adjudicating Authority has issued and served a notice upon the defaulter calling upon him to appear before him on the date specified in the notice and to show cause why he should not be committed to the civil prison, and unless the Adjudicating Authority, for reasons in writing, is satisfied—

- that the defaulter, with the object or effect of obstructing the recovery of penalty, has after the issue of notice by the Adjudicating Authority, dishonestly transferred concealed, or removed any part of his property, or

that the defaulter has, or has had since the issuing of notice by the Adjudicating Authority, the means to pay the arrears or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same. **[Sec 14(2)]**

(C) Notwithstanding anything contained in sub-section (1), a warrant for the arrest of the defaulter may be issued by the Adjudicating Authority if the Adjudicating Authority is

satisfied, by affidavit or otherwise, that with the object or effect of delaying the execution of the certificate the defaulter is likely to abscond or leave the local limits of the jurisdiction of the Adjudicating Authority. **[Sec 14(3)]**

(D) Where appearance is not made pursuant to a notice issued and served under sub-section (1), the Adjudicating Authority may issue a warrant for the arrest of the defaulter. **[Sec 14(4)]**

(E) A warrant of arrest issued by the Adjudicating Authority under sub-section (3) or sub-section (4) may also be executed by any other Adjudicating Authority within whose jurisdiction the defaulter may for the time being be found. **[Sec 14(5)]**

(F) Every person arrested in pursuance of a warrant of arrest under this section shall be brought before the Adjudicating Authority issuing the warrant as soon as practicable and in any event within twenty-four hours of his arrest (exclusive of the time required for the journey):

Provided that, if the defaulter pays the amount entered in the warrant of arrest as due and the costs of the arrest to the officer arresting him, such officer shall at once release him. **[Sec 14(6)]**

(G) When a defaulter appears before the Adjudicating Authority pursuant to a notice to show cause or is brought before the Adjudicating Authority under this section, the Adjudicating Authority shall give the defaulter an opportunity showing cause why he should not be committed to the civil prison. **[Sec 14(7)]**

(H) Pending the conclusion of the inquiry, the Adjudicating Authority may, in his discretion, order the defaulter to be detained in the custody of such officer as the Adjudicating Authority may think fit or release him on his furnishing the security to the satisfaction of the Adjudicating Authority for his appearance as and when required. **[Sec 14(8)]**

(I) Upon the conclusion of the inquiry, the Adjudicating Authority may make an order for the detention of the defaulter in the civil prison and shall in that event cause him to be arrested if he is not already under arrest:

Provided that in order to give a defaulter an opportunity of satisfying the arrears, the Adjudicating Authority may, before making the order of detention, leave the defaulter in the

custody of the officer arresting him or of any other officer for a specified period not exceeding fifteen days, or release him on his furnishing security to the satisfaction of the Adjudicating Authority for his appearance at the expiration of the specified period if the arrears are not satisfied. **[Sec 14(9)]**

(J) When the Adjudicating Authority does not make an order of detention under sub-section (9), he shall, if the defaulter is under arrest, direct his release. **[Sec 14(10)]**

(K) Every person detained in the civil prison in execution of the certificate may be so detained,—

- where the certificate is for a demand of an amount exceeding rupees one crore, up to three years, and
- in any other case, up to six months:

Provided that he shall be released from such detention on the amount mentioned in the warrant for his detention being paid to the officer-in-charge of the civil prison. **[Sec 14(11)]**

(L) A defaulter released from detention under this section shall not, merely by reason of his release, be discharged from his liability for the arrears, but he shall not be liable to be arrested under the certificate in execution of which he was detained in the civil prison. **[Sec 14(12)]**

(M) A detention order may be executed at any place in India in the manner provided for the execution of warrant of arrest under the Code of Criminal Procedure, 1973 (2 of 1974). **[Sec 14(13)]**

Power to compound contravention

- Any contravention under section 13 may, on an application made by the person committing such contravention, be compounded within one hundred and eighty days from the date of receipt of application by the Director of Enforcement or such other officers of the Directorate of Enforcement and Officers of the Reserve Bank as may be authorised in this behalf by the Central Government in such manner as may be prescribed. **[Sec 15(1)]**

- Where a contravention has been compounded under sub-section (1), no proceeding or further proceeding, as the case may be, shall be initiated or continued, as the case may be, against the person committing such contravention under that section, in respect of the contravention so compounded. **[Sec 15(2)]**

16.8 Adjudication and Appeal

Appointment of Adjudicating Authority

(a) For the purpose of adjudication under section 13, the Central Government may, by an order published in the Official Gazette, appoint as many officers of the Central Government as it may think fit, as the Adjudicating Authorities for holding an inquiry in the manner prescribed after giving the person alleged to have committed contravention under section 13, against whom a complaint has been made under sub-section (2) (hereinafter in this section referred to as the said person) a reasonable opportunity of being heard for the purpose of imposing any penalty. Provided that where the Adjudicating Authority is of opinion that the said person is likely to abscond or is likely to evade in any manner, the payment of penalty, if levied, it may direct the said person to furnish a bond or guarantee for such amount and subject to such conditions as it may deem fit. **[Sec 16(1)]**

(b) The Central Government shall, while appointing the Adjudicating Authorities under sub-section (1), also specify in the order published in the Official Gazette, their respective jurisdictions. **[Sec 16(2)]**

(c) No Adjudicating Authority shall hold an enquiry under sub-section (1) except upon a complaint in writing made by any officer authorised by a general or special order by the Central Government. **[Sec 16(3)]**

(d) The said person may appear either in person or take the assistance of a legal practitioner or a chartered accountant of his choice for presenting his case before the Adjudicating Authority. **[Sec 16(4)]**

(e) Every Adjudicating Authority shall have the same powers of a civil court which are conferred on the Appellate Tribunal under sub-section (2) of section 28.

- all proceedings before it shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860);

- Shall be deemed to be a civil court for the purposes of sections 345 and 346 of the Code of Criminal Procedure, 1973 (2 of 1974). **[Sec 16(5)]**

(f) Every Adjudicating Authority shall deal with the complaint under sub-section (2) as expeditiously as possible and endeavor shall be made to dispose of the complaint finally within one year from the date of receipt of the complaint. Provided that where the complaint cannot be disposed off within the said period, the Adjudicating Authority shall record periodically the reasons in writing for not disposing off the complaint within the said period. **[Sec 16(6)]**

Appeal to Special Director (Appeals)

- The Central Government shall, by notification, appoint one or more Special Directors (Appeals) to hear appeals against the orders of the Adjudicating Authorities under this section and shall also specify in the said notification the matter and places in relation to which the Special Director (Appeals) may exercise jurisdiction. **[Sec 17(1)]**
- Any person aggrieved by an order made by the Adjudicating Authority, being an Assistant Director of Enforcement or a Deputy Director of Enforcement may prefer an appeal to the Special Director (Appeals). **[Sec 17(2)]**
- Every appeal under sub-section (1) shall be filed within forty-five days from the date on which the copy of the order made by the Adjudicating Authority is received by the aggrieved person and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed. Provided that the Special Director (Appeals) may entertain an appeal after the expiry of the said period of forty-five days, if he is satisfied that there was sufficient cause for not filing it within that period. **[Sec 17(3)]**
- On receipt of an appeal under sub-section (1), the Special Director (Appeals) may after giving the parties to the appeal an opportunity of being heard, pass such order thereon as he thinks fit confirming, modifying or setting aside the order appealed against. **[Sec 17(4)]**
- The Special Director (Appeals) shall send a copy of every order made by him to the parties to appeal and to the concerned Adjudicating Authority. **[Sec 17(5)]**

Establishment of Appellate Tribunal

- The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Appellate Tribunal for Foreign Exchange to hear appeals against the orders of the Adjudicating Authorities and the Special Director (Appeals) under this Act. **[Sec 18]**

Appeal to Appellate Tribunal

- Save as provided in sub-section (2), the Central Government or any person aggrieved by an order made by an Adjudicating Authority, other than those referred to sub-section (1) of section 17, or the Special Director (Appeals), may prefer an appeal to the Appellate Tribunal. **[Sec 19(1)]**
- Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made by the Adjudicating Authority or the Special Director (Appeals) is received by the aggrieved person or by the Central Government and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed. **[Sec 19(2)]**
- On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against. **[Sec 19(3)]**
- The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Adjudicating Authority or the Special Director (Appeals), as the case may be. **[Sec 19(4)]**
- The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within one hundred and eighty days from the date of receipt of the appeal. **[Sec 19(5)]**
- The Appellate Tribunal may, for the purpose of examining the legality, propriety or correctness of any order made by the Adjudicating Authority under section 16 in relation to any proceeding, on its own motion or otherwise, calls for the records of such proceedings and makes such order in the case as it thinks fit. **[Sec 19(6)]**

Composition of Appellate Tribunal

The main provisions in respect of the composition of Appellate Tribunal are as under:

The Appellate Tribunal shall consist of a Chairperson and such number of Members as the Central Government may deem fit. **[Sec 20(1)]**

(2) Subject to the provisions of this Act,—

- The jurisdiction of the Appellate Tribunal may be exercised by Benches thereof;
- The Benches of the Appellate Tribunal shall ordinarily sit at New Delhi and at such other places as the Central Government may, in consultation with the Chairperson, notify;
- The Central Government shall notify the areas in relation to which each Bench of the Appellate Tribunal may exercise jurisdiction. **[Sec 20(2)]**
- Notwithstanding anything contained in sub-section (2), the Chairperson may transfer a Member from one Bench to another Bench. **[Sec 20(3)]**
- If at any stage of the hearing of any case or matter it appears to the Chairperson or a Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the Chairperson or, as the case may be, referred to him for transfer, to such Bench as the Chairperson may deem fit. **[Sec 20(4)]**

Qualifications for appointment of Chairperson, Member and Special Director (Appeals)

(a) A person shall not be qualified for appointment as the Chairperson or a Member unless he—

- in the case of Chairperson, is or has been, or is qualified to be, a Judge of a High Court; and
- in the case of a Member, is or has been, or is qualified to be, a District Judge. **[Sec 21(1)]**

(b) A person shall not be qualified for appointment as a Special Director (Appeals) unless he—

- has been a member of the Indian Legal Service and has held a post in Grade I of that Service; or
- has been a member of the Indian Revenue Service and has held a post equivalent to a Joint Secretary to the Government of India. **[Sec 21(2)]**

Term of office

The Chairperson and every other Member shall hold office as such for a term of five years from the date on which he enters upon his office:

Provided that no Chairperson or other Member shall hold office as such after he has attained,—

- in the case of the Chairperson, the age of sixty-five years;
- in the case of any other Member, the age of sixty-two years. **[Sec 22]**

Terms and conditions of service

The salary and allowances payable to and the other terms and conditions of service of the Chairperson, other Members and the Special Director (Appeals) shall be such as may be prescribed. Provided that neither the salary and allowances nor the other terms and conditions of service of the Chairperson or a Member shall be varied to his disadvantage after appointment. **[Sec 23]**

Vacancies

If, for reason other than temporary absence, any vacancy occurs in the office of the Chairperson or a Member, the Central Government shall appoint another person in accordance with the provisions of this Act to fill the vacancy and the proceedings may be continued before the Appellate Tribunal from the stage at which the vacancy is filled. **[Sec 24]**

Resignation and removal

The Chairperson or a Member may, by notice in writing under his hand addressed to the Central Government, resign his office. Provided that the Chairperson or a Member shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to

hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of term of office, whichever is the earliest. **[Sec 25(1)]**

The Chairperson or a Member shall not be removed from his office except by an order by the Central Government on the ground of proved misbehavior or incapacity after an inquiry made by such person as the President may appoint for this purpose in which the Chairperson or a Member concerned has been informed of the charges against him and given a reasonable opportunity of being heard in respect of such charges. **[Sec 25(2)]**

Procedure and powers of Appellate Tribunal and Special Director (Appeals)

(a) The Appellate Tribunal and the Special Director (Appeals) shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908) but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Appellate Tribunal and the Special Director (Appeals) shall have powers to regulate its own procedure. **[Sec 28(1)]**

(b) The Appellate Tribunal and the Special Director (Appeals) shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908); while trying a suit, in respect of the following matters, namely:—

- summoning and enforcing the attendance of any person and examining him on oath;
- requiring the discovery and production of documents;
- receiving evidence on affidavits;
- subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872) requisitioning any public record or document or copy of such record or document from any office;
- issuing commissions for the examination of witnesses or documents;
- reviewing its decisions;
- dismissing a representation of default or deciding it *ex parte;*
- setting aside any order of dismissal of any representation for default or any order passed by it *ex parte;* and

- any other matter which may be prescribed by the Central Government. **[Sec 28(2)]**

Members, etc. to be public servants

The Chairperson, Members and other officers and employees of the Appellate Tribunal, the Special Director (Appeals) and the Adjudicating Authority shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code (45 of 1860). **[Sec 33]**

Civil court not to have jurisdiction

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an Adjudicating Authority or the Appellate Tribunal or the Special Director (Appeals) is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act. **[Sec 34]**

Appeal to High Court

Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal on any question of law arising out of such order. Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days. **[Sec 35]**

Directorate of Enforcement

- The Central Government shall establish a Directorate of Enforcement with a Director and such other officers or class of officers as it thinks fit, who shall be called officers of Enforcement, for the purposes of this Act. **[Sec 36(1)]**
- Without prejudice to provisions of sub-section (1), the Central Government may authorize the Director of Enforcement or an Additional Director of Enforcement or a Special Director of Enforcement or a Deputy Director of Enforcement to appoint officers of Enforcement below the rank of an Assistant Director of Enforcement. **[Sec 36(2)]**

- Subject to such conditions and limitations as the Central Government may impose, an officer of Enforcement may exercise the powers and discharge the duties conferred or imposed on him under this Act. **[Sec 36(3)]**

Power of search, seizure etc.

- The Director of Enforcement and other officers of Enforcement, not below the rank of an Assistant Director, shall take up for investigation the contravention referred to in section 13. **[Sec 37(1)]**
- Without prejudice to the provisions of sub-section (1), the Central Government may also, by notification, authorize any officer or class of officers in the Central Government, State Government or the Reserve Bank, not below the rank of an Under Secretary to the Government of India to investigate any contravention referred to in section 13. **[Sec 37(2)]**
- The officers referred to in sub-section (1) shall exercise the like powers which are conferred on income-tax authorities under the Income-tax Act, 1961 (43 of 1961) and shall exercise such powers, subject to such limitations laid down under that Act. **[Sec 37(3)]**

Power of Central Government to give directions

For the purposes of this Act, the Central Government may, from time to time, give to the Reserve Bank such general or special directions as it thinks fit, and the Reserve Bank shall, in the discharge of its functions under this Act, comply with any such directions. **[Sec 41]**

Removal of difficulties

If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order, do anything not inconsistent with the provisions of this Act for the purpose of removing the difficulty. Provided that no such order shall be made under this section after the expiry of two years from the commencement of this Act. **[Sec 45(1)]**

Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament. **[Sec 45(2)]**

16.9 Repeal and saving

The Foreign Exchange Regulation Act, 1973 (46 of 1973) is hereby repealed and the Appellate Board constituted under sub-section (1) of section 52 of the said Act (hereinafter referred to as the repealed Act) shall stand dissolved. **[Sec 49(1)]**

On the dissolution of the said Appellate Board, the person appointed as Chairman of the Appellate Board and every other person appointed as Member and holding office as such immediately before such date shall vacate their respective offices and no such Chairman or other person shall be entitled to claim any compensation for the premature termination of the term of his office or of any contract of service. **[Sec 49(2)]**

Notwithstanding anything contained in any other law for the time being in force, no court shall take cognizance of an offence under the repealed Act and no adjudicating officer shall take notice of any contravention under section 51 of the repealed Act after the expiry of a period of two years from the date of the commencement of this Act. **[Sec 49(3)]**

(4) Subject to the provisions of sub-section (3) all offences committed under the repealed Act shall continue to be governed by the provisions of the repealed Act as if that Act had not been repealed. **[Sec 49(4)]**

16.10 Summary

In this unit we studied about the FEMA, its regulations, difference between FERA and FEMA. The Foreign Exchange Management Act (FEMA) was an act passed in the winter session of Parliament in 1999 which replaced Foreign Exchange Regulation Act. This act seeks to make offenses related to foreign exchange civil offenses. It extends to the whole of India. FEMA, which replaced Foreign Exchange Regulation Act, had become the need of the hour since FERA had become incompatible with the pro-liberalization policies of the Government of India. The object of FERA 1973 was to conserve foreign exchange and prevention of leakage of it due to adverse position of foreign exchange balance in India. On the other hand, FEMA is an Act to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India. If any person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any

condition subject to which an authorization is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty as per the rules.

16.11 Glossary

1. **"Adjudicating Authority"** means an officer authorised under sub-section (1) of section 16;

2. **"Appellate Tribunal"** means the Appellate Tribunal for Foreign Exchange established under section 18; (c) "authorised person" means an authorised dealer, money changer, off-shore banking unit or any other person for the time being authorised under sub-section (1) of section 10 to deal in foreign exchange or foreign securities;

3. **"Bench"** means a Bench of the Appellate Tribunal;

4. **"Capital Account Transaction"** means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India, and includes transactions referred to in sub-section (3) of section 6;

5. **"Chairperson"** means the Chairperson of the Appellate Tribunal;

6. **"Chartered Accountant"** shall have the meaning assigned to it in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 (38 of 1949);

7. **"Currency"** includes all currency notes, postal notes, postal orders, money orders, cheques, drafts, travellers cheques, letters of credit, bills of exchange and promissory notes, credit cards or such other similar instruments, as may be notified by the Reserve Bank.

8. **"Director of Enforcement"** means the Director of Enforcement appointed under sub-section (1) of section 36;

9. **"Export",** with its grammatical variations and cognate expressions, means—

- the taking out of India to a place outside India any goods,
- provision of services from India to any person outside India;

10. **"Foreign Currency"** means any currency other than Indian currency;

11. **"Foreign Exchange"** means foreign currency and includes,—

- deposits, credits and balances payable in any foreign currency,
- drafts, travelers cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency,
- drafts, travelers cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency;

12. **"Foreign Security"** means any security, in the form of shares, stocks, bonds, debentures or any other instrument denominated or expressed in foreign currency and includes securities expressed in foreign currency, but where redemption or any form of return such as interest or dividends is payable in Indian currency;

13. **"Import",** with its grammatical variations and cognate expressions, means bringing into India any goods or services;

14. **"Indian currency"** means currency which is expressed or drawn in Indian rupees but does not include special bank notes and special one rupee notes issued under section 28A of the Reserve Bank of India Act, 1934 (2 of 1934);

15. **"Person Resident in India"** means—

- a person residing in India for more than one hundred and eighty-two days during the course of the preceding financial year but does not include—

(A) A person who has gone out of India or who stays outside India, in either case
(B) A person who has come to or stays in India, in either case

- any person or body corporate registered or incorporated in India,
- an office, branch or agency in India owned or controlled by a person resident outside India,
- an office, branch or agency outside India owned or controlled by a person resident in India;

16. **"Person resident outside India"** means a person who is not resident in India;

17. **"Reserve Bank"** means the Reserve Bank of India constituted under sub-section (1) of section 3 of the Reserve Bank of India Act, 1934 (2 of 1934);

18. **"Security"** means shares, stocks, bonds and debentures, Government securities as defined in the Public Debt Act, 1944 (18 of 1944), savings certificates to which the Government Savings Certificates Act, 1959 (46 of 1959) applies, deposit receipts in respect of deposits of securities and units of the Unit Trust of India established under sub-section (1) of section 3 of the Unit Trust of India Act, 1963 (52 of 1963) or of any mutual fund and includes certificates of title to securities, but does not include bills of exchange or promissory notes other than Government promissory notes or any other instruments which may be notified by the Reserve Bank as security for the purposes of this Act;

19. **"Service"** means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, medical assistance, legal assistance, chit fund, real estate, transport, processing, supply of electrical or other energy, boarding or lodging or both, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;

20. **"Transfer"** includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien.

16.12 Check your progress

1 The Foreign Exchange Management Act (FEMA) was passed by the Indian Parliament in ---------- in winter session by replacing FERA.

(a) 1987
(b) 1999
(c) 1989
(d) 1992

2. The minimum qualification for the appointment of chairperson under FEMA is---------

(a) District Judge

(b) High Court judge

(c) Supreme Court Judge

(d) Chief Parliament Secretary

3**.** Which of the following were the main objectives behind replacement of FERA with FEMA.

(a) Facilitating external trade and payments

(b) Promoting the orderly development

(c) Maintenance of foreign exchange market

(d) All of the above

4. Which of the following matter that the enactment of FEMA brought it in 2002?

(a) Prevention of Money Laundering Act

(b) Promote external trade

(c) To stop fraud in foreign exchange market

(d) All of the above

5. The FEMA head-office, also known as Enforcement Directorate is situated in ---------

(a) Mumbai

(b) New Delhi

(c) Pune

(d) Ranchi

16.13 Answers to check your progress

1. b) 2. b) 3. d) 4. a) 5. b)

16.14 Terminal Questions

1. Define FEMA. Explain its features, needs and objectives.

2. Explain in brief main provisions of the foreign exchange management act.

3. State the penalty system for contravention of provisions, rules and regulations of FEMA. State the power of Adjudicating Authority to realize the amount of penalty.

4. Write short notes on the followings:

(a) FERA and FEMA

(b) Qualifications for appointment of Chairperson, Member and Special Director

(c) Adjudication and Appeal under FEMA

(d) Current and Capital account transactions

5. Explain various important terminology related to the foreign exchange management act 2000 in brief.

16.15 References

Garg Richa, "Foreign exchange management", Vrinda publications private ltd, 2010

Bharat, "Foreign Exchange Management Act: Rules and Regulations", Bharat law house pvt ltd, 2007

Sharan V, "International Financial Management", prentice Hall of India, N. Delhi, 2009

Seth A K, "International Financial Management" Galgotia publishing company, 2009.

http://exim.indiamart.com/act-regulations/fera-1993.html

http://en.wikipedia.org/wiki/Fera

http://www.cabible.com/forum/showthread.php/6677-Difference-between-FERA-and-FEMA

Unit – 17: Encryption and Cyber Crimes

17.1 Introduction

17.2 Meaning and Uses/ Utility of Encryption

17.3 Encryption Methods

17.4 Encryption Techniques

17.5 Limitations of Encryption

17.6 Cyber Crime meaning

17.7 Distinction between Conventional and Cyber Crime

17.8 Reasons for Cyber Crime

17.9 Cyber Criminals

17.10 Mode and Manner of Committing Cyber Crime

17.11 Classification of Cyber Crimes

17.12 Statutory provisions

17.13 Prevention of cyber crime

17.14 Can Encryption prevent Cyber Crimes?

17.15 Summary

17.16 Glossary

17.17 Answers to check your progress/SAQ

17.18 References/Bibliography

17.19 Suggested Readings

17.20 Terminal Questions

Objectives

After reading this unit you will be able to:

- Explain the meaning of encryption and cyber crime
- Describe the utility and methods of encryption
- Elucidate the classical and modern techniques of encryption
- Distinction between Conventional and Cyber Crime
- Know about Mode and Manner of Committing Cyber Crime
- Classification and prevention of Cyber Crimes with encryption

17.1 Introduction

Data encryption is a process of creating secret message formats for data that is stored on computer files. Within computer software there are multiple encryption techniques available for data files. These techniques are typically known as data encryption algorithms. Each algorithm has unique benefits and usage patterns based on the type of data and the level of protection desired. Unencrypted data is information that can be easily read by a computer or person. When data is created on a computer it is automatically saved in an unencrypted format. This data is saved on computers or fileservers and can easily be accessed by would-be hackers on the Internet. Encryption techniques are special processes designed to convert the readable data into the equivalent of gibberish. The process of secretly encoding messages has been used for centuries in espionage. Encryption patterns and standards are managed by the National Institute of Standards and Technology (NIST). This body approves and tests newly developed encryption techniques. Currently, the advanced encryption standard (AES) is considered one of the most modern of standards on cryptography. It is designed to support a 256-bit key encryption program. The advanced encryption standard was created in 2001 and currently supports several encryption algorithms.

17.2 Meaning and Uses/ Utility of Encryption

Encryption is the process of transforming information using an algorithm to make it unreadable to anyone except those possessing special knowledge, usually referred to as a key. The result of the process is encrypted information. The reverse process, i.e., to make the encrypted information readable again, is referred to as decryption.

Encryption has long been used by militaries and governments to facilitate secret communication. It is now commonly used in protecting information within many kinds of civilian systems. For example, the Computer Security Institute reported that in 2007, 71% of companies surveyed utilized encryption for some of their data in transit, and 53% utilized encryption for some of their data in storage.

Encryption can be used to protect data "at rest", such as files on computers and storage devices (e.g. USB flash drives). In recent years there have been numerous reports of confidential data such as customers' personal records being exposed through loss or theft of laptops or backup drives. Encrypting such files at rest helps protect them should physical security measures fail. Digital rights management systems which prevent unauthorized use or

reproduction of copyrighted material and protect software against reverse engineering are another somewhat different example of using encryption on data at rest.

Encryption is also used to protect data in transit, for example data being transferred via networks (e.g. the Internet, e-commerce), mobile, telephones, microphones, wireless systems, Bluetooth devices and bank automatic teller machines. There have been numerous reports of data in transit being intercepted in recent years. Encrypting data in transit also helps to secure it as it is often difficult to physically secure all access to networks.

Encryption, by itself, can protect the confidentiality of messages, but other techniques are still needed to protect the integrity and authenticity of a message; for example, verification of a message authentication codes (MAC) or a digital signature. Standards and cryptographic software and hardware to perform encryption are widely available, but successfully using encryption to ensure security may be a challenging problem. A single slip-up in system design or execution can allow successful attacks. Sometimes an adversary can obtain unencrypted information without directly undoing the encryption.

17.3 Encryption Methods

Encryption is the process of changing text so that it is no longer easy to read. A very simple example is the following sentence. Commercial encryption uses methods which are a lot more secure than the one I used to produce that example. Almost all modern encryption methods rely on a key - a particular number or string of characters which are used to encrypt, decrypt, or both.

In the next sections, common encryption methods are presented:

1. Private Key Encryption

Private Key encryption is the standard form. Both parties share an encryption key and the encryption key is also the one used to decrypt the message. The difficulty is sharing the key before you start encrypting the message - how do you safely transmit it?

Many private key encryption methods use public key encryption to transmit the private key for each data transfer session.

If A and B want to use private key encryption to share a secret message, they would each use a copy of the same key. A writes his message to B and uses their shared private key to encrypt the message. The message is then sent to B. B uses his copy of the private key to decrypt the message. Private Key encryption is like making copies of a key. Anyone with a

copy can open the lock. In the case of A and B, their keys would be guarded closely because they can both encrypt and decrypt messages.

2. Public Key Encryption

Public key encryption uses two keys - one to encrypt, and one to decrypt. The sender asks the receiver for the encryption key, encrypts the message, and sends the encrypted message to the receiver. Only the receiver can then decrypt the message - even the sender cannot read the encrypted message.

When A wants to share a secret with B using public key encryption, he first asks B for his public key. Next, A uses B's public key to encrypt the message. In public key encryption, only B's private key can unlock the message encrypted with his public key. A sends his message to B. B uses his private key to decrypt A's message.

The things that make public key encryption work is that B very closely guards his private key and freely distributes his public key. He knows that it will unlock any message encrypted with his public key.

17.4 Encryption Techniques

17.4.1 Classical Techniques

The two basic building blocks of all encryption techniques are:

Substitution

- Letters of plain text are replaced by other letters or by numbers or symbols
- If the plain text is viewed as a sequence of bits, then substitution involves replacing plain text bit patterns with cipher text bit patterns

Transposition/Permutation

- The letters/bytes/bits of the plaintext are rearranged without altering the actual letters used
- Can be easily recognized since the cipher texts have the same frequency distribution as the original plain text.

Substitution Algorithms

1. Caesar Cipher

Earliest known substitution cipher by Julius Caesar. It involves replacing each letter in the plaintext by a shifted letter in the alphabet used.

Example: If the shift value is (3) then we can define transformation as:

a	b	c	d	e	f	g	h	i	j	k	l	m	n	o	p	q	r	s	t	u	v	w	x	y	z
D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X	Y	Z	A	B	C

so the message "meet me after the toga party" becomes:

PHHW PH DIWHU WKH WRJD SDUWB

Mathematical Model

Mathematically give each letter a number:

a	b	c	d	e	f	g	h	i	j	k	l	m	n	o	p	q	r	s	t	u	v	w	x	y	z
0	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25

Then the Caesar cipher is expressed as:

$C = \mathrm{E}(p) = (p + k) \bmod (26)$

$p = \mathrm{D}(C) = (C - k) \bmod (26)$

Cryptanalysis

Can try each of the keys (shifts) in turn, until we recognize the original message, therefore using a Brute Force Attack we can have only 26 trials!!

Example:

Breaking cipher text "GCUA VQ DTGCM" is: "easy to break", with a shift of 2

2. Mono-alphabetic Cipher

Each plaintext letter maps to a different random cipher text letter , Hence the key size is 26 letters long

Example:

Key:

a	b	c	d	e	f	g	h	i	j	k	l	m	n	o	p	q	r	s	t	u	v	w	x	y	z
D	K	V	Q	F	I	B	J	W	P	E	S	C	X	H	T	M	Y	A	U	O	L	R	G	Z	N

Plain text: ifwewishtoreplaceletters

Cipher text: WIRFRWAJUHYFTSDVFSFUUFYA

Cryptanalysis

Now the Brute Force attack to this cipher requires exhaustive search of a total of 26! = 4 x 1026 keys, but the cryptanalysis makes use of the language characteristics, the Letter that is commonly used in English is the letter ***e*** , then ***T,R,N,I,O,A,S*** other letters are fairly rare ***Z,J,K,Q,X*** There are tables of single, double & triple letter frequencies

3. Polyalphabetic Ciphers

Another approach to improving security is to use multiple cipher alphabets Called Polyalphabetic substitution ciphers. Makes cryptanalysis harder with more alphabets to guess and flatter frequency distribution.

Use a key to select which alphabet is used for each letter of the message.

Example: the **Vigenère** Cipher:

1. Write the plain text
2. Write the keyword repeated below it
3. Use each key letter as a Caesar cipher key
4. Encrypt the corresponding plaintext letter.

Plaintext:	ATTACKATDAWN
Key:	LEMONLEMONLE
Ciphertext:	LXFOPVEFRNHR

4. Auto key Cipher

Vigenère proposed the auto key cipher to strengthen his cipher system. With keyword is prefixed to message as key But still have frequency characteristics to attack.

Key: deceptivewearediscoveredsav

Plaintext: wearediscoveredsaveyourself

Cipher text: ZICVTWQNGKZEIIGASXSTSLVVWLA

Notice how we completed the key with characters from plain text.

5. One-Time Pad

IT is a system that uses a truly random key as long as the message in the decryption and **encryption** processes. It is unbreakable since cipher text bears no statistical relationship to the plaintext since for any plaintext & any cipher text there exists a key mapping one to other.

This system is practically infeasible since its impractical to generate large quantities of random keys. The key distribution and protection is a big problem in this case.

Transposition Ciphers

1. Rail Fence cipher

Write the message letters out diagonally over a number of rows then read off cipher row by row.

Example: Encrypting the following message using rail fence of depth 2:

"**Meet me after the Graduation party**"

Write message out as:

m e m a t r h g a u t o p r y

e t e f e t e r d a i n a t

2. Product Ciphers

Ciphers using substitutions or transpositions are not secure because of language characteristics. Hence consider using several ciphers in succession to make cryptanalysis harder, two substitutions make a more complex substitution, two transpositions make more complex transposition but a substitution followed by a transposition makes a new much harder cipher.

17.4.2 Modern Encryption Techniques

As modern encryption techniques develop, it seems that code breakers have gone to extraordinary lengths to break them. The following "unbreakable" systems have been documented as exploitable.

1. AES Encryptions Broken

Although much more secure than their DES counterparts, the AES Encryption has shown to be exploitable as well. The Wi-Fi Encryption Scheme (WEP), is a modern day AES system that has been broken. In 2005 the FBI held a demonstration where they broke into a WEP network in 3 minutes.

2. Content Scrambling System

This system, which is used in all DVD's and DVD Players is a holdover from before 1996 when the government regulated the length of encryption keys, and has been broken on countless occasions.

3. GSM Communications

GSM Communications are the encryptions used by A5/1 and A5/2 cell phone roaming networks, which 98% of all cell phones are on, have also been cracked.

4. Current State of Computing

In a PBS Frontline Interview, John Arquilla put it best, "The strongest computer in the world is not a mainframe being manufactured in the United States or Japan. It's the parallel computer being hotwired by a hacker from some dusty office in some abandoned building."

17.5 Limitations of Encryption

Cryptanalysis, or the process of attempting to read the encrypted message without the key, is very much easier with modern computers than it has ever been before. Modern computers are fast enough to allow for 'brute force' methods of cryptanalysis - or using every possible key in turn until the 'plain text' version of the message is found.

The longer the key, the longer it takes to use the 'brute force' method of cryptanalysis - but it also makes the process of encrypting and decrypting the message slower. Key length is very

important to the security of the encryption method - but the 'safe' key length changes every time CPU manufacturers bring out a new processor.
Encryption does not make your data secure. Not using encryption, however, means that any data in transit is as easy to read as the contents of a postcard, sent in regular mail. Encryption at least ensures that anyone who does read your messages has worked hard at it.

17.6 Cyber Crime

Meaning/ Introduction

The term ‘cyber crime’ is a misnomer. This term has nowhere been defined in any statute /Act passed or enacted by the Indian Parliament. The concept of cyber crime is not radically different from the concept of conventional crime. Both include conduct whether act or omission, which cause breach of rules of law and counterbalanced by the sanction of the state.

Before evaluating the concept of cyber crime it is obvious that the concept of conventional crime be discussed and the points of similarity and deviance between both these forms may be discussed. Computer crime refers to any crime that involves a computer and a network. The computer may have been used in the commission of a crime, or it may be the target. Net crime refers to criminal exploitation of the Internet.

Cyber crimes are defined as: "Offences that are committed against individuals or groups of individuals with a criminal motive to intentionally harm the reputation of the victim or cause physical or mental harm to the victim directly or indirectly, using modern telecommunication networks such as Internet (Chat rooms, emails, notice boards and groups) and mobile phones (SMS/MMS)".Such crimes may threaten a nation’s security and financial health. Issues surrounding this type of crime has become high-profile, particularly those surrounding cracking, copyright infringement, child pornography, and child grooming. There are also problems of privacy when confidential information is lost or intercepted, lawfully or otherwise.

Internationally, both governmental and non-state actors engage in cyber crimes, including espionage, financial theft, and other cross-border crimes. Activity crossing international borders and involving the interests of at least one nation-state is sometimes referred to as

cyber warfare. The international legal system is attempting to hold actors accountable for their actions through the International Criminal Court.

17.7 Distinction between Conventional and Cyber Crime

There is apparently no distinction between cyber and conventional crime. However on a deep introspection we may say that there exists a fine line of demarcation between the conventional and cyber crime, which is appreciable. The demarcation lies in the involvement of the medium in cases of cyber crime. The *sine qua non* for cyber crime is that there should be an involvement, at any stage, of the virtual cyber medium.

17.8 Reasons for Cyber Crime

Hart in his work "The Concept of Law" has said 'human beings are vulnerable so rule of law is required to protect them'. Applying this to the cyberspace we may say that computers are vulnerable so rule of law is required to protect and safeguard them against cyber crime. The reasons for the vulnerability of computers may be said to be:

1. **Capacity to store data in comparatively small space**

   The computer has unique characteristic of storing data in a very small space. This affords to remove or derive information either through physical or virtual medium makes it much easier.

2. **Easy to access**

   The problem encountered in guarding a computer system from unauthorised access is that there is every possibility of breach not due to human error but due to the complex technology. By secretly implanted logic bomb, key loggers that can steal access codes, advanced voice recorders; retina imagers etc. that can fool biometric systems and bypass firewalls can be utilized to get past many a security system.

3. **Complex**

   The computers work on operating systems and these operating systems in turn are composed of millions of codes. Human mind is fallible and it is not possible that there

might not be a lapse at any stage. The cyber criminals take advantage of these lacunas and penetrate into the computer system.

4. **Negligence**

Negligence is very closely connected with human conduct. It is therefore very probable that while protecting the computer system there might be any negligence, which in turn provides a cyber criminal to gain access and control over the computer system.

5. **Loss of evidence**

Loss of evidence is a very common & obvious problem as all the data are routinely destroyed. Further collection of data outside the territorial extent also paralyses this system of crime investigation.

17.8 Cyber Criminals

The cyber criminals constitute of various groups/ category. This division may be justified on the basis of the object that they have in their mind. The following are the category of cyber criminals-

1**. Children and adolescents between the age group of 6 – 18 years**

The simple reason for this type of delinquent behaviour pattern in children is seen mostly due to the inquisitiveness to know and explore the things. Other cognate reason may be to prove themselves to be outstanding amongst other children in their group. Further the reasons may be psychological even. E.g. the Bal Bharati (Delhi) case was the outcome of harassment of the delinquent by his friends.

2. Organised hackers

These kinds of hackers are mostly organised together to fulfil certain objective. The reason may be to fulfil their political bias, fundamentalism, etc. The Pakistanis are said to be one of the best quality hackers in the world. They mainly target the Indian government sites with the purpose to fulfil their political objectives. Further the *NASA* as well as the *Microsoft* sites is always under attack by the hackers.

***3*. Professional hackers / crackers**

Their work is motivated by the colour of money. These kinds of hackers are mostly employed to hack the site of the rivals and get credible, reliable and valuable information. Further they are ven employed to crack the system of the employer basically as a measure to make it safer by detecting the loopholes.

4. Discontented employees

This group include those people who have been either sacked by their employer or are dissatisfied with their employer. To avenge they normally hack the system of their employee.

17.9 Mode and Manner of Committing Cyber Crime

1. **Unauthorized access to computer systems or networks / Hacking**

This kind of offence is normally referred as hacking in the generic sense. However the framers of the information technology act 2000 have no where used this term so to avoid any confusion we would not interchangeably use the word hacking for 'unauthorized access' as the latter has wide connotation.

2. **Theft of information contained in electronic form**

This includes information stored in computer hard disks, removable storage media etc. Theft may be either by appropriating the data physically or by tampering them through the virtual medium.

3. **Email bombing**

This kind of activity refers to sending large numbers of mail to the victim, which may be an individual or a company or even mail servers there by ultimately resulting into crashing.

4. **Data diddling**

This kind of an attack involves altering raw data just before a computer processes it and then changing it back after the processing is completed. The *electricity board* faced similar problem of data diddling while the department was being computerised.

5. Salami attacks

This kind of crime is normally prevalent in the financial institutions or for the purpose of committing financial crimes. An important feature of this type of offence is that the alteration is so small that it would normally go unnoticed. E.g. the *Ziegler case* wherein a logic bomb was introduced in the bank's system, which deducted 10 cents from every account and deposited it in a particular account.

6. Denial of Service attack

The computer of the victim is flooded with more requests than it can handle which cause it to crash. Distributed Denial of Service (DDoS) attack is also a type of denial of service attack, in which the offenders are wide in number and widespread. E.g. *Amazon, Yahoo*.

7. Virus / worm attacks

Viruses are programs that attach themselves to a computer or a file and then circulate themselves to other files and to other computers on a network. They usually affect the data on a computer, either by altering or deleting it. Worms, unlike viruses do not need the host to attach themselves to. They merely make functional copies of themselves and do this repeatedly till they eat up all the available space on a computer's memory. E.g. *love bug virus*, which affected at least 5 % of the computers of the globe. The losses were accounted to be $ 10 million. The world's most famous worm was the Internet worm let loose on the Internet by *Robert Morris* sometime in 1988. Almost brought development of Internet to a complete halt.

8. Logic bombs

These are event dependent programs. This implies that these programs are created to do something only when a certain event (known as a trigger event) occurs. E.g. even some viruses may be termed logic bombs because they lie dormant all through the year and become active only on a particular date (like the *Chernobyl virus*).

9. **Trojan attacks**

This term has its origin in the word 'Trojan horse'. In software field this means an unauthorized programme, which passively gains control over another's system by representing itself as an authorised programme. The most common form of installing a Trojan is through e-mail. E.g. a Trojan was installed in the computer of a *lady film director* in the U.S. while chatting. The cyber criminal through the web cam installed in the computer obtained her nude photographs. He further harassed this lady.

10. Internet time thefts

Normally in these kinds of thefts the Internet surfing hours of the victim are used up by another person. This is done by gaining access to the login ID and the password. E.g. *Colonel Bajwa's case*- the Internet hours were used up by any other person. This was perhaps one of the first reported cases related to cyber crime in India. However this case made the police infamous as to their lack of understanding of the nature of cyber crime.

11. **Web jacking**

This term is derived from the term hi jacking. In these kinds of offences the hacker gains access and control over the web site of another. He may even mutilate or change the information on the site. This may be done for fulfilling political objectives or for money. E.g. recently the site of MIT (Ministry of Information Technology) was hacked by the Pakistani hackers and some obscene matter was placed therein. Further the site of Bombay crime branch was also web jacked. Another case of web jacking is that of the '*gold fish'* case. In this case the site was hacked and the information pertaining to gold fish was changed. Further a ransom of US $ 1 million was demanded as ransom. Thus web jacking is a process where by control over the site of another is made backed by some consideration for it.

17.10 Classification of Cyber Crimes

The subject of cyber crime may be broadly classified under the following three groups. They are-

1. Against Individuals

a. Their person &

b. Their property of an individual

2. Against Organization

a. Government

c. Firm, Company, Group of Individuals.

3. Against Society at large

The following are the crimes, which can be committed against the followings group

Against Individuals: –

i. Harassment via e-mails.

ii. Cyber-stalking.

iii. Dissemination of obscene material.

iv. Defamation.

v. Unauthorized control/access over computer system.

vi. Indecent exposure

vii. Email spoofing

viii. Cheating & Fraud

Against Individual Property: -

i. Computer vandalism

ii. Transmitting virus

iii. Netrespass

iv. Unauthorized control/access over computer system.

v. Intellectual Property crimes

vi. Internet time thefts

Against Organization: -

i. Unauthorized control/access over computer system

ii. Possession of unauthorized information.

iii. Cyber terrorism against the government organization.

iv. Distribution of pirated software etc.

Against Society at large: -

i. Pornography (basically child pornography).
ii. Polluting the youth through indecent exposure.
iii. Trafficking
iv. Financial crimes
v. Sale of illegal articles
vi. Online gambling
vii. Forgery

The above mentioned offences may discuss in brief as follows:

1. Harassment via e-mails

Harassment through e-mails is not a new concept. It is very similar to harassing through letters.

2. Cyber-stalking

The Oxford dictionary defines stalking as "pursuing stealthily". Cyber stalking involves following a person's movements across the Internet by posting messages (sometimes threatening) on the bulletin boards frequented by the victim, entering the chat-rooms frequented by the victim, constantly bombarding the victim with emails etc.

3. Dissemination of obscene material/ Indecent exposure/ Pornography (basically child pornography) / Polluting through indecent exposure

Pornography on the net may take various forms. It may include the hosting of web site containing these prohibited materials. Use of computers for producing these obscene materials. Downloading through the Internet, obscene materials. These obscene matters may cause harm to the mind of the adolescent and tend to deprave or corrupt their mind.

4. Defamation

It is an act of imputing any person with intent to lower the person in the estimation of the right-thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule. Cyber defamation is not different from conventional defamation except the involvement of a virtual medium.

5. Unauthorized control/access over computer system

This activity is commonly referred to as hacking. The Indian law has however given a different connotation to the term hacking, so we will not use the term "unauthorized access" interchangeably with the term "hacking" to prevent confusion as the term used in the Act of 2000 is much wider than hacking.

6. E mail spoofing

A spoofed e-mail may be said to be one, which misrepresents its origin. It shows it's origin to be different from which actually it originates. *Rajesh Manyar*, a graduate student at Purdue University in Indiana, was arrested for threatening to detonate a nuclear device in the college campus. The alleged e- mail was sent from the account of another student to the vice president for student services. However the mail was traced to be sent from the account of Rajesh Manyar.

7. Computer vandalism

Vandalism means deliberately destroying or damaging property of another. Thus computer vandalism may include within its purview any kind of physical harm done to the computer of any person. These acts may take the form of the theft of a computer, some part of a computer or a peripheral attached to the computer or by physically damaging a computer or its peripherals.

8. Intellectual Property crimes / Distribution of pirated software

Intellectual property consists of a bundle of rights. Any unlawful act by which the owner is deprived completely or partially of his rights is an offence. The common form of IPR violation may be said to be software piracy, copyright infringement, trademark and service mark violation, theft of computer source code, etc.

9. Cyber terrorism against the government organization

At this juncture a necessity may be felt that what is the need to distinguish between cyber terrorism and cyber crime. Both are criminal acts. However there is a compelling need to distinguish between both these crimes. A cyber crime is generally a domestic issue, which may have international consequences; however cyber

terrorism is a global concern, which has domestic as well as international consequences. The common form of these terrorist attacks on the Internet is by distributed denial of service attacks, hate websites and hate emails, attacks on sensitive computer networks, etc. Technology savvy terrorists are using 512-bit encryption, which is next to impossible to decrypt. The recent example may be cited of – *Osama Bin Laden*, the *LTTE*, attack on *America's army deployment system* during Iraq war.

Cyber terrorism may be defined to be " *the premeditated use of disruptive activities, or the threat thereof, in cyber space, with the intention to further social, ideological, religious, political or similar objectives, or to intimidate any person in furtherance of such objectives"*

10. Trafficking

Trafficking may assume different forms. It may be trafficking in drugs, human beings, arms weapons etc. These forms of trafficking are going unchecked because they are carried on under pseudonyms. A racket was busted in Chennai where drugs were being sold under the pseudonym of honey.

11. Fraud & Cheating

Online fraud and cheating is one of the most lucrative businesses that are growing today in the cyber space. It may assume different forms. Some of the cases of online fraud and cheating that have come to light are those pertaining to credit card crimes, contractual crimes, offering jobs, etc.

17.13 Statutory Provisions

The Indian parliament considered it necessary to give effect to the resolution by which the General Assembly adopted Model Law on Electronic Commerce adopted by the United Nations Commission on Trade Law. As a consequence of which the Information Technology Act 2000 was passed and enforced on 17th May 2000. The basic purpose to incorporate the changes in these Acts is to make them compatible with the Act of 2000. So that they may regulate and control the affairs of the cyber world in an effective manner.

The Information Technology Act deals with the various cyber crimes. Section 43 in particular deals with the unauthorised access, unauthorised downloading, virus attacks or any contaminant, causes damage, disruption, denial of access, interference with the service availed by a person. This section provide for a fine up to Rs. 1 Crore by way of remedy.

Analysis of statutory provisions

The Information Technology Act 2000 was undoubtedly a welcome step at a time when there was no legislation on this specialised field. The Act has however during its application has proved to be inadequate to a certain extent. The **various loopholes** in the Act are-

1. The hurry in which the legislation was passed, without sufficient public debate, did not really serve the desired purpose

Experts are of the opinion that one of the reasons for the inadequacy of the legislation has been the hurry in which it was passed by the parliament and it is also a fact that sufficient time was not given for public debate.

2. "Cyber laws, in their very preamble and aim, state that they are targeted at aiding e-commerce, and are not meant to regulate cyber crime

The main intention of the legislators has been to provide for a law to regulate the e-commerce and with that aim the I.T.Act 2000 was passed, which also is one of the reasons for its inadequacy to deal with cases of cyber crime.

3. Cyber Torts

The recent cases including Cyber stalking cyber harassment, cyber nuisance, and cyber defamation have shown that the I.T.Act 2000 has not dealt with those offences. Further it is also contended that in future new forms of cyber crime will emerge which even need to be taken care of. Therefore India should sign the cyber crime convention. However the I.T.Act 2000 read with the Penal Code is capable of dealing with these felonies.

4. Ambiguity in the definitions

The definition of hacking provided in section 66 of the Act is very wide and capable of misapplication. There is every possibility of this section being misapplied. Further section 67 is also vague to certain extent. It is difficult to define the term lascivious information or obscene pornographic information.

5. Uniform law

The need of the hour is a worldwide uniform cyber law to combat cyber crime. Cyber crime is a global phenomenon and therefore the initiative to fight it should come from the same level. E.g. the author of the love bug virus was appreciated by his countrymen.

6. Jurisdiction issues

Jurisdiction is also one of the debatable issues in the cases of cyber crime due to the very universal nature of cyber space. With the ever-growing arms of cyber space the territorial concept seems to vanish. New methods of dispute resolution should give way to the conventional methods. The Act of 2000 is very silent on these issues.

7. Extra territorial application

Though Sec.75 provides for extra-territorial operations of this law, but they could be meaningful only when backed with provisions recognizing orders and warrants for Information issued by competent authorities outside their jurisdiction and measure for cooperation for exchange of material and evidence of computer crimes between law enforcement agencies.

8. Dynamic form of cyber crime

Speaking on the dynamic nature of cyber crime FBI Director Louis Freeh has said, "*In short, even though we have markedly improved our capabilities to fight cyber intrusions the problem is growing even faster and we are falling further behind.*" The (de)creativity of human mind cannot be checked by any law. Thus the only way out is the liberal construction while applying the statutory provisions to cyber crime cases.

9. Hesitation to report offences

As stated above one of the fatal drawbacks of the Act has been the cases going unreported. One obvious reason is the non-cooperative police force. "The police are a powerful force today which can play an instrumental role in preventing cyber crime. At the same time, it can also end up wielding the rod and harassing innocent s, preventing them from going about their normal cyber business.

17.13 Prevention of cyber crime

Prevention is always better than cure. It is always better to take certain precaution while operating the net. A should make them his part of cyber life. Saileshkumar Zarkar, technical advisor and network security consultant to the Mumbai Police Cyber crime Cell, advocates the 5P mantra for online security*: Precaution, Prevention, Protection, Preservation and Perseverance.* A netizen should keep in mind the following things-

- To prevent cyber stalking avoid disclosing any information pertaining to oneself. This is as good as disclosing your identity to strangers in public place.
- Always avoid sending any photograph online particularly to strangers and chat friends as there have been incidents of misuse of the photographs.
- Always use latest and update antivirus software to guard against virus attacks.
- Always keep back up volumes so that one may not suffer data loss in case of virus contamination
- Never send your credit card number to any site that is not secured, to guard against frauds.
- Always keep a watch on the sites that your children are accessing to prevent any kind of harassment or depravation in children.
- It is better to use a security programme that gives control over the cookies and send information back to the site as leaving the cookies unguarded might prove fatal.
- Web site owners should watch traffic and check any irregularity on the site. Putting host-based intrusion detection devices on servers may do this.

- Use of firewalls may be beneficial.
- Web servers running public sites must be physically separate protected from internal corporate network.

17.14 Can Encryption prevent Cyber Crimes?

Can encryption be used as a measure of preventing cyber crimes including planned security breaches but also as a means of protecting intellectual property crimes and other crimes involving cyber stalking, harassment, and software theft? However the balance of constitutional concerns must be balanced with the use of encryption.

Encryption is the transformation of data into a form that is as close to impossible as possible to read without the appropriate knowledge. The purpose of encryption is to ensure privacy by keeping information hidden from anyone for whom it is not intended including even individuals that have access to this encrypted data. Decryption is the reverse of encryption and it involved the transformation of encrypted data back into a readable form that can be unlocked. Encryption and decryption generally require the use of some secret information that is referred to as a key. For encryption measures, the same key is used but for other measures a different key is used. Authentication has become another emerging area of cryptography and has begun a great part of the Internet as privacy and contractual arising are arising online. When agreements are being sent electronically, a system of authentication needs to be into place to demonstrate that this document is what it says that it is and has been signed by the appropriate parties involved. Cryptography is the study of techniques and applications that depend on the existence of difficult problems. Cryptography is concerned with keeping communications private and determining whether communications are indeed authenticated. Cryptography provides the tools for authentication including a digital signature that binds a document to a possessor of a particular key and a digital timestamp that binds a document to its creation at a certain time.

17.15 Summary

In this unit we studied about encryption, its methods, techniques and limitations of encryption and cyber crime, reasons, classifications, statutory provision and prevention of cyber crime. Encryption is the process of transforming information using an algorithm to make it unreadable to anyone except those possessing special knowledge, usually referred to as a key.

The result of the process is encrypted information. The reverse process, i.e., to make the encrypted information readable again, is referred to as decryption. Encryption has long been used by militaries and governments to facilitate secret communication. It is now commonly used in protecting information within many kinds of civilian systems. Cyber crimes are defined as: "Offences that are committed against individuals or groups of individuals with a criminal motive to intentionally harm the reputation of the victim or cause physical or mental harm to the victim directly or indirectly, using modern telecommunication networks such as Internet. Encryption is used as a measure of preventing cyber crimes including planned security breaches but also as a means of protecting intellectual property crimes and other crimes involving cyber stalking, harassment, and software theft? However the balance of constitutional concerns must be balanced with the use of encryption.

17.16 Glossary

Cipher text -- data that has been encrypted.

Countermeasure -- any action or device that reduces a computer system's vulnerability.

Cryptography -- protecting information or hiding its meaning by converting it into a secret code before sending it out over a public network.

Cyber crime -- crime related to technology, computers, and the Internet.

Digital signature -- an electronic equivalent of a signature.

Encryption -- the process of protecting information or hiding its meaning by converting it into a code

Piracy -- the act of illegally copying software, music, or movies that are copyright-protected.

Virus -- a computer program designed to make copies of itself and spread itself from one machine to another without the help of the user.

Social engineering -- term often used to describe the techniques virus writers and hackers utilize to trick computer users into revealing information or activating viruses.

17.17 Check your Progress

1. What is the name for text that has been encrypted and converted to a coded message format?

(a) DoS

(b) Cipher text

(c) GUID

(d) Spim

2. What is the act of harassing or threatening an individual less capable of defending himself or herself repeatedly through the use of electronic communications?

(a) Phishing

(b) Cracking

(c) Cyber bullying

(d) Hacking

3. Which of the following is an example of malware?

(a) A zombie

(b) An evil twin

(c) A macro virus

(d) An active badge

4. What is the substitute for barcodes, often used for inventory tracking, which can also pose privacy risks if not deactivated?

(A) RFID

(b) SET

(c) WEP

(d) WPA

5. What method of user validation uses a variety of techniques such as voice recognition, retina scans, and fingerprints?

(a) Digital signature

(b) Digital certificate

(c) Biometric authentication

(d) Global unique identifier

6._____ refers to a coding or scrambling process that renders a message unreadable by anyone except the intended recipient.

7. _____ is an individual who studies the process of transforming information into an encoded state.

8. _____is the ability to convey a message without disclosing your name or identity.

9. _____ uses a single key to encrypt and decrypt.

10._____makes use of fake e-mails and social engineering to trick specific people, such as senior executives or members of a particular organization, into providing personal information to enable identity theft.

17.18 Answers to check your progress/SAQ

1. b) 2. c) 3. c) 4. a) 5. c) 6**.** Public key encryption **7.** Cryptographer 8. Anonymity 9. Symmetric key encryption 10. Spear Phishing

17.19 Terminal Questions

1. What do you understand by encryption? What are the uses of encryption to control over the cyber crimes?

2. What are the various methods and techniques of encryption? Discuss in detail.

3. Can encryption prevent cyber crimes? Explain the limitations of encryption.

4. What are the reasons for cyber crime? Distinguish between conventional and cyber crimes.
5. What are the statutory provisions for prevention of cyber crime in India?
6. Discuss the different types of cyber crime in detail.

17.20 References/Bibliography

JayashankarK.K, Johnson Philip, “Cyber Law” Pacific books international, 2011
Goel Hemant, “Law and Emerging Technology Cyber law” Jain Book Depot, 2004
Fadia Ankit, “Encryption” Vikas publisher, 2010.
Barkha, Ram Mohan, “Cyber Law and Crimes” Jain Book depot, 2011

http://www.cidap.gov.in/documents/Cyber%20Crime.pdf
http://en.wikipedia.org/wiki/Encryption
http://en.wikipedia.org/wiki/Computer_crime

Unit – 18: E-Governance and IT Act, 2000

18.1 Introduction

18.2 Meaning and features of E- Governance

18.3 Scope of E-Governance

18.4 Advantages of E-Governance

18.5 Objectives of E-Governance

18.6 Aspects of E-Governance

18.7 Stages of E-Governance

18.8 Strategies for E-Governance in India

18.9 E-Governance Infrastructure in India

18.10 Information Technology Act, 2000

18.10.1 Features of IT act

18.10.2 Main provisions of IT act

18.10.3 Penalties under IT act

18.10.4 Features of amended IT act, 2008

18.11 Summary

18.12 Glossary

18.13 Answers to check your progress/SAQ

18.14 References/Bibliography

18.15 Suggested Readings

18.16 Terminal Questions

Objectives

After reading this unit you will be able to:

- Explain the meaning, features and objectives of E-Governance.
- Describe the scope, advantage and various aspects of E-Governance.
- Describe the process and strategies of E-Governance.
- Explain the infrastructure of E-Governance in India.
- Elaborate IT act, 2000 its features, main provisions and penalties.

18.1 Introduction

E-governance refers to the use of information and communication technologies (ICT) to improve the efficiency, transparency and accountability of government. Traditionally, the interaction between a citizen or business and a government agency took place in a government office. With the emergence of information and communication technologies it is possible to locate service centers closer to the citizens. In India, e-governance is an application area, where IT has made considerable progress and it offers vast potential to provide good governance. It offers opportunities to transform both the mechanics of government and the nature of government itself. It affects all government functions and agencies, the private sector and the society in general. Needless to emphasize the application of IT in information and knowledge area, there is a great deal of possibility of its usage in providing good governance to people in remote places in rural areas. Good governance means achieving the desired goals and delivering through a system of adequate capacity to perform with sound norms and values. It is an essence about being able to provide basic equal socio economic and political opportunities to people, being responsive to people's needs, being able to provide basic services to people, and being fair and accountable in dealings. It also requires that institutions and processes are sensitive to the problems of the people and try to serve all stakeholders in a reasonable timeframe.

18.2 Meaning and features of E- Governance

What is e- governance?

E-governance is a use of information and communication technologies with the aim of improving information and services delivery, encouraging citizens' participation in the

decision making process and making government more accountable, transparent and effective.

Results/ Features of e-governance

- Quality Service Delivery: The delivery of services to citizens should confirm to set specific standards.

- Grievance Redresses: The grievances should be redressed within a time limit.

- Feedback: Citizens should be in a position to give feedback to government departments/ service provider about the service/ information provided to them.

- Transparency: It should provide transparency in decision making and the citizen should have access to the reasons for the decision taken.

- Accountability: It is essential for maintaining public confidence in governance, justifying and ensuring the overall legitimacy of the e- governance system.

- Involving people in Decision Making: Citizens should get the opportunities to participate in the decision making processes to local development.

The object of E-Governance is to provide a SMARRT Government. The Acronym SMART refers to Simple, Moral, Accountable, Responsive, Responsible and Transparent Government.

S - The use of ICT brings simplicity in governance through electronic documentation, online submission, online service delivery, etc.

M - It brings Morality to governance as immoralities like bribing; red-tapism, etc. are eliminated.

A - It makes the Government accountable as all the data and information of Government is available online for consideration of every citizen, the NGOs and the media.

R - Due to reduced paperwork and increased communication speeds and decreased communication time, the Government agencies become responsive.

R - Technology can help convert an irresponsible Government Responsible. Increased access to information makes more informed citizens. And these empowered citizens make a responsible Government.

T - With increased morality, online availability of information and reduced red-tapism the process of governance becomes transparent leaving no room for the Government to conceal any information from the citizens.

18.3 Scope of E-Governance

Governance is all about flow of information between the Government and Citizens, Government and Businesses and Government and Government. E-Governance also covers all these relationships as follows:

A. Government to Citizen (G2C)
B. Citizen to Government (C2G)
C. Government to Government (G2G)
D. Government to Business (G2B)

A. Government to Citizen

Government to Citizen relationship is the most basic aspect of E-Governance. In modern times, Government deals with many aspects of the life of a citizen. The relation of a citizen with the Government starts with the birth and ends with the death of the citizen. A person transacts with the Government on every corner of his life. May it be birth registration, marriage registration, divorce or death registration.

The G2C relation will include the services provided by the Government to the Citizens. These services include the public utility services i.e. Telecommunication, Transportation, Post, Medical facilities, Electricity, Education and also some of the democratic services relating to the citizenship such as Certification, Registration, Licensing, Taxation, Passports, ID Cards etc.

Therefore E-Governance in G2C relationship will involve facilitation of the services flowing from Government towards Citizens with the use of Information and Communications Technology (ICT).

1. E-Citizenship - E-Citizenship will include the implementation of ICT for facilitation of Government Services relating to citizenship of an individual. It may involve online transactions relating to issue and renewal of documents like *Ration Cards, Passports, Election Cards, Identity Cards*, etc. It will require the Government to create a virtual identity of every citizen so as to enable them to access the Government services online. For the same, Government would need to create a Citizen Database which is a huge task.

2. E-Registration - E-Registration will cover the online registration of various contracts. An individual enters into several contracts during his life. Many of these contracts and transactions require registration for giving it legality and enforceability. Such registration may also be made ICT enabled. E-registration will help to reduce a significant amount of paperwork.

3. E-Transportation - E-Transportation services would include ICT enablement of services of Government relating to Transport by Road, Rail, Water or Air. This may involve online –

- booking and cancellation of tickets,
- status of vehicles, railways, boats and flights,
- issue and renewal of Driving Licenses,
- registration and renewal of vehicles,
- transfer of vehicles,
- payment of the fees of licenses,
- payment of fees and taxes for vehicle registration,

4. E-Health - E-Health services would be ICT enablement of the health services of the Government. Under this interconnection of all hospitals may take place. A patient database may be created. A local pharmacy database may also be created. All this can be done.

5. E-Education - E-Education would cover the implementation of ICT in imparting of education and conducting of Courses. Distant as will as classroom education will be

facilitated with the use of ICT. Use of internet can reduce the communication time required in Distance education; Internet may also help in conducting online classes.

6. E-Help - E-Help refers to facilitation of disaster and crisis management using ICT. It includes the use of technologies like internet, SMS, etc. for the purpose of reducing the response time of the Government agencies to the disasters. NGOs help Government in providing help in situations of disasters. Online information relating to disasters, warnings and calls for help can help the Government and the NGOs coordinate their work and facilitate and speed up the rescue work.

7. E-Taxation - E-Taxation will facilitate the taxing process by implementing ICT in the taxing process. Online tax due alerts and online payment of taxes would help transact faster.

B. Citizen to Government

Citizen to Government relationship will include the communication of citizens with the Government arising in the Democratic process like voting, campaigning, feedback, etc.

1. E-Democracy - The true concept of Democracy includes the participation of the citizens in the democratic and governing process. Today due to the increased population the active participation of the citizens in governing process is not possible. The ICT can help enable the true democratic process including voting, public opinion, feedback and Government accountability.

2. E-Feedback - E-Feedback includes the use of ICT for the purpose of giving feedback to the Government. Lobbying is pursuing the Government to take a certain decision. Use of ICT can enable online feedback to the Government, online debates as to the Government services

C. Government to Government

G2G relationship would include the relationships between Central and State Government and also the relationship between two or more Government departments.

1. E-administration - E-administration would include the implementation of ICT in the functioning of the Government, internally and externally. Implementation of ICT can reduce the communication time between the Government Departments and Governments. It can substantially reduce paperwork if properly used. E-administration will also bring morality and transparency to the administration of Government Departments.

2. E-police - The concept of E-police is little different from Cyber-Police. Cyber Police require technology experts to curb the electronic/cyber crimes. E-police refers to the use of ICT for the purpose of facilitating the work of the Police department in investigation and administration. The concept of E-police includes databases of Police Officers, their performances, Criminal databases – wanted as well as in custody, the trends in crimes and much more. ICT can help reduce the response time of the Police department and also reduce cost by reducing paperwork.

3. E-courts - The concept of E-Court will include the ICT enablement of the judicial process. Technology may help distant hearing, online summons and warrants and online publication of Judgments and Decrees.

D. Government to Business

1. E-Taxation - Corporate sector pays many taxes, duties and dues to the Government. Payment of these taxes and duties will be made easier by E-Taxation. Online taxing and online payment of taxes can help reduce cost and time required for physical submission of taxes. ICT can also help crosscheck the frauds and deficiencies in payment, further bringing accuracy and revenue to the Government.

2. E-Licencing - Companies have to acquire various licences from the Government, similarly the companies have to acquire various registrations. ICT enablement of the licensing and registration can reduce time and cost.

3. E-Tendering - E-Tendering will include the facilities of online tendering and procurement. It will online alerts as to new opportunities of business with the Government and also online submission of tenders and online allotment of work. It will reduce time and cost involved in the physical tendering system.

18.4 Advantages of E-Governance

Following are the advantages of E-Governance

1. Speed – Technology makes communication speedier. Internet, Phones, Cell Phones have reduced the time taken in normal communication.

2. Cost Reduction – Most of the Government expenditure is appropriated towards the cost of stationary. Paper-based communication needs lots of stationary, printers, computers, etc. which calls for continuous heavy expenditure. Internet and Phones makes communication cheaper saving valuable money for the Government.

3. Transparency – Use of ICT makes governing profess transparent. All the information of the Government would be made available on the internet. The citizens can see the information whenever they want to see. But this is only possible when every piece of information of the Government is uploaded on the internet and is available for the public to peruse. Current governing process leaves many ways to conceal the information from all the people. ICT helps make the information available online eliminating all the possibilities of concealing of information.

4. Accountability – Once the governing process is made transparent the Government is automatically made accountable. Accountability is answerability of the Government to the people. It is the answerability for the deeds of the Government. An accountable Government is a responsible Government.

18.5 Objectives of E-Governance

Following are the objectives/aims of E-Governance:

1. To build an informed society – An informed society is an empowered society. Only informed people can make a Government responsible. So providing access to all to every piece of information of the Government and of public importance is one of the basic objectives of E-Governance.

2. To increase Government and Citizen Interaction - In the physical world, the Government and Citizens hardly interact. The amount of feedback from and to the citizens is very negligible. E-Governance aims at build a feedback framework, to get feedback from the people and to make the Government aware of people's problems.

3. To encourage citizen participation - True democracy requires participation of each individual citizen. Increased population has led to representative democracy, which is not democracy in the true sense. E-governance aims to restore democracy to its true meaning by

improving citizen participation in the Governing process, by improving the feedback, access to information and overall participation of the citizens in the decision making.

4. To bring transparency in the governing process - E-governance carries an objective to make the Governing process transparent by making all the Government data and information available to the people for access. It is to make people know the decisions, and policies of the Government.

5) To make the Government accountable - Government is responsible and answerable for every act decision taken by it. E-Governance aims and will help make the Government more accountable than now by bringing transparency's and making the citizens more informed.

6) To reduce the cost of Governance - E-Governance also aims to reduce cost of governance by cutting down on expenditure on physical delivery of information and services. It aims to do this by cutting down on stationary, which amounts to the most of the government's expenditure. It also does away with the physical communication thereby reducing the time required for communication while reducing cost.

7) To reduce the reaction time of the Government – Normally due to red-tapism and other reasons, the Government takes long to reply to people's queries and problems. E-Governance aims to reduce the reaction time of the Government to the people's queries and problems, because's problems are basically Government's problems as Government is for the people.

18.6 Aspects of E-Governance

1. Information Management
2. Identity and Access Management
3. Content Management
4. Standards Management
5. ICT Legal Framework

1. Information Management

Information management is gathering and storing at one place, the information relating to the Government and Governing process. It is the systematic arrangement/classification of

information. If the information of the Government is gathered at one place without any arrangement or management, it would prove difficult for the users to find the required information. Managing information is an important aspect of E-governance. Information management addresses the issues like – How to provide? What to provide? Whom to Provide? When to provide? Where to provide? Why to provide?

The process of information management may further be divided into three aspects – (1) Database Management, (2) Indicator Management, and (3) Knowledge Management. Database Management involves bare compilation and organization of data and information at one place. Indicator Management involves storing with the information the catch words, labels, tags, meanings and context relating to the information. Knowledge Management involves managing the skills and know-how of the employees/experts of the Government for benefit of the Government.

Information management is an integral aspect of E-commerce. It also proves essential for E-Governance. It helps transform the governing process in a business-like efficient and cost-effective process. Information management aims at reducing cost, improving performance, differentiating of products and services of Government, specialised/customised information, and citizen focus.

Information management involves following stages –

- Gathering – gathering all the available information of the government
- Creating – creating information which is lost or not available
- Storing – storing the gathered information in one place
- Accessing – accessing of stored information by the people
- Distributing – distributing required information to the public
- Ignoring – ignoring the information not publicly important
- Discarding – discarding ignored and insignificant information
- Updating – continuous updating information
- Securing – securing the information with latest technology so as to give access to information to those who really require it.

2. Identity and Access Management

Identity management is a set of processes and infrastructure for the creation, maintenance and use of digital identities for the purpose of access to E-governance portals and the information on those portals. Well established Identity management system helps setup an Access management system. The object of Identity Management is to create scalable, extensible and secure standards based framework for identity data acquisition and storage.

Access management involves authentication of identity of the user and giving access to the Government and public information available online. Access management is necessary to give a secure access to information to the public. Securing of public information available online is very important due to recent online piracy and attacks on websites through hacking. E-governance would involve huge of sensitive public information up for grabs for the hackers of other countries. Further there are certain things which require to be accessed by only the Government officials. So online security of information is very necessary which can be done through Access management. Access management is only possible if there is an Identity Management system is already online and running successfully.

The identities can be classified as follows: (1) Citizens, (2) Employees, (3) Customers, (4) Organizations, (5) Agencies, (6) Partners, etc.

The process of Identity Management involves following stages

a) Citizen Request – The first stage is the Citizens' requests for creation of identities. This may be done physically by submitting forms and documents.

b) Verification – The second stage is to physically verify the identities by crosschecking various documents, photo identities, etc.

c) Assignment of identifier – The Government has to assign a unique identifier which may be a number or a username and password to every citizen so as to eliminate multiplicity of identities. Today according to the emerging technologies the identifiers may also be in the form of biometrics, digital certificates, smart cards, etc.

d) Storage of Identities in ID stores/databases – Once an identifier is assigned/username and password is created, the identities are stored in the identity stores.

The process of Access Management involves following stages:

a) Authentication – Once a user wants to access online portal, he will need to access it through the unique identifier assigned after registration. After the user enters the username and passwords or through any other authentication process like biometrics, digital certificates, etc. his access to the portal is authenticated.

b) Authorisation – Authorisation of user depends on the type the user belongs. The user may be administrator, Manager, Author, Creator, user, etc. A user will only be authorised to access the information. The Administrator is authorised to change the information.

c) Access Control – Based on the authorisation of the user, his access of information in various areas will be controlled. This will be based on the type of user, i.e. Administrator, user, etc.

d) Audit and Reporting – Audit and Reporting involves the monitoring the access of information by users, their authority and access rights. This helps in improving the access security and also the security of the information.

Advantages/Benefits of Identity and Access Management

a) Elimination of storage of duplicate identities

b) Interoperability of applications by enforcement of data standardization

c) Single Sign in

d) Secure Access

e) Curbing unauthorized access

f) Increased Citizen Participation

g) Improve performance of the Government Services

h) Improve Service Delivery

i) 24x7 availability of Government services

3. Content Management

Content management is the process of organizing, distributing and tracking information/data through a website over the internet. It helps to make users more knowledgeable or informed by offering instant access to correct information online. It deals with providing right information, to right people at right time.

Contents of a website can be divided as follows: Text, Graphics, Audio, Video, Diagrams, Links, etc. Managing this various type of content is important. It is necessary to decide where to provide text and where images and graphics.

Content management further involves:

a) Web based publishing – publishing WebPages, documents, charts, graphs, etc online on a website;

b) Format management – following practice of fixed formats for WebPages, text, graphics, audio and video;

c) Revision – involves continuous updating of information;

d) Indexing – creating indexes of the topics and subjects of which information is available on the website;

e) Search – providing search facility to users to find out exact data that user wants.

Object of Content Management

a) To Communicate Right Data to Right People at Right Time

b) To ensure that the contents are need based, relevant, up to date and accurate

c) To avoid duplication of content

Essentials of Content Management

a) Centralized storage – information must be stored centrally, i.e. at one place to make access easy and avoid complications of networking and computing;

b) Reviewing and Authentication of Contents – The contents of the website must be continuously reviewed and authenticated so as to maintain the authenticity of the data available on the website. It must also be done for providing relevant content/information on the website;

c) Access of data by the end user – Unless the user access the data published on the website, the whole effort is in vain.

4. Standards Management

ICT provides many ways to achieve E-governance. There are multiple formats to deal with WebPages, text, graphics, audio, and video. However, as seen currently, there is no uniformity in the e-governance websites as to the use of formats. There are also various levels of technologies, basic and advanced. For e-governance, basic technologies are not sufficient because of the security concerns of sensitive data/information. Therefore, e-governance websites have to maintain standards. Standards management involves further aspects as follows:

1. Network and information Security Standards

2. Meta data and data standards

3. Localization and language technology

4. Quality and documentation standards

5. Technical standards

6. Web accessibility standards

18.7 Stages of E-Governance

United Nations E-Readiness Survey contemplates the following stages of E-governance as to the online presence of Governments worldwide:

1. Emerging Presence – The Stage I i.e. emerging presence considers online availability of limited and basic information. A basic online presence of an e-government involves an

official website and few WebPages. Links to ministries and departments of Central Government, regional/local Government may or may not be available. The website at this stage may also have some archived information such as the head of states' messages or the constitution. However at this stage most of the information remains static without there being any options for citizens.

2. Enhanced presence – The Stage II contemplated by UN is Enhanced presence of the Government online. At this stage the Government provides more public information resources such as policies of the Government, laws, regulations, reports, newsletters. This may also be downloadable at this stage. This stage may allow users to search the information within the documents available online. A help and a sitemap feature may also be provided on the website to make navigation of the website simpler. At this stage though there are more number of documents available online, the navigation of the website is still not sophisticated and is unidirectional. There are no interactivity at this stage as the information is only flowing towards the citizens rather than also from citizens to Government.

3**. Interactive presence** – The Stage III of Interactive presence considers Governments to initiate interactivity in their websites. It involves availability of online services of the government to enhance convenience of the consumer. This will include downloadable forms and applications for payment of bills, taxes and renewal of licenses. Government Websites at this stage would have audio and video capability to increase the interactivity with the citizens. At this stage the government officials would be able contacted via email, fax, telephone and post. The website would be updated regularly to keep the information current and up to date for the public.

4. Transactional presence – The Stage IV i.e. transactional presence allows two-way interaction between the citizens and Government. It includes options such as paying taxes, applying for ID cards, birth certificates, passports, license renewals and other similar C2G interactions by allowing the citizen to submit forms and applications online 24/7. The citizens at this stage will be able to pay for relevant public services, such as motor vehicle violation, taxes, fees for postal services through their credit, bank or debit card. Providers of goods and services are able to bid online for public contacts via secure links.

5. Networked presence – The Stage V as contemplated by UN Survey is 'Networked Presence' which represents the most sophisticated level in the online e-government

initiatives. It can be characterized by an integration of G2G, G2C and C2G interactions. The government at this stage encourages citizen participation, online participatory decision-making and is willing and able to involve the society in a two-way open dialogue. Through interactive features such as the web comment form, and innovative online consultation mechanisms, the government will actively solicits citizens' views on public policy, law making, and democratic participatory decision making. At this stage of E-governance the integration of the public sector agencies with full cooperation and understanding of the concept of collective decision-making, participatory democracy and citizen empowerment as a democratic right, is initiated.

18.8 Strategies for E-Governance in India

1. To build technical infrastructure/framework across India

India lacks a full fledged ICT framework for implementation of e-governance. Complete implementation of E-governance in India will include building technical Hardware and Software infrastructure. It will also include better and faster connectivity options. Newer connectivity options will include faster Broadband connections and faster wireless networks such as 3G and 4G. The infrastructure must be built by Government, Private Sector as well as individuals. Infrastructure will also include promotion of Internet Cafes, Information and Interactive Kiosks. However while building technical infrastructure, disabled persons must also be considered. The technology implemented, shall incorporate the disabled persons.

2. To build institutional capacity

Apart from building technical infrastructure, the Government needs to build its institutional capacity. This will include training of Government employees, appointment of experts. Along with the Government has also to create an Expert database for better utilisation of intellectual resources with it. Apart from this, the Government has to equip the departments with hi-technology and has also to setup special investigating agency.

3. To build legal infrastructure

For better implementation of e-governance, the Government will need to frame laws which will fully incorporate the established as will as emerging technology. Changing technology has changed many pre-established notions; similarly the technology is growing and changing

rapidly. It is important, that the Government makes laws which incorporate the current technology and has enough space to incorporate the changing future technology. These IT laws need to be flexible to adjust with the rapidly changing technology. Currently India has only the IT Act, 2000 which is mainly an E-Commerce legislation. India has also modified many laws to include electronic technology, however it is not sufficient to cover e-governance completely.

4. To build judicial infrastructure

Overall technological awareness in current Judges is very low. The judiciary as a whole needs to be trained in new technology, its benefits and drawbacks and the various usages. The judiciary may alternatively appoint new judges with new judges and setup special Courts to deal with the matters relating to ICT. The Government can also setup special tribunals to deal with matters relating with ICT.

5. To make all information available online

The Government has to publish all the information online through websites. This can be facilitated through centralized storage of information, Localization of content and content management. The information of government is public information; therefore the citizens are entitled to know every piece of information of the Government, because the Government is of the People, by the People and for the People.

6. To popularize E-governance

Literacy percentage in India is alarming. The whole world is moving towards e-governance, but India still lacks in the literacy department. The people need to be educated and made e-literate for e-governance to flourish. There are very few e-literate people in India is very low. The Government needs to campaign for e-governance, increase people's awareness towards e-governance. Government can only encourage people to go online if it can make people feel comfortable with e-governance. This can be done through educating the people about the advantages of e-governance over physical governance. This can also be done through raising awareness of the leaders who can motivate the people to go online.

7. Centre-State Partnership

Indian setup is quasi-federal. Therefore Centre-State and inter-state cooperation is necessary for smooth functioning of the democratic process. This cooperation is also necessary for successful implementation of e-governance. This cooperation shall extend to Centre-state, inter-state and inter-department relationships. For the same the Government can setup a Central Hub like the current Government of India portal, for accessing the information of all the organs of the central government and also all the state government. The states can cooperate with the Centre to create a National Citizen Database.

8. To set standards

Finally it is important to set various standards to bring e-governance to the quality and performance level of private corporate sector. The Government of India is currently working on standards management and has various drafts prepared for the same. These standards include following: Inter-operability standards, Security standards, Technical standards, Quality standards. Government websites in India currently have no uniform standard. Many Government of Maharashtra websites differ in standards within even two of its WebPages. There is no set standard as to quality of the information, document, the formats, etc. It is very important for the Government to set uniform national standards to be followed by all the Governments and agencies.

18.9 E-Governance Infrastructure in India

- State Wide Area Network (SWAN)
- State Data Centre
- NSDG **(**National e-governance Service Delivery Gateway)
- Common Services Centers

1. State Wide Area Network (SWAN)

Wide Area Network is an advanced telecommunication infrastructure, which is used now-a-days extensively, for exchange of data and other types of information between two or more locations, separated by significant geographical distances. The medium of connectivity can be copper, optical fibre cable or wireless, as may be found feasible. Such wide area networks, in a way, create a highway for electronic transfer of information in the form of voice, video

and data. Department of IT in Government of India is implementing an approved Scheme known as State Wide Area Network (SWAN) Scheme, envisaged to create such a connectivity in each State / UT, to bring speed, efficiency, reliability and accountability in overall system of Government-to-Government (G2G) functioning. When fully implemented, SWAN would work as a converged backbone network for voice, video and data communications across each State / UT. SWAN is designed to cater to the governance information and communication requirements of all the State / UT Departments. When fully implemented, SWANs across the country are expected to cover at least 50000 departmental offices through 1 million (10 lacs) route kilometers of communication links.

State Wide Area Network Scheme

Department of IT obtained Government approval in March 2005, for the SWAN Scheme for an overall outlay of Rs. 3334 Crores. This outlay has a Grant In Aid component of Rs. 2005 Crores, to be expended by Department of IT in five years. The Scheme has a State / UT share of balance Rs.1329 crores, which has been provisioned by the Department of Expenditure, Govt. of India, under Additional Central Assistance (ACA). Under the SWAN Scheme, Wide Area Networks are being established in 27 States and 6 UTs across the country. The State of Goa and UT of Andaman & Nicobar Islands have implemented Wide Area Networks in the respective State / UT, outside the SWAN Scheme. Implementation of the SWAN Scheme is in full swing in 33 States/ UTs.

2. State Data Centre

State Data Centre (SDC) has been identified as one of the important element of the core infrastructure for supporting e-governance initiatives of National e-governance Plan (NeGP).

Under NeGP, it is proposed to create State Data Centers for the States to consolidate services, applications and infrastructure to provide efficient electronic delivery of G2G, G2C and G2B services. These services can be rendered by the States through common delivery platform seamlessly supported by core Connectivity Infrastructure such as State Wide Area Network (SWAN) and Common Service Centre (CSC) connectivity extended up to village level. State Data Centre would provide many functionalities and some of the key functionalities are Central Repository of the State, Secure Data Storage, Online Delivery of Services, Citizen Information/Services Portal, State Intranet Portal, Disaster Recovery, Remote Management

and Service Integration etc. SDCs would also provide better operation & management control and minimize overall cost of Data Management, IT Resource Management, Deployment and other costs.

Department of Electronics and Information Technology (DeitY) has formulated the Guidelines to provide Technical and Financial assistance to the States for setting up State Data Centre. These Guidelines also include the implementation options that can be exercised by the State to establish the SDC.

SDC scheme has been approved by Government with an outlay of Rs. 1623.20 Crores over a period of 5 years. It is expected that the State Data Centers shall be set-up and operationalised in all the States/UTs by March 2011.

3 NSDG (National e-governance Service Delivery Gateway)

The National e-governance Service Delivery Gateway (NSDG), an integrated MMP under the National e-governance Plan (NeGP), can simplify the above task by acting as a standards-based messaging switch and providing seamless interoperability and exchange of data across the departments. NSDG acting as a nerve centre, would handle large number of transactions and would help in tracking and time stamping all transactions of the Government.
In order for the Government to realize the NeGP vision, it is imperative that the different departments in the Centre, States and Local Government cooperate, collaborate and integrate information across the various levels, domains and geographies. Government systems characterized by islands of legacy systems using heterogeneous platforms and technologies and spread across diverse geographical locations, in varying state of automation, make this task very challenging. The National e-governance Service Delivery Gateway (NSDG), a MMP under the NeGP, can simplify this task by acting as a standards-based messaging switch and providing seamless interoperability and exchange of data across.

Vision of NSDG

The emergence of many e-governance applications for different departments to provide online services to citizens, businesses and government would require increasing interactions amongst departments and with external agencies at various levels in Government. Departments would need to develop connectors/adaptors for point to point connections

between departments creating a mesh as shown in figure and also tight coupling between applications. This would lead to applications that are difficult to maintain and upgrade in case of version change and change in government policies and business rules. The NSDG is an attempt to reduce such point to point connections between departments and provide a standardized interfacing, messaging and routing switch through which various players such as departments, front-end service access providers and back-end service providers can make their applications and data inter-operable. The NSDG aims to achieve a high order of interoperability among autonomous and heterogeneous entities of the Government (in the Centre, States or Local bodies), based on a framework of e-Governance Standards.

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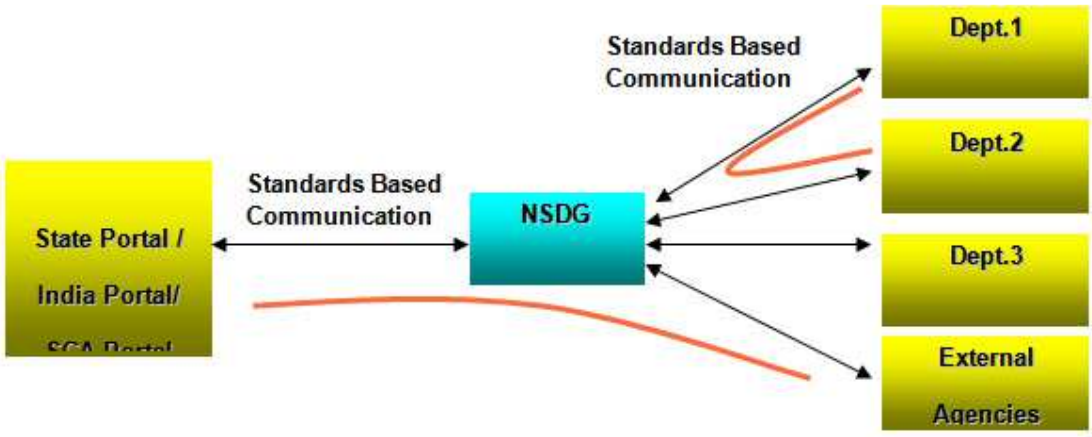

4 Common Service Centre

The CSC is a strategic cornerstone of the National e-Governance Plan (NeGP), as part of its commitment in the National Common Minimum Programme to introduce e-governance on a massive scale.

The CSCs would provide high quality and cost-effective video, voice and data content and services, in the areas of e-governance, education, health, telemedicine, entertainment as well as other private services. A highlight of the CSCs is that it will offer web-enabled e-

governance services in rural areas, including application forms, certificates, and utility payments such as electricity, telephone and water bills.

The Scheme creates a conducive environment for the private sector and NGOs to play an active role in implementation of the CSC Scheme, thereby becoming a partner of the government in the development of rural India. The PPP model of the CSC scheme envisages a 3-tier structure consisting of the CSC operator (called Village Level Entrepreneur or VLE) the Service Centre Agency (SCA), that will be responsible for a division of 500-1000 CSCs and a State Designated Agency (SDA) identified by the State Government responsible for managing the implementation over the entire State.

The CSC Scheme has been approved by Government in September 2006 with an outlay of Rs. 5742 Crores over a period of 4 years. It is expected that 100% CSCs would be rolled by March 2011.

18.10 Information Technology act, 2000

An Act to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternatives to paper-based methods of and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, the Indian Evidence Act, 1872, the Bankers' Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto.

18.10.1 Features of IT act, 2000

The IT act, 2000 seeks to introduce some sort of control over the use of encryption for communication in India. The use of the cryptography and encryption for communication in India is relatively a new concept with following features:

- Information is human
- Information is expandable
- Information is substitution
- Information is diffusive, transportable, sharable

- Control over the encryption
- Promoting, attributing and securing electronic record

18.10.2 Main Provisions of Act

Be it enacted by Parliament in the Fifty-first Year of the Republic of India with main provisions as follows:—

1. Legal Recognition of Electronic Records

Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is-

- Rendered or made available in an electronic form, and
- Accessible so as to be usable for a subsequent reference.

2. Legal Recognition of Digital Signatures

Where any law provides that information or any other matter shall be authenticated by affixing the signature or any document shall be signed or bear the signature of any person (hen, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied, if such information or matter is authenticated by means of digital signature affixed in such manner as may be prescribed by the Central Government.
Explanation.-For the purposes of this section, "signed", with its grammatical variations and cognate expressions, shall, with reference to a person, mean affixing of his hand written signature or any mark on any document and the expression "signature" shall be construed accordingly.

3**. Use of electronic records and digital signatures in Government and its agencies**.

- The filing of any form, application or any other document with any office, authority, body or agency owned or controlled by the appropriate Government in a particular manner.
- The issue or grant of any license, permit, sanction or approval by whatever name called in a particular manner.

- The receipt or payment of money in a particular manner. Then, notwithstanding anything contained in any other law for the time being in force, such requirement shall be deemed to have been satisfied if such filing, issue, grant, receipt or payment, as the case may be, is affected by means of such electronic form as may be prescribed by the appropriate Government.

4. Retention of electronic records

Where any law provides that documents, records or information shall be retained for any specific period, then, that requirement shall be deemed to have been satisfied if such documents, records or information are retained in the electronic form, if-

- The information contained therein remains accessible so as to be usable for a subsequent reference.
- The electronic record is retained in the format in which it was originally generated, sent or received or in a format which can be demonstrated to represent accurately the information originally generated, sent or received.
- The details which will facilitate the identification of the origin, destination, date and time of dispatch or receipt of such electronic record are available in the electronic record.

5. Publication of rule, regulation, etc., in Electronic Gazette.

Where any law provides that any rule, regulation, order, bye-law, notification or any other matter shall be published in the Official Gazette, then, such requirement shall be deemed to have been satisfied if such rule, regulation, order, bye-law, notification or any other matter is published in the Official Gazette or Electronic Gazette:
Provided that where any rule, regulation, order, bye-law, notification or any other matter is published in the Official Gazette or Electronic Gazette, the date of publication shall be deemed to be the date of the Gazette which was first published in any form.

6. Power to make rules by Central Government in respect of digital signature

The Central Government may, for the purposes of this Act, by rules, prescribe-

- The type of digital signature.
- The manner and format in which the digital signature shall be affixed.
- The manner or procedure which facilitates identification of the person affixing the digital signature.
- Control processes and procedures to ensure adequate integrity, security and confidentiality of electronic records or payments, and
- Any other matter which is necessary to give legal effect to digital signatures.

7. Attribution of electronic records.

An electronic record shall be attributed to the originator -

- If it was sent by the originator himself.
- By a person who had the authority to act on behalf of the originator in respect of that electronic record.

8. Acknowledgment of receipt

Where the originator has not agreed with the addressee that the acknowledgment of receipt of electronic record be given in a particular form or by a particular method, an acknowledgment may be given by -

- Any communication by the addressee, automated or otherwise, or
- Any conduct of the addressee, sufficient to indicate to the originator that the electronic record has been received.
- Where the originator has stipulated that the electronic record shall be binding only on receipt of an acknowledgment of such electronic record by him, then unless acknowledgment has been so received, the electronic record shall be deemed to have been never sent by the originator.

9. Time and place of dispatch and receipt of electronic record

Save as otherwise agreed between the originator and the addressee, the time of receipt of an electronic record shall be determined as follows, namely :-

- If the addressee has designated a computer resource for the purpose of receiving electronic records -

- Receipt occurs at the time when the electronic, record enters the designated computer resource, or
- If the electronic record is sent to a computer resource of the addressee that is not the designated computer resource, receipt occurs at the time when the electronic record is retrieved by the addressee.
- If the addressee has not designated a computer resource along with specified timings, if any, receipt occurs when the electronic record enters the computer resource of the addressee.

10. Secure electronic record

Where any security procedure has been applied to an electronic record at a specific point of time. Then such record shall be deemed to be a secure electronic record from such point of time to the time of verification.

11. Secure digital signature

If, by application of a security procedure agreed to by the parties concerned, it can be verified that a digital signature, at the time it was affixed, was-

- Unique to the subscriber affixing it.
- Capable of identifying such subscriber.
- Created in a manner or using a means under the exclusive control of the subscriber and is linked to the electronic record to which it relates in such a manner that if the electronic record was altered the digital signature would be invalidated.
- Then such digital signature shall be deemed to be a secure digital signature.

12. Security procedure

The Central Government shall for the purposes of this Act prescribe the security procedure having regard to commercial circumstances prevailing at the time when the procedure was used, including-

- The nature of the transaction.
- The level of sophistication of the parties with reference to their technological capacity.

- The volume of similar transactions engaged in by other parties.
- The availability of alternatives offered to but rejected by any party.
- The cost of alternative procedures, and
- The procedures in general use for similar types of transactions or communications.

13. Certifying Authority to issue Digital Signature Certificate

Any person may make an application to the Certifying Authority for the issue of a Digital Signature Certificate in such form as may be prescribed by the Central Government

On receipt of an application under sub-section (1), the Certifying Authority may, after consideration of the certification practice statement or the other statement under sub-section (3) and after making such enquiries as it may deem fit, grant the Digital Signature Certificate or for reasons to be recorded in writing, reject the application:

Provided that no Digital Signature Certificate shall be granted unless the Certifying Authority is satisfied that -

- The applicant holds the private key corresponding to the public key to be listed in the Digital Signature Certificate.
- The applicant holds a private key, which is capable of creating a digital signature.
- The public key to be listed in the certificate can be used to verify a digital signature affixed by the private key held by the applicant.

14. Representations upon issuance of Digital Signature Certificate

A Certifying Authority while issuing a Digital Signature Certificate shall certify that--

- It has complied with the provisions of this Act and the rules and regulations made there under.
- It has published the Digital Signature Certificate or otherwise made it available to such person relying on it and the subscriber has accepted it.
- The subscriber holds the private key corresponding to the public key, listed in the Digital Signature Certificate.
- The subscriber's public key and private key constitute a functioning key pair.
- The information contained in the Digital Signature Certificate is accurate, and

15. Suspension of Digital Signature Certificate

Subject to the provisions of sub-section (2), the Certifying Authority which has issued a Digital Signature Certificate may suspend such Digital Signature Certificate -

On receipt of a request to that effect from -

- the subscriber listed in toe Digital Signature Certificate, or
- any person duly authorized to act on behalf of that subscriber
- if it is of opinion that the Digital Signature Certificate should be suspended in public interest
- A Digital Signature Certificate shall not be suspended for a period exceeding fifteen days unless the subscriber has been given an opportunity of being heard in the matter.
- On suspension of a Digital Signature Certificate under this section, the Certifying Authority shall communicate the same to the subscriber.

16. Revocation of Digital Signature Certificate

A Certifying Authority may revoke a Digital Signature Certificate issued by it -

- where the subscriber or any other person authorised by him makes a request to that effect, or
- upon the death of the subscriber, or
- Upon the dissolution of the firm or winding up of the company where the subscriber is a firm or a company.
- A material fact represented in the Digital Signature Certificate is false or has been concealed.
- A requirement for issuance of the Digital Signature Certificate was not satisfied.
- The Certifying Authority's private key or security system was compromised in a manner materially affecting the Digital Signature Certificate's reliability.
- The subscriber has been declared insolvent or dead or where a subscriber is a firm or a company, which has been dissolved, wound-up or otherwise ceased to exist.

17. Notice of suspension or revocation

Where a Digital Signature Certificate is suspended or revoked under section 37 or section 38, the Certifying Authority shall publish a notice of such suspension or revocation, as the case

may be, in the repository specified in the Digital Signature Certificate for publication of such notice.

Where one or more repositories are specified, the Certifying Authority shall publish notices of such suspension or revocation, as the case may be in all such repositories.

18.10.3 Penalties for damaging computer, hacking with computer system, etc. under IT act.

- If any person without permission of the owner or any other person who is in charge of a computer, computer system or computer network -
- Accesses or secures access to such computer, computer system or computer network.
- Downloads, copies or extracts any data, computer data base or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium.
- Introduces or causes to be introduced any computer contaminant or computer virus into any computer, computer system or computer network.
- damages or causes to be damaged any computer, computer system or computer network, data, computer data base or any other programmes residing in such computer, computer system or computer network.
- disrupts or causes disruption of any computer, computer system or computer network
- Denies or causes the denial of access to any person authorised to access any computer, computer system or computer network by any means.
- Provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of this Act, rules or regulations made there under.
- Charges the services availed of by a person to the account of another person by tampering with or manipulating any computer, computer system, or computer network.
- He shall be liable to pay damages by way of compensation not exceeding one crore rupees to the person so affected.

- Whoever with the intent to cause or knowing that he is likely to cause wrongful loss or damage to the public or any person destroys or deletes or alters any information

residing in a computer resource or diminishes its value or utility or affects it injuriously by any means, commits hack:

- Whoever commits hacking shall be punished with imprisonment up to three years, or with fine which may extend up to two lakh rupees, or with both.

18.10.4 Salient features of the Information Technology (Amendment) Act, 2008

The Information Technology (Amendment) Act, 2008 has been signed by the President of India on February 5, 2009. A review of the amendments indicates that there are several provisions relating to data protection and privacy as well as provisions to curb terrorism using the electronic and digital medium that have been introduced into the new Act. Some of the salient features of the Act are as follows:

- The term "digital signature" has been replaced with "electronic signature" to make the Act more technology neutral.
- A new section has been inserted to define "communication device" to mean cell phones, personal digital assistance or combination of both or any other device used to communicate, send or transmit any text video, audio or image.
- A new section has been added to define "cyber café" as any facility from where the access to the internet is offered by any person in the ordinary course of business to the members of the public.

- A new definition has been inserted for "intermediary" with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online market places and cyber cafes, but does not include a body corporate referred to in Section 43A.

- A new section 10A has been inserted to the effect that contracts concluded electronically shall not be deemed to be unenforceable solely on the ground that electronic form or means was used.

- A host of new sections have been added to section 66 as sections 66A to 66F prescribing punishment for offenses such as obscene electronic message transmissions, identity theft, cheating by impersonation using computer resource, violation of privacy and cyber terrorism.
- Section 67 of the old Act is amended to reduce the term of imprisonment for publishing or transmitting obscene material in electronic form to three years from five years and increase the fine thereof from Indian Rupees 100,000 (approximately USD 2000) to Indian Rupees 500,000 (approximately USD 10,000). A host of new sections have been inserted as Sections 67 A to 67C. While Sections 67 A and B insert penal provisions in respect of offenses of publishing or transmitting of material containing sexually explicit act and child pornography in electronic form, section 67C deals with the obligation of an intermediary to preserve and retain such information as may be specified for such duration and in such manner and format as the central government may prescribe.
- In view of the increasing threat of terrorism in the country, the new amendments include an amended section 69 giving power to the state to issue directions for interception or monitoring of decryption of any information through any computer resource.
- Further, sections 69 A and B, two new sections, grant power to the state to issue directions for blocking for public access of any information through any computer resource and to authorize to monitor and collect traffic data or information through any computer resource for cyber security.
- A provision has been added to Section 81 which states that the provisions of the Act shall have overriding effect. The provisions states that nothing contained in the Act shall restrict any person from exercising any right conferred under the Copyright Act, 1957.

18.11 Summary

In this unit we came to know about e-governance and IT act. E-governance refers to the use of information and communication technologies (ICT) to improve the efficiency, transparency and accountability of government. . In India, e-governance is an application area, where IT has made considerable progress and it offers vast potential to provide good governance. It offers opportunities to transform both the mechanics of government and the

nature of government itself. It affects all government functions and agencies, the private sector and the society in general. Needless to emphasize the application of IT in information and knowledge area, there is a great deal of possibility of its usage in providing good governance to people in remote places in rural areas. The object of E-Governance is to provide a SMARRT Government. Use of ICT makes governing profess transparent. All the information of the Government would be made available on the internet. The citizens can see the information whenever they want to see. But this is only possible when every piece of information of the Government is uploaded on the internet and is available for the public to peruse. Current governing process leaves many ways to conceal the information from all the people. ICT helps make the information available online eliminating all the possibilities of concealing of information. On the other hand, IT Act, 2000 provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, which involve the use of alternatives to paper-based methods of and storage of information, to facilitate electronic filing of documents with the Government agencies. A review of the amendments in IT act in 2008 indicates that there are several provisions relating to data protection and privacy as well as provisions to curb terrorism using the electronic and digital medium that have been introduced into this new Act.

18.12 Glossary

Proxy: A proxy is a computer in a network which temporarily stores data downloaded from the internet. Proxies are used for performance reasons or in order to improve IT security.

Service Provider: Provider of telecommunications and media services. The commercial nature of the offered services is not a prerequisite for this designation.

Accessibility: Accessibility refers to the accessibility of web pages to all users. People with impaired sight, hearing, manual dexterity or cognitive function encounter barriers when they attempt to use the internet.

Archives: Archives are files which contain other files, normally compressed. The commonest format used for archiving services is the ZIP file.

Communication Technology: Technology used to transmit information. Thus, in the context of "e-government", communication technology primarily refers to computer networks such as the internet and other data connections, but also includes fax, telephone, and mobile phone.

Crypto processor: A processor for the cryptographic treatment of data, cryptography.

18.13 Check your progress

True/False Questions

1. E-government is a federal concept and so does not include any form of state buying activity. T/F

2. E-government is the application of information technology to the process of government. T/F

3. E-government applies only to the interaction of the government with its business suppliers. T/F

4. G2G includes all intergovernmental activities among government units, as well as interactions with other governments. T/F

5. G2C is easier to implement than G2B. T/F

6. E-government is totally dependent on the Internet. T/F

7. One major benefit of e-learning is that it is much easier to update a Web site than a traditional textbook. T/F

8. The cost of distributing government benefits electronically is much lower than the conventional check distribution system. T/F

9. The IT act, 2000 seeks to introduce some sort of control over the use of encryption for communication. T/F

10. The term "digital signature" has been replaced with "electronic signature" to make the IT act more technology neutral in the amendments of IT act, 2002. T/ F

11. The use of the cryptography and encryption for communication in India is relatively a new concept. T/F

12. An electronic record shall be attributed to the originator if it was sent by the originator himself. T/F

18.14 Answers to check your progress/SAQ

1. F 2. T 3. F 4. T 5. F 6. F 7.T 8.T 9. T 10. F 11.T 12.T

18.15 Terminal Questions

1. What is E-Governance? Explain its features and advantages.
2. What is the scope of E-Governance in India?
3. "Governance is all about flow of information between the Government, Citizens, and Business" Explain this statement.
4. What are the objectives of E- Governance? What can be the right strategy for Implementation of e-governance in India?
5. How Information and Communication Technology (ICT) play vital role in the Infrastructural development of e-governance?
6. Write short notes on:
    A. State Wide Area Network (SWAN)
    B. NSDG (National e-governance Service Delivery Gateway)
7. Explain the major provisions under IT act, 2000 for data protection and privacy.
8. What are Salient features of the Information Technology (Amendment) Act, 2008?

18.16 References/Bibliography

Singh Gurvinder, Rachhpal "Computer applications in business and economics", Kalyani Publishers, 2006

Sinha R P,"E-Governance in India: initiatives & issues "Publisher concept publishing company, 2006

Prabhu C S R, "E-Governance: concepts and cases studies" PHI Learning Pvt Ltd, 2006

Gupta D N, "E-Governance- A Comprehensive Framework" New Century Publications, 2008.

http://en.wikipedia.org/wiki/E-Governance

http://eprocure.gov.in/cppp/sites/default/files/eproc/itact2000.pdf

Unit –19: Constitutional and Administrative Underpinnings of Environmental Law

19.1 Introduction

19.2 Meaning of Environment

19.3 Causes of Environmental Pollution

19.4 General Powers of the Central Government under the Environment (Protection) Act, 1986

19.5 Prohibiting or Restricting the Handling of Hazardous Substances

- **19.5.1 Imports and Exports**
- **19.5.2 Location of industries**
- **19.5.3 Duties and Liabilities of the Persons Carrying on Industry**
- **19.5.4 When Environmental pollutant is excess than that of the prescribed Standards**

19.6 Power of officers in respect of Entry and Inspection

19.7 Power to take Sample and Procedure

19.8 Offences and Penalties for Contravention of the provision of Act

19.9 Summary

19.10 Glossary

19.11 Check your progress

19.12 Answers to check your progress/SAQ

19.13 Terminal Questions

19.14 References/Bibliography

Objectives

After reading this unit you will be able to

- Explain the Meaning of Environment, Environmental Pollutant and Environmental Pollution.
- Describe causes of Environmental Pollution

- Discuss powers of the Central Government under the Environment (Protection) Act, 1986
- Describe power to take sample and procedure

- Describe Offences and Penalties for Contravention of the provision of Act.

- Know about the procedure to be followed in case of location of industries and export and import.

- Know about duties and liabilities of the persons carrying on Industry

19.1 Introduction

Generally speaking environment includes air, water, light, temperature, soil etc. plant and animals and all other non living objects which are surrounding us. Word "environment" is most commonly used describing "natural" environment and means the sum of all living and non-living things that surround an organism, or group of organisms. Environment includes all elements, factors, and conditions that have some impact on growth and development of certain organism. Environment includes both biotic and a biotic factors that have influence on observed organism. A biotic factor such as light, temperature, water, atmospheric gases combine with biotic factors.

In the Constitution of India it is clearly stated that it is the duty of the state to 'protect and improve the environment and to safeguard the forests and wildlife of the country'. It imposes a duty on every citizen 'to protect and improve the natural environment including forests, lakes, rivers, and wildlife'. Reference to the environment has also been made in the Directive Principles of State Policy as well as the Fundamental Rights. The Department of Environment was established in India in 1980 to ensure a healthy environment for the country. This later became the Ministry of Environment and Forests in 1985. The constitutional provisions are backed by a number of laws – acts, rules, and notifications. **The EPA (Environment Protection Act), 1986 came into force soon after the Bhopal Gas Tragedy and is considered an umbrella legislation as it fills many gaps in the existing laws**. Thereafter a large number of laws came into existence as the problems began arising, for example, Handling and Management of Hazardous Waste Rules in 1989.

19.2 Meaning of Environment, Environmental Pollutant and Environmental Pollution

Environment-Generally speaking environment includes air, water, light, temperature, soil etc., plants and animals and all other non living objects which are surrounding us. On consulting a dictionary we find that 'environment' means a surrounding, external conditions influencing development or growth of people, animals or plant, living or working conditions etc.

According to C.C. Park 'environment' refers to the sum total of conditions which surrounds man at a given point in space and time.

The word 'environment' is defined under Section 2(a) of the Environment (Protection) Act, 1986 that in this Act, unless the context · otherwise requires, 'environment' includes water, air and land and the inter-relationship which exists among and between water, air and land and human beings, other living creatures, plants, microorganism and property.

According to the above definition the environment encompasses both the non-living and the living components of the earth. Non-living environment is called physical or a biotic environment and living environment is called biotic environment. Physical or biotic component consist of lithospheric, hydrospheric and atmospheric components. On the other hand, biotic component consists of plant, animal, man and microorganism components.

Environmental Pollutant-The term 'environmental pollutant' is defined under Section 2(b) of the Environment (Protection) Act, 1986 which says that in this Act, unless the context otherwise requires, the 'environmental pollutant' means any solid, liquid or gaseous substance present in such concentration as may be or tend to be injurious to environment.

Environmental Pollution-According to Section 2(c) of the Environmental pollution means the presence in the environment of any environs mental pollutant. All the ways by, which people pollute their surroundings is called environmental pollution. In environmental pollution the environmental quality is lowered exclusively by human activities at local scale. Environmental pollution is, undoubtedly, the outcome of urban industrialization, technological revolution of natural resources, urban effluents and consumer goods along with increased rate of exchange of matter and energy and ever increasing industrial wastes.

19.3 Causes of Environmental Pollution

At present environmental pollution is one of the biggest and hazardous problems of, not only India but of whole of the world. The continued degradation of environment is the result of the modern living technological advancement, industrialization and urbanization. According to Krishna Iyer V.R. contemporary scientific and technological revolution 'has significantly transformed the relationship between man and nature. It has rightly been said that man is nature's best promise and worst enemy. Thus, the main causes or factors of the environmental pollution may be stated as below-

(1) **Growth of population**-One of the most important factor of the lowering of quality of environment and ecological balance is growth of human population. The people generate better facilities for their existence and better life so the results of growth of population are increased in means of transportation, development in agriculture, urban growth and industrial expansion etc. If we want to save the humanity from hunger, natural calamity and disaster on the one hand and if we want to stand with other States of the global nationality in the race of development on the other hand, we have to develop our scientific techniques and advanced technologies. Thus the root cause of environmental degradation and ecological imbalance is overpopulation. There is a direct relationship between increase in population and environmental impact. If there are more people, they will require more food and more land for growing agricultural products and buildings accordingly.

(2) **Poverty-**Poverty is another factor which affects the environmental pollution. For meeting their daily and basic needs which includes food for himself and his cattle, fuel and shelter the people exploit excessively the natural resources of the country due to poverty. According to Late Prime Minister Mrs. Indra Gandhi the poverty and need are indeed the greatest polluters. Thus, it is truly said that the poor cause damage to environment.

(3) **Industrial development-**It is true that rapid industrial development has given economic prosperity to human society but it has also created environmental problems. Industrial development is regarded as the parameter of modernism and as a necessary element of social and economic development of a State. Rapid rate of exploitation of natural resources and increased industrial output have created several lethal environmental problems and have caused large scale environmental problems. In order to meet the industrial demand of raw materials, the exploitation of natural resources has resulted into the reduction of forest covers due to reckless cutting of

trees, excavation of land for mining, reduction in arable land due to industrial expansion, lowering of groundwater level etc. That apart, industrial waste, polluted water, toxic gases, chemicals, aerosol ashes and smokes etc., are numerous undesired outputs from the factories besides desired production. These undesired outputs pollute air, water, land, soil etc., and degrade the environment.

(4) **Agricultural development-**Expansion of agricultural land, increase in agricultural productivity and increase in net agricultural production is called agricultural development. Agricultural development is possible only due to development in modern scientific techniques, advanced technologies, increased production and use of chemical 'fertilizers etc., which have solved the problem of growing demand food due to over increasing world population. But the agricultural development has degraded the environment through the application of chemical fertilizers and pesticides and insecticides, the increase in irrigation facilities and amount of irrigation, changes in biological communities etc. Forest land is also converted in agricultural land. All these process and measures of increased agricultural development cause several serious and hazardous environmental problems.

(5) **Urbanization-**The accumulation of wealth and availability of more economic and job opportunity in the urban centers have resulted into the concentration of population in the congested metropolitan areas and thus the formation and growth of big slum areas. Exodus of population from rural areas to urban centre and origin and expansion of new urban centers due to industrial expansion and development are responsible for rapid rate of exploitation of natural resources and several types of environment degradation and pollution in the developed and developing countries. Urbanization results in the increase of buildings, roads and streets, sewage and storm drains, all types of vehicles, number of industries and factories, urban wastes, aerosols, smoke and dusts, sewage water etc. These all things cause several environmental problems. The urban areas suffer from their own plight, squatter, settlement, lack of sanitation and water supply, overcrowding, congestion, chronic shortage of traffic congestion etc.

(6) **Technological development-**The environmental problems have been increased also due to technological development. Danger to the environment increases simultaneously with the more development and economic field and industrial development in the world. The United Nations Economic And Social Commission For Asia And the Pacific (ESCAP) warned early in February 1985 that the Asian

Environment, already in a critical state, is likely to be burdened with additional load' resulting from development activities. Considering technology in the perspective of environment, we are faced with three different aspects-the lack of environment, friendly technology, the excess of environment concerns. What we need is to search and increase the technology which is environment friendly and at the same time stopping or at least reducing the use of these technologies which are affecting the environment adversely.

19.4 General Powers of the Central Government under the Environment (Protection) Act, 1986

Section 3 of the Environment (Protection) Act, 1986 gives various powers to the Central Government. The general powers has been granted under Section 3 of the Act to the Central Government, that subject to the provisions of this Act the Central Government shall have the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution which may include measures with respect to all or any of the following matters.

- Co-coordinating the actions of various State Governments, Officers and authorities under this Act or rules made there under or under any other law concerning environmental pollution;
- Planning and execution of a nation-wide programme for the prevention, control and abatement of environmental pollution;
- Restricting the carrying on of industries, operations or processes in certain areas or permitting them to be carried out subject to certain safeguard;
- Examining manufacturing processes, materials and substances as are likely to cause environmental pollution;
- Carrying out and sponsoring investigations and research relating to problems of environmental pollution;
- Laying down procedures and safeguard for the handling of hazardous substances;
- Laying down standards for the quality of environment;

- Laying down standards for emission or discharge of environmental pollutants from various sources. Different standards may be laid down for different sources of emission of discharge of environmental pollutants;
- Laying down procedures and safeguards for the prevention of accidents which may cause environmental pollution and remedial measures for such accidents;
- Inspecting any premises, plant, equipment, machinery, manufacturing process, materials, etc. and issuing directions to any person, Officer or authority, etc. to take steps for the prevention, control and abatement of environmental pollution;
- Preparing manuals, codes, guides, etc. to prevent, cryotron and abatement of environmental pollution;
- Establishing and recognizing environmental laboratories;
- Collecting and disseminating information relating to environmental pollution;
- Such other matters as the Central Government deems necessary or expedient for the purpose of securing effective implementation of the provisions of this Act.

1. Power to constitute authority or authorities

Section 3(3) of the Act empowers the Central Government to constitute, by order published in Official Gazette, an authority or authorities by such name or names, as may be specified in order for the purpose of exercising and performing such of the powers and functions of the Central Government under this Act as may be prescribed.

2. Power of appointment of Officers

Section 4 of the Act empowers the Central Government to appoint Officers and entrust them with certain powers and functions under the Act. The so appointed Officers shall be subject to the general control of the Central Government or the authority or authorities constituted under this Act or any other authority or Officer.

3. Power to give directions

Section 5 of the Act empowers the Central Government to issue any direction in writing to any person, Officer or authority, in exercise of its powers and performance of its functions under this Act, including directions for closure, prohibition or regulation of any industry, operation or process or stoppage or regulation of the supply of electricity or water or any other service.

4. Power to make rules

Section 6 of the Act empowers the Central Government to make rules to carry out the purpose of the legislation in relation to matters which are within the preview of Section 3 of the Act. Section 6 of the Act lays down that the Central Government may, by notification in the Official Gazette, make rules in respect of an or any of the matters referred to in Section 3 of the Act. In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters

- The standard of quality of air, water or soil for various areas and purposes;
- The maximum allowable limit of concentration of various environmental pollutants for different areas; .
- The procedure and safeguard for the handling of hazardous substances;
- Prohibition and restrictions on the location of industries and the carrying on of processes and operations in different areas. .
- The prohibition and restrictions on the handling of hazardous substances in different areas;
- The procedures and safeguards for the prevention of accidents which may cause environmental pollution and for providing for remedial measures for such accidents.

5. Power to establish environmental laboratories

Central Government has been empowered under Section 12 to establish or recognise one or more environmental laboratories for the analysis of samples of air, water, soil and other substances taken by Central Government or Officer empowered in this behalf.

6. Power to appoint Government Analysts

Section 13 of the Act gives power to the Central Government to appoint or recognise, by notification in Official Gazette, Government Analyst for the purpose of analysis of samples of air, water, soil or other substances sent for analysis to and environmental laboratory.

In relation to its functions and powers the Central Government may require any person, Officer, State Government or other authority to furnish to it or any prescribed authority or

Officer any reports, returns, statistics, accounts and other information and such person, Officer, State Government or other authority shall be bound to do so.

19.5 Prohibiting or Restricting the Handling of Hazardous Substances

Rule 13 of the Environment (Protection) Rule, 1986 deals with the provisions of prohibitions and restrictions on the handling of hazardous substances in different areas. According to Sub-rule (1) of Rule 13 the Central Government may take into consideration the following factors while prohibiting or restricting the handling of hazardous substances in different areas.

Considerable factors

- The hazardous nature of the substance, either in qualitative or quantitative terms, as far as may be in terms of its damage causing potential to the environment, human beings, other living creatures, plants and property;
- The substances that may be or likely to be or readily available as substitutes for the substances proposed to be prohibited or restricted;
- The indigenous availability of the substitute, or the state of technology available with country for developing a safe substitute;
- The gestation period that may be necessary for gradual introduction of a new substitute with a view to bringing about a total prohibition of the hazardous substance in question; and
- Any other factor as may be considered by the Central Government to be relevant to the protection of environment.

19.5.1 Imports and Exports

Procedure-Sub-rule (2) of Rule 13 prescribes the procedure to be followed by the Central Government. It lays down that while prohibiting or restricting the handling of hazardous substances in an area including their imports and exports the Central Government shall follow the procedure hereinafter laid down-

1. Whenever it appears to the Central Government that it is expedient to impose prohibition or restriction on the handling of hazardous substances in an area, it may, by notification in the Official Gazette and in such other manner as the Central

Government may deem necessary from time to time, give notice of its intention to do so.

2. Every such notification shall give a brief description of the hazardous substance and geographical region or the area to which such notification pertains and also specify the reasons for the imposition of prohibition or restriction on the handling of such hazardous substances in that region or area.
3. Any person interested in filing objection against the imposition of prohibitions or restrictions on the handling of hazardous substances as notified under the notification may do so in writing to the Central Government within thirty days from the date of publication of the notification in the Official Gazette.
4. The Central Government shall within a period of sixty days from the date of publication of the notification in the Official Gazette consider all objections received against such notification and may impose prohibition or restrictions on the handling of hazardous substances in a region or an area.

19.5.2 Location of industries

Prohibition and restrictions on the location of industries and the carrying on process and operations in different areas Rule 5 of the Environment (Protection) Rules, 1986 deals with the power of Central Government to prohibit and restrict on location of industries and the carrying on process and operations in different areas.

Sub-rule (1) of Rule 5 lays down that the Central Government may take into consideration the following factors while prohibiting or restricting the location of industries and carrying on of processes and operations in different areas

- Standards for quality of environment in its various aspects laid down for an area.
- The maximum allowable limits of concentration of various environment pollutants (including noise) for an area.
- The likely emission or discharge of environmental pollutants from an industry, process or operation proposed to be prohibited or restricted.
- The topographic and c1imatie features of an area.
- The biological diversity of the area which, in the opinion of Central Government, needs to be preserved.
- Environmentally compatable land use.

- Net adverse environmental impact likely to be caused by an industry, process or operation proposed to be prohibited or restricted.
- Proximity to a protected area under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 or a sanctuary, National Park, Game Reserve or Closed Area notified, as such under the Wild Life (Protection) Act, 1972, or places protected under any treaty, agreement or convention with any other country or countries or in pursuance of any decision made in any International Conference, association or other body.
- Proximity to human settlements.
- Any other factors as may be considered by the Central Government to be relevant to the protection of the environment in an area.

Procedure-Sub-rule (2) provides that while prohibiting or restricting the location of industries and carrying on of process and operations in an area, the Central Government shall follow the procedure hereinafter laid down-

(a) Whenever it appears to the Central Government that it is expedient to impose prohibition or restrictions on the location of an industry or the carrying on of processes and operations in an area, it may, by notification in the Official Gazette and in such other manner as the Central Government may deem necessary from time to time, give notice of its intention to do so.

(b) Every notification under Clause (a) shall give a brief description of the area, industries, operations, process in that area about which such notification pertains and also specify the reasons for the 'imposition of prohibition or restrictions on the location of the industries and carrying on the process or operations in that area.

(c) Any person interested in filing objection against the imposition of prohibition or restriction on carrying on of processes or operations as notified under Clause (a) may do so in writing to the Central Government within sixty days from the date of publication of the notification in the Official Gazette.

(d) The Central Government shall, within a period of one hundred and twenty days from the date of publication of the notification, consider all the objections received against such notification and may within three hundred and sixty five days from such date of publication, impose prohibition or restrictions on location of such industries and the carrying on of any process for operation in an area.

19.5.3 Duties and Liabilities of the Persons Carrying on Industry

Section 7 of the Environment (Protection) Rule, 1986 deals with the persons carrying on industry, operation, etc. According to this section these persons are not allowed to emission or discharge of environmental pollutants in excess of the standard. Section 7 lays down that no person carrying on any industry, operation or process shall discharge or emit or permit to be discharged or emitted any environmental pollutant in excess of such standards as may be prescribed. Under this section discharge as permission to discharge or emit of any environmental pollutant in excess of standards is - strictly prohibited.

In the case of M. C. Mehta Vs. Union of India, A.I.R. 1988, S.C. 1115, the Supreme Court has issued directions to the concerned authorities to control and prevent the pollution of Ganga water at Kanpur, inter alia, being

(a) Prevention from waste gathered at the dairies;
(b) Enlargement of sewers and construction of sewers where absent;
(c) Provision for public latrines to avoid use of open land;
(d) High Courts should not ordinarily stay - criminal proceedings in such matters;
(e) Corpses or half cremated bodies are not thrown in the river;
(f) New industries to get licences only after making provision for treatment of effluents and immediate action against existing pollution industries.
(g) Central Government to include environment as a subject in educational institutions.
(h) People should be made aware of the environmental problems.

Section 8 of the Act enjoins upon persons to comply with the procedures laid down and safeguards prescribed under the rules in the handling of hazardous substances. It says that no person shall handle or cause to be handled any hazardous substances except in accordance with such procedure and after complying with such safeguard as may be prescribed.

Rule 13 of the Environment (Protection) Rules, 1986 deals with the prohibition or restriction on the handling of hazardous substances in different areas. The provisions of Rule 13 are follows as under-

1. The Central Government may take into consideration the following factors while prohibiting or restricting the handling of hazardous substances in different areas-

- The hazardous nature of the substance (either in qualitative or quantitative terms) as far as may be in terms of its damage causing potential to the environment, human beings; other living creatures, plants and property;
- The substances that may be or likely to be or readily available as substitutes for the substances proposed to be prohibited or restricted;
- The indigenous availability of the substitute, or the state of technology available in the country for developing a safe substitute;
- The gestation period that may be necessary for gradual introduction of a new substitute with a view to bringing about a total prohibition of the hazardous substance in question; and
- Any other factor as may be considered by the Central Government to be relevant to the protection of environment.

2. While prohibiting or restricting the handling of hazardous substances in an area including their imports and exports the Central Government shall follow the procedure hereinafter laid down –

- whenever it appears to the Central Government that it is expedient to impose prohibition or restriction on the handling of hazardous substances in an area, it may, by notification in the Official Gazette and in such other manner as the Central Government may deem necessary from time to time, give notice of its intention to do so;
- every notification under Clause (i) shall give a brief description of the hazardous substance and the geographical region or the area to which such notification pertains and also specify the reasons for the imposition of prohibition or restriction on the handling of such hazardous substances in that region or area.
- Any person interested in filing objection against the imposition of prohibition or restriction on the handling of hazardous substances as notified under Clause (i) may do so in writing to the Central Government within thirty days from the date of publication of the notification in the Official Gazette.
- The Central Government shall within a period of sixty days from the date of publication of the notification in the Official Gazette consider all the objections

received against such notification and may impose prohibition or restrictions on the handling of hazardous substances in a region or an area.

19.5.4 When Environmental pollutant is excess than that of the prescribed standards

Liability of persons-in cases where the discharge of environmental pollutant is excess than that of the prescribed standards-With this regard Section 9 or the Environment (Protection) Act, 1986 enjoins upon certain persons to furnish information to authorities and agencies in" cases where the discharge or environmental pollutant is in excess than that of prescribed standard.

The provisions of Section 9 or the Act lies down as under-

Section 9(1): Where the discharge or environmental pollutant IS in excess or the prescribed standards occurs or is apprehended to occur due to any accident or other unforeseen act or event, the person responsible for such discharge and the person in charge or the place at which such discharge occurs or is apprehended to occur shall be bound to prevent or mitigate the environmental pollution caused as a result of such discharge and shall also forthwith

(a) Intimate the fact or such occurrence or apprehension or such occurrence; and

(b) Be bound, if called upon, to render all assistance, to such authorities or agencies as may be prescribed.

Section 9(2): On receipt or information with respect to the fact or apprehension or any occurrence or the nature referred to in Sub-section (1), whether, through intimation under that sub-section or otherwise, the authorities or agencies referred to in Sub-section (1) shall, as early as practicable, cause such remedial measures to be taken as are necessary to prevent or mitigate the environmental pollution.

Section 9(3): The expenses, if any, incurred by any authority or, agency with respect to the remedial measures referred to in Sub-section (2), together with interest (at such reasonable rate as the Government may, by order, fix) from the date when a demand for the expenses is made until it is paid, may be recovered by such authority or agency from the person concerned as arrears of land revenue or of public demand.

19.6 Power of officers in respect of Entry and Inspection

The powers of entry and inspection are provided under Section 10 of the Environment (Protection) Act, 1986. The provisions of Section 10 of the Act are as under-

Section 10(1): Subject to the provisions of this section any person empowered by the Central Government in this behalf shall have a right to enter, at all reasonable times with such assistance as he considers necessary, any place-

(a) For the purpose of performing any of the functions of the Central Government entrusted to him;

(b) for the purpose of determining whether and if so in what manner, any such functions are to be performed or whether any provisions of this Act or the Rules made there under or any notice, order, direction or authorization served, made, given or granted 'under this Act is being or has been complied with;

(c) for the purpose of examining and testing any equipment, industrial plant, record, register, document or any other material object or for conducting a search of any building in which he has reason to believe that an offence under this Act or Rules made there under has been or is being" Or is about to be committed and for seizing any such equipment, industrial plant, record register, document or other material object if he has reasons to believe that it may furnish evidence of the commission of· an offence punishable under this Act or the Rules made there under or that such seizer is necessary to prevent or mitigate environmental pollution.

Section 10(2): Every person carrying on any industry, operation or process or handling any hazardous substance shall be bound to render all assistance to the person empowered·- by the Central Government under Sub-section (1) for carrying out the functions under that sub-section and if he fails to do so without any reasonable cause or excuse, he shall be guilty of an offence under this Act.

Section 10(3): If any person willfully delays or obstructs any person empowered by the Central Government under Sub-section (1) in the performance of his function, he shall be guilty of an offence under this Act.

Section 10(4) : The provisions of the Code of Criminal Procedure, 197.3, or in relation to the State of Jammu & Kashmir, or any area in which that Code is not in force, the provisions of any corresponding law in force in that State or area shall, so far as may be, apply to any search or seizer under this section as they apply to any search or seizer made under the authority of a warrant issued under Section 94 of the said code or, as the case may be, under the corresponding provision of the said law.

19.7 Power to take Sample and Procedure

Section 11 of the Environment (Protection) Act, 1986 deals with the power to take sample and procedure to be followed in connection therewith which follows in connection therewith which follows as under- .

Section 11(1): The Central Government or any officer empowered by it in this behalf, shall have power to take, for the purpose of analysis, samples of air, water, soil or other substance from any factory, premises or other place in such manner as may be prescribed.

Section 11(2): The result of any analysis of a sample taken under Sub-section (1) shall not be admissible in evidence in any legal proceeding unless the provisions of Sub-section (3) and (4) are complied with.

Section 11(3): Subject to the provisions of Sub-section (4), the person taking the sample under Sub-section (1) shall

(a) Serve on the occupier or his agent or person in charge of the place, a notice, then and there, in such form as may be prescribed, of his intention to have it so analyzed;
(b) In the presence of the occupier or his agent or person, collect a sample for analysis;
(c) Cause the sample to be placed in a container or containers which shall be marked and sealed and shall also be signed both by the person taking the sample and the occupier or his agent or person;
(d) Send without delay, the container or the containers to the laboratory established or recognized by the Central Government under Section 12.

Section 11(4): When a sample is taken for analysis under Sub-section (1) and the person taking the sample serves on the occupier or his agent or person, a notice under Clause (a) of Sub-section (3), then-

(a) In a case where the. occupier, his agent or person willfully absents himself, the person taking the sample shall collect the sample for analysis to be placed in a container or containers which shall be marked and sealed .and shall also be signed by the person taking the sample; and

(b) In a case where occupier or his agent or person present at the time of taking, the sample refuses to sign the marked and sealed container or containers of the sample as required under Clause (c) of Sub-section (3), the marked and sealed container or containers shall be signed by the person taking the samples, and the container or containers shall be sent without delay by the person taking the sample for analysis to the laboratory established or recognized under Section 12 and such person shall inform the Government Analyst appointed or recognized under Section 13 in writing, about the willful absence of the occupier or his agent or person, or, as the case may be, his refusal to sign the container or containers.

Procedure for taking samples-Under Section 11 of the Environment (Protection) Act, 1986 the Central Government or any Officer empowered by it in this behalf is empowered to take samples of air, water, soil and other substances for the purpose of analysis. But before taking any sample the Central Government or the Officer empowered shall serve on the occupier or his agent or person in charge of the place a notice then and there of his intention to have the sample analyzed. The procedure for taking samples is specified under Rule 6 of the Environment (Protection) Rules, 1986 which is as under:

The Central Government or the Officer empowered to take samples under Section 11 of the Act shall collect the sample in sufficient quantity to be divided into two uniform parts and effectively seal and suitably mark the same and permit the person from whom the sample is taken to add his own seal or mark to all or any of the portions so sealed and marked. In case where the sample is made up on containers or small volumes and is likely to deteriorate or be otherwise damaged if exposed, the Central Government or the Officer empowered shall take two of the said samples without opening the containers and suitably seal and mark the same. The Central Government or the Officer empowered shall dispose of the samples so collected as follows-

(i) One portion shall be handed over to the person from whom the sample is taken under acknowledgement; and

(ii) The other portion shall be sent forthwith to the environmental laboratory for analysis.

Procedure for submission of samples for analysis and the form of laboratory report thereon-Where a sample is taken for analysis under Section 11 of the Act by the Central Government or Officer so empowered it is sent to the laboratory according to the procedure which is specified under Rule 8 of the Environment (Protection) Rules, 1986 as under –

1. Sample taken for analysis shall be sent by the Central Government or the Officer empowered to the environmental laboratory by registered post or through special messenger.
2. Another copy together with specimen impression of seals of the Officer empowered to take samples along with the seals/marks, if any, of the person from whom the sample is taken shall be sent separately in a sealed cover by registered post or through special messenger to the environmental laboratory.
3. The findings shall be recorded in triplicate and signed by the Government Analyst and sent to Officer from whom the sample is received for analysis.
4. On receipt of the report of the findings of the Government Analyst, the Officer for analysis, the second copy shall be retained by him for his records and the third copy of the report shall be kept by him to be produced in the Court before which proceedings, if any are instituted.

19.8 Offences and Penalties for Contravention of the provision of Act

Under the Environment (Protection) Act, 1986 the provisions with respect to the offences by company have been made under Section 16 and Section 17 of the Act deals with the offences by Government Departments. The penalty for contravention of the provisions of the Act and the Rules, orders and directions is specified under Section 15 of the Act but protection has been given under Section 18 of the Act to the actions which are taken in good faith.

Offences by company: With regard to the offences by companies Section 16 of the Act lays down as under-

Section 16(1): Where any offence under this Act has been committed by a company, every person who, at the time the offence was committed, was directly in charge of and was responsible to, the company for the conduct of the business of the company, as well as the company shall deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

Section 16(2): Notwithstanding anything contained in Sub-section (1), where an offence under this act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other Officer of the company, such director, manager, secretary or other Officer shall also be deemed to be guilty. of that offence and shall be liable to be proceeded against and punished accordingly.

For the purpose of this section -

(a) 'Company' means anybody corporate, and includes a firm or other association of individuals; and

(b) 'Director', in relation to a firm, means a partner in the firm.

Offences by Government Department --With this regard Section 17 of the Act improvises as under-

Section 17(1): Where an offence under this Act has been committed by any Department of Government, the Head of the Department shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this section shall render such Head of the Department liable to any punishment if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

Section 17(2): Notwithstanding anything contained in Sub-section (1), where an offence under this Act has been committed by a Department of Government and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any Officer, other than the Head of the Department, such Officer shall

also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Penalty for the contravention of the provisions of the Act and the Rules, orders and directions

Severe penalties have been provided under Section 15 of the Environment (Protection) Act, 1986 for contravention of the provisions of the Act and Rules, orders and directions. Sub-section (1) of Section 15 says that whoever fails to comply with or contravenes any of the provisions of this Act, or the rules made or orders or direction issued there under, shall, in respect of each such failure or contravention, be punishable with imprisonment for a term which may extend to five Jears or with fine which may extend to one lakh rupees, or with both, Q 1d in case the failure or contravention continues, with additional , fine which may extend to five thousand rupees for every day during which such failure or contravention continues after the conviction for the first· such failure or contravention.

Sub-section (2) of Section 15 provides that if the failure or contravention referred to in Sub-section (1) continues beyond a period of one year after the date of conviction, the offender shall be punishable with imprisonment for a term which may extend to seven years.

Protection of action taken in good faith-Good faith implies a duty to act with a reasonable degree of prudence. Under Section 18 of the Environment (Protection) Act, 1986 protection of action taken in good faith is offered to the Government, any Officer or employee of the Government, any authority constituted under this Act and any member, Officer or other employee of an authority constituted under this Act. Section 18 of the Act provides that no suit, prosecution or other legal proceeding shall be against -

- The Government; or
- Any Officer or other employee of the Government; or.
- Any authority constituted under this Act; or
- Any member, Officer and other employee of such authority;

In respect of anything which is done or intended to be done in good faith in pursuance of this Act or the Rules made or orders or directions issued there under.

19.9 Summary

In this unit we studied about environment, its pollutants and the powers of the central government to control and save the environment and various provisions regarding location of

industries. Environment includes all elements, factors, and conditions that have some impact on growth and development of certain organism. Environment includes both biotic and a biotic factors that have influence on observed organism. A biotic factor such as light, temperature, water, atmospheric gases combine with biotic factors. At present environmental pollution is one of the biggest and hazardous problems of, not only India but of whole of the world. The continued degradation of environment is the result of the modern living technological advancement, industrialization and urbanization. . The general powers has been granted under Section 3 of the Environment (Protection) Act, 1986 to the Central Government, that subject to the provisions of this Act the Central Government shall have the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution. Environmental law lays down that no person carrying on any industry, operation or process shall discharge or emit or permit to be discharged or emitted any environmental pollutant in excess of such standards as may be prescribed.

19.10 Glossary

Acid rain: Precipitation which has been rendered (made) acidic by airborne pollutants.

Air pollutant: Any substance in air that could, in high enough concentration, harm man, other animals, vegetation, or material. Pollutants may include almost any natural or artificial composition of airborne matter capable of being airborne. They may be in the form of solid particles, liquid droplets, gases, or in combination thereof.

By-product: Material, other than the principal product, generated as a consequence of an industrial process.

Chronic effect: An adverse effect on a human or animal in which symptoms recur frequently or develop slowly over a long period of time.

Conservation: Preserving and renewing natural resources to assure their highest economic or social benefit over the longest period of time. Clean rivers and lakes, wilderness areas, a diverse wildlife population, healthy soil, and clean air are natural resources worth conserving for future generations.

Density: A measure of how heavy a solid, liquid or gas is for its size. Density is expressed in terms of weight per unit volume, that is, grams per cubic centimeter or pounds per cubic foot. The density of water is 1.0 gram per cubic centimeter or about 62.4 pounds per cubic foot.

Effluent: Water or some other liquid-raw, partially or completely treated-flowing from a reservoir, basin, treatment process or treatment plant.

Hazardous substance: 1. any material that poses a threat to human health and- /or the environment. Typical hazardous substances are toxic, corrosive, ignitable, explosive, or chemically reactive. 2. Any substance designated by EPA to be reported if a designated quantity of the substance is spilled in the waters of the United States or if otherwise released into the environment.

19.11 check your progress

True /False questions

1. Section 3 of the Environment (Protection) Act, 1986 gives various powers to the Central Government. **T/F**

2. Sample taken for analysis shall be sent by the Central Government or the Officer empowered to the environmental laboratory**. T/F**

3. The United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) warned early in February 1985 that the Asian Environment, already in a good state. **T/F**

4. Rule 19 of the Environment (Protection) Rules, 1986 deals with the prohibition or restriction on the handling of hazardous substances in different areas. **T/F**

5. The environmental problems have been increased also due to technological development. **T/F**

19.12 Answers to check your progress/SAQ

1. T 2. T 3. F 4. F 5.T

19.13 Terminal Questions

1. Explain the Meaning of Environment, Environmental Pollutant and Environmental Pollution and describe causes of Environmental Pollution.

2. Discuss powers of the Central Government under the Environment (Protection) Act, 1986to protect the environment.

3. Describe Offences and Penalties for Contravention of the Environment (Protection) Act, 1986.

4. What factors may be considered and what procedure may be followed by the Central Government while prohibiting or restricting the handling of hazardous substances.

5. Explain the different Offences and Penalties for Contravention of the provision of the Environment (Protection) Act, 1986.

6. Write notes on the following

a. Power of officers in respect of Entry and Inspection
b. Power to take Sample and Procedure
c. Duties and Liabilities of the Persons Carrying on Industry

7. Explain the procedure to be followed in case of location of industries and export and import under the Environment (Protection) Act, 1986.

8. What are the Powers of officers in respect of Entry and Inspection under the Environment (Protection) Act, 8 1986?

19.14 References/Bibliography

Leelakrishan P, Envoirnmental Law in India, LexisNexis 2010**.**

Tiwari A. K**,** Environmental Law in India, Eastern Book Corporation, 2006

P.B. Sahasranaman, Handbook of Environmental Law in India, Oxford University Press, 2008

http://www.medindia.net/indian_health_act/the_environment_protection_act_1986_preliminary/list-of-acts.htm

http://www.ceeraindia.org/documents/lib_tabofcon_160300.htm

Unit –20: Prevention and Control of Pollution Laws

20.1 Introduction

20.2 Water (Prevention and Control of Pollution) Act, 1974

- **20.2.1 Water Pollution Meaning and Causes**
- **20.2.2 Central Board for Prevention and Control of Water Pollution**
- **20.2.3 Constitution of State Pollution Control Boards**
- **20.2.4 Constitution of Joint Board by Central and State Government**
- **20.2.5 Functions of Central Board**
- **20.2.6 Functions of a State Board**
- **20.2.7 Prohibition on use of stream or well for disposal of polluting matters**
- **20.2.8 Restriction on new outlets and new discharge**
- **20.2.9 Penalties**
- **20.2.10 Appeals**

20.3 Air (Prevention and Control of Pollution) Act, 1981

- **20.3.1 Meaning and Causes of Air Pollution**
- **20.3.2 Central and State Pollution Control Boards**
- **20.3.3 Powers and Functions of Central Board**
- **20.3.4 Functions of State Boards**
- **20.3.5 Power to declare air pollution control areas**
- **20.3.6 Power of Board to restrain persons from causing air pollution**
- **20.3.7 Punishment and Penalties**

20.4 Meaning, Causes and Effects of Noise pollution

20.5 Wild Life (Protection) Act-1972

20.6 Summary

20.7 Glossary

20.8 Check your progress

20.9 Answers to check your progress

20.10 Terminal Questions

20.11 References/Bibliography

Objectives

After reading this unit you will be able to:

- Explain the Meaning of water, air and noise pollution and their main causes
- Describe constitution and functions of central board for prevention and control of water
  Pollution
- Describe constitution and functions of state board for prevention and control of water Pollution
- Discuss various penalties and appeals under Water (Prevention and Control of Pollution) Act, 1974
- Know Air (Prevention and Control of Pollution) Act, 1981
- Know about Power of State Government to declare air pollution control areas
- Describe Noise pollution act,
- Know Wild Life (Protection) Act-1972

20.1 Introduction

The enhanced pace of developmental activities and rapid urbanization have resulted in stress on natural resources and quality of life. The trend of increasing pollution in various environmental media is evident from the deteriorating air and water quality, higher noise levels, increasing vehicular emission etc. Realising the urgent need for arresting the trend, Ministry adopted policy for Abatement of Pollution which provides for several mechanisms in the form of regulations, legislation, agreements, fiscal incentives and other measures to prevent and abate pollution. Further, realizing that conventional pollution control approach by treatment at the end of the pipe is not delivering the desired benefits in terms of resource conservation, the thrust has been shifted to pollution prevention and control through promotion of clean and low waste technology, re-use and recycling, natural resource accounting, Environmental Audit and Institutional and Human Resource Development. To give effect to various measures and policies on ground, multi-pronged approach is adopted which includes stringent regulations, development of Environmental Standards, Control of Vehicular Pollution and preparation of Zoning Atlas for Spatial Environmental Planning including Industrial Estates etc.

20.2 Water (Prevention and Control of Pollution) Act, 1974

20.2.1 Water Pollution Meaning and Causes

Pollution of the water in rivers and lakes pollution undesirable state of the natural environment being contaminated with harmful substances as consequences of human activities. Water pollution is the contamination of water bodies such as lakes, rivers, oceans, and groundwater caused by human activities, which can be harmful to organisms and plants which live in these water bodies. The main causes for water pollution are:

1. Disposal of waste

This waste includes sewage, garbage and liquid waste from factories and homes. Wastages from chemical factories contain many toxic or poisonous chemicals. These are discharged into rivers. The river-water becomes poisonous for fish and other aquatic animals and plants.

2. Chemical fertilizers and pesticides

Farmers use fertilizers for growth, and pesticides to kill insects that damage crops. Fertilizers and pesticides which are good for plants may be harmful to human beings and animals. Many of these chemicals get dissolved in rainwater which flows into ponds, canals, rivers and seas.

3. Disposal of human excreta and animal dung

The rain washes away human excreta and animal dung into rivers, ponds and lakes. Drinking this polluted water may cause several water-borne diseases such as diarrhea, dysentery, jaundice, typhoid and cholera. Polluted river-water can cause diseases to the whole population.

4. **Urbanization**

Rapid urbanization in the world during the recent decades has given rise to a number of environmental problems such as water supply, waste water generation and its collection, treatment and disposal. Many towns and cities which came up on the banks of rivers have not given a proper thought to the problems of wastewater, sewerage etc. In urban areas, the wastewater is let out untreated and causes large scale water pollution.

5. Industries

Most of the rivers and other sources of fresh water are polluted by industrial wastes or effluents. All these industrial wastes are toxic to life forms that consume this water. Thermal power plants, engineering industries, paper mills, steel plants, textile industries and sugar industries are the major contributors of wastewater production.

6. Agricultural runoff and improper agricultural practices

Traces of fertilizers and pesticides are wasted into the nearest water bodies at the onset of the monsoons or whenever there are heavy showers. Intensive and ever increasing usage of chemical fertilizers, pesticides, and other chemicals cause water pollution. Flood-plain cultivation is another significant contributor to water pollution.

7. Religious and social practices

Religious faiths and social practices also add to pollution of river waters. Carcasses of cattle and other animals are disposed in the rivers. Dead bodies are cremated on the river banks. Partially burnt bodies are also flung into the river. These practices pollute the river water and adversely affect the water quality. Mass bathing in the river during religious festival is another environmentally harmful practice.

20.2.2 Central Board for Prevention and Control of Water Pollution

The Central Board for Prevention and Control of Water Pollution is constituted under Section 3 of The Water (Prevention and Control of Pollution) Act, 1974 Improvises as follows –

Section 3(1) : The Central Government shall, with effect from such date (being date not lader than six months of the commencement of this Act in the States of Assam, Bihar, Gujrat, Haryana, Himachal Pradesh, Jammu & Kashmir, Karnataka, Kerala" Madhya Pradesh, Rajasthan, Tripura and West Bengal and in the Union Territories) as it may, by notification in the Official Gazette, appoint, constitute a Central Board to be called the Central Pollution Control Board to exercise the powers conferred (..1 and perform the functions assigned to that Board under this Act.

Section 3(2): The Central Board shall consist of the following members, name1y-

Appointment of Chairman:

(a) A full time Chairman, being a person having special knowledge or practical experience in respect of matters relating to environmental protection or a person having knowledge and experience in administering institutions dealing with the matters aforesaid, to be nominated by the Central Government;

(b) Such number of officials not exceeding five to be nominated by the Central Government to represent that Government;

(c) Such number of persons not exceeding five, to be nominated by the Central Government, from amongst the Members of the State Boards, of whom not exceeding two shall be from those referred to in Clause © of the Sub-section (2) of Section 4;

(d) Such number of non-officials not exceeding three to be nominated by the Central Government, to represent the interests of agriculture, fishery or industry or trade or any other interest which, in the opinion of the Central Government, ought to be represented;

(e) Two persons to represent the companies or corporation owned, controlled or managed by the Central Government, to be nominated by that Government;

(f) A full time member-secretary, possessing qualifications, knowledge and experience of scientific, engineering or management aspects of pollution control, to be appointed by the Central Government;

Section 3(3) : The Central Board shall be a body corporate with the name aforesaid having perpetual succession and a common seal with power, subject to the provisions of this Act, to acquire; hold and dispose of property and to contract, and may, by the aforesaid name, sue or be sued.

20.2.3 Constitution of State Pollution Control Boards

Section 4 of The Water (Prevention and Control of Pollution) Act; 1974 lays down the provisions regarding the Constitution of State Pollution Control Boards.

Section 4 of the Act provides as follows:

Section 4(1): The State Government shall, with effect from such date as it may, by notification in the Official Gazette, appoint, constitute a State Pollution Control Board under such name as may be specified in the notification, to exercise the powers conferred on and perform the functions assigned to that Board under this Act.

Section 4(2): A State Board shall consist of the following members namely-,

(a) Chairman, being a person having special knowledge or practical experience in respect of matter relating to environmental protection or a person having knowledge and experience in administering institutions dealing with the matters aforesaid, to be nominated by the State Government :

Provided that the Chairman may be either whole time or part time as the State Government may think fit?

(b) Such number of officials, not exceeding five to be nominated by the State Government to represent that Government;

© Such number of persons, not exceeding five to be nominated by the State Government from amongst the members of the local authorities functioning within the State;

(d) such number of nonofficial's, not exceeding three to be nominated by the State Government represent the interests of agriculture, fishery, or industry or trade or any other interest which, in the opinion of the State Government, ought to be represented;

(e) Two persons to represent the companies or corporations owned, controlled or managed by the State Government, to be nominated by that Government;

(f) A full-time member secretary possessing qualifications, knowledge and experience of scientific, engineering or management aspects of pollution control, to be appointed by the State Government.

Section 4(3): Every State Board shall be a body corporate with the name specified by the State Government in the notification under Subsection (1), having perpetual succession and a common seal with power, subject to the provisions of this Act, to acquire, hold and dispose of property and to contract, and may, by the said name, sue or be sued.

Section 4(4): Notwithstanding anything contained in this section no State Board shall be constituted for a Union Territory .and in relation to a Union Territory, the Central Board shall exercise the powers and perform the functions of a State Board for the Union Territory:

Provided that in relation to any Union Territory the Central Board may delegate all or any of its powers and functions under this sub-section to such person or body of persons as the Central Government may specify.

20.2.4 Constitution of Joint Board by Central and State Government

Section 13 of the Water (Prevention and of Pollution Act, 1974 makes provisions for the constitution of Joint Board and according to

Section 13(1): Notwithstanding anything contained 10 this Act, an agreement may be entered into-

(a) By two or more Governments of contiguous; or

(b) By the Central Government (in respect of one or more Union territory or one or more Government of States) contiguous to such Union territory or Union territories, to be in force for such period and to subject to renewal for such further period, if any as may be specified in the agreement to provide for the constitution of a Joint Board –

(i) In a case referred to in Clause (a), for all the participating States; and

(ii) In a case referred to in Clause for all the participating Union territory or Union territories and the State or States.

Composition of Joint Board: Section 14 of the Water (Prevention and Control of Pollution) Act, 1974 deals with the composition of Joint Board. The provisions of Section 14 follow as under-

Section 14(1): A Joint Board constituted in pursuance or an agreement entered into under Clause (a) of Sub-section (1) of Section 13 shall consist of the following members, namely-

(a) A full-time Chairman, being a person having special knowledge or practical experience in respect of matters relating to the use and conservation of water resources or the prevention and control of water pollution or a person having knowledge and experience in administering institutions dealing with the matters aforesaid, to be nominated by the Central Government;

(b) Two officials from each of the participating States to be nominated by the concerned participating State Government to represent that Government;

© One person to be nominated by each of the participating Governments from amongst the members of the local authorities functioning within the State concerned;

(d) One non-official to be nominated by each of the participating State Governments to represent the interest of agriculture, fishery or industry or trade in the State concerned or

any other interest which, in the opinion of the participating State Government, is to be represented;

(e) Two persons to be nominated by the Central Government to represent the companies or corporations owned, controlled or managed by the participating State Governments;

(f) A full-time member-secretary qualified in public health, engineering and having administrative experience, to be appointed by the Central Government.

20.2.5 Functions of Central Board

Section 16 of the Water (Prevention and Control of Pollution) Act, 1974 deals with the functions of the Central Board. The main function of the Central Board shall be to promote cleanliness of streams and wells in different areas of the States. In particular and without prejudice to the generality of the foregoing functions, the Central Board may perform all or any of the following functions, namely-

- Advice the Central Government on any matter concerning to prevention and control of water pollution;
- Co-ordinate the activities of the State Board and resolve dispute among them;
- Provide technical assistance and guidance to the State Boards carry out and sponsor investigations and research relating to problems of water pollution and prevention, control or abatement of water pollution;
- Plan and organize the training of persons engaged or to be engaged in programmes for the preventional control or abatement of water pollution on such terms and conditions as the Central Board may specify;
- Organize through mass media a comprehensive programme regarding the prevention and control of water pollution;
- Collect, compile and publish technical and statistical data relating to water pollution and the measures devised for its effective prevention and control and prepare manuals, codes or guides relating to treatment and disposal of sewage and trade effluents and disseminate information connected therewith;
- Lay down, modify or annul, in consultation with the State Government concerned, the standards for a stream or well :
- Provided that different standards may be laid down for the same stream or well or for different streams or wells, having regard to the quality of water, flow

characteristics of the stream or well and the nature of the use of the water in such stream or well or streams or wells;

- Plan and cause to be executed a nationwide programme for the prevention, control or abatement of water pollution;
- Perform such other functions as may be prescribed.

20.2.6 Functions of a State Board

The main functions of the State Board shall be

- To plan a comprehensive programme for the prevention, control or abatement of pollution of streams and wells in the State and to secure the execution thereof.
- To advise the State Government on any matter concerning the prevention, control or abatement of water pollution.
- To collect and disseminate information relating to water pollution and the prevention, control or abatement thereof;
- To encourage, conduct and participate in investigations and research relating to problems of water pollution and prevention, control or abatement of water pollution;
- To collaborate with the Central Board in organizing the training of persons engaged or to be engaged in programmes relating to prevention, control or abatement of water pollution and to organize mass education programmers relating thereto;
- To inspect sewage or trade effluents, works and plants for the treatment of sewage and trade effluents and to review plans, specifications or other data relating to plants set up for the treatment of water, works for the purification thereof and the system for the disposed of sewage or trade effluents or in connection with the grant of any consent as required by this Act.
- To evolve economical and reliable methods of treatment of sewage and trade effluents, having regard to the peculiar conditions of soils, climate and water resources of different regions and more especially the prevailing flow characteristics of water in streams and wells which render it impossible to attain even the minimum degree of dilution.
- To evolve methods of utilization of sewage and suitable trade effluents in agriculture;

- To lay down standards of treatment of sewage and trade effluents to be discharged into any particular stream taking into account the minimum fair weather dilution available in that stream and the tolerance limits of pollution permissible in the water of the stream, after the discharge of such effluents.
- To lay down effluent standards to be complied with by persons while causing discharge of sewage or sullage or both and to lie down, modify or annul effluent standards for the sewage and trade effluents.
- To advise the State Government with respect to the location of any industry the carrying on of which is likely to pollute stream or well.
- To perform such other functions as may be prescribed or as may, from time to time, be entrusted to it by Central Board or the State Government.

20.2.7 Prohibition on use of stream or well for disposal of polluting matters

Section 24 of the Water (Prevention and Control of Pollution) Act, 1974 deals with the prohibition on use of stream or well for disposal of polluting matters etc. under which the acts which come under the category of offence or which do not come under the category of offence is stated. It also states in respect of granting exemptions by State Board.

The provisions of Section 24 follow as under –

- No person shall knowingly cause or permit any poisonous, noxious or polluting matter determined in accordance with such standards as may be laid down by the State Board to enter (whether directly or indirectly) into any stream or well or sewer or on land; or
- No person shall knowingly cause or permit to enter into any stream any other matter which may contain either directly or in combination with similar matters to impede the proper flow of water of the stream in a manner leading or likely to lead to a substantial aggravation of pollution due to other causes or of its consequences.
- Constructing, improving or maintaining in or across or on the bank or bed of any stream any building, bridge, weir, dam, sluice, dock, pier, drain or sewer or other permanent works which he has a right to construct, improve or maintain.

- Depositing any materials on the bank or in the bed of any stream· for the purpose of reclaiming land or for supporting, repairing or protecting the bank or bed of such stream provided such materials are not capable or polluting such stream.
- Putting into any stream any sand or gravel or other natural deposit which has flowed from or been deposited by the current of such stream.
- Causing or permitting, with the consent of the State Board, the deposit, accumulated in a well, pond or reservoir to enter into any stream.

20.2.8 Restriction on new outlets and new discharge

Section 25 of the Water (Prevention and Control of Pollution) Act, 1974 deals with the restrictions on new outlets and new discharges. This section had been extensively amended by the Amendment Act of 1988 by which it was made obligatory on the part of that person to obtain the consent of the Board for establishing or taking any steps to establish an industry, operation or process which is likely to cause pollution' of water. Section 25 also deals with the granting of such consent by the Board. The provisions of Section 25 improvises as under-

Subject to the provisions of this section, no person shall, without the previous consent of the State Board-

- Establish to take any steps to establish any industry, operation or process, or any treatment and disposal system or any extension or addition thereto, which is likely to discharge sewage or trade effluent into a stream or well or sewer' or on land (such discharge being hereafter in this section referred to as discharge of sewage).
- Bring into use any new or altered outlet for the discharge of sewage.
- Begin to made any new discharge or sewage.
- An application form shall be accompanied by such fees as may be prescribed
- In the case or a new discharge, conditions as to the nature and composition, temperature, volume, or rate of discharge of the effluent from the land or premises from which the discharge or new discharge is to be made.
- That the consent will be valid only for such period as may be specified in the order, and any such conditions imposed shall be binding on any person

establishing or taking any steps to establish any industry, operation or process, or treatment and disposal system or extension or addition thereto, or using the new or altered outlet.

- Every State Board shall maintain a register containing particulars of the conditions imposed under this section and so much of the register as relates to any outlet or to any effluent from the land or premises shall be open to inspection to all reasonable hours by any person interested in or affected by such outlet.

20.2.9 Penalties

Section 42 of the Water (Prevention and Control of Pollution) Act, 1974 deals with penalties for certain acts according to which, whoever

- Destroys, pull down, removes, injures or defaces any pillar, post or stake fixed in the ground or any notice or other matter put up, inscribed or placed by or under authority of the Board; or
- Obstructs any person acting under the orders or directions of the Board from exercising his powers and performing his functions under this Act; or
- Damages any works or property belonging to the Board; or
- Fails to furnish to any Officer or other employees of the Board any information required by him for the purpose of this Act; or
- Fails to intimate the occurrence of any accident or other unforeseen act or event under Section 31 of the Board and other authorities or agencies as required by that section;
- In giving any information which he is required under this Act, knowingly or willfully makes a statement which is false in any material particular; or
- For the purpose of obtaining any consent under Section 25 or Section 26 knowingly or willfully makes a statement which is false in material particular, shall be punishable with imprisonment for a term which may extend to three months or with fine which may extend to ten thousand rupees or with both.

Penalty for contravention of provisions of Section 24- Section 43 of the Act provides that whoever contravenes the provisions of Section 24 shall be punishable with imprisonment for a term which shall not be less than one year and six months but which

may extend to six years and with fine. [Section 24 deals with prohibition on use of stream or well for disposal of polluting matters etc.]

Penalty for contravention of Section 25 or Section 26- Section 44 of the Act provides that whoever contravenes the provisions of Section 25 [restrictions on new outlet and new discharges] or Section 26 [regarding existing discharge of sewage or trade effluents] shall be punishable with imprisonment for a term which shall not be less than one year and six months but which may extend to six years and with fine.

Enhanced penalty after previous conviction- Section 45 of the Act provides that if any person who has been. Convicted of an offence under Sections 24, 25 or 26 is again found guilty of an offence involving a contravention of the same provision, he shall, on the second and on every subsequent conviction, be punishable with imprisonment for a term which shall not be less than two years but which may extend to seven years and with fine.

Penalty for contravention of certain provisions of the Act- With this regard a new Section 45-A has been introduced under this Act by Section 25 of the Act No. 53 of 1988 which provides that whoever contravenes any of the provisions of this Act or fails to comply with any order or direction given under this Act or fails to comply with any order or direction given under this Act, for which no penalty has been elsewhere provided in this Act, shall be punishable with imprisonment which may extend to three months or with fine which may extend to ten thousand rupees or with both and in case of continuous contravention or failure, with an additional fine which may extend to five thousand rupees for every day during which such contravention or failure continues after conviction for the first such contravention or failure.

20.2.10 Appeals

Section 28 of the Water (Prevention and Control of Pollution) Act, 1974 deals with the provisions of appeals against the orders passed under this Act. Section 28 provides as under-

- An Appellate Authority shall consist of a single person or three persons, as the State Government may think fit, to be appointed by the Government.
- The form and manner in which an appeal may be preferred under Sub-section (l), the fee payable for such appeal and the procedure to be followed by the Appellate Authority shall be such as may be prescribed.

- On receipt of an appeal preferred under Sub-section (1) the Appellate Authority shall, after giving the appellant and the State .Board an opportunity of being heard, dispose of the appeal expeditiously as possible.
- If the Appellate Authority determines that any condition imposed, or the variation of any condition, as the case may be was unreasonable then-

(a) Where the appeal is in respect of the unreasonableness of any condition imposed, such authority may direct either that the condition shall be treated as annulled or that there shall be substituted for it such as appears to it to be reasonable;

(b) Where the appeal is in respect of the unreasonableness of any variation of condition, such authority may direct either that the condition shall be treated as continuing in force unvaried or that it shall be varied in such manner as appears to it to be reasonable.

20.3 Air (Prevention and Control of Pollution) Act, 1981

20.3.1 Meaning and Causes of Air Pollution

Air pollution occurs when the air contains gases, dust, fumes or odor in harmful amounts. That is, amounts which could be harmful to the health or comfort of humans and animals or which could cause damage to plants and materials. The substances that cause air pollution are called pollutants. Pollutants that are pumped into our atmosphere and directly pollute the air are called primary pollutants. Primary pollutant examples include carbon monoxide from car exhausts and sulfur dioxide from the combustion of coal. Further pollution can arise if primary pollutants in the atmosphere undergo chemical reactions. The resulting compounds are called secondary pollutants. Photochemical smog is an example of this.

Causes of air pollution

1. Air pollution is caused by a wide variety of things. The earth is great at cleaning the air on its own. However, air pollution has grown so much, the earth can no longer clean all of it. This is starting to have adverse effects on the environment such as causing acid rain, smog and a wide variety of health problems.

2. Cars, trucks, jet airplanes and other combustion engine vehicles cause air pollution. The exhaust from these contains carbon monoxide, nitrous oxide and gaseous oxide. This type of air pollution creates smog (as seen in Los Angeles) which causes respiratory health problems and holes in the ozone layer, which increases the exposure to the sun's harmful rays.

3. Factories, office buildings, homes and power-generating stations burn fossil fuels, which cause air pollution. The burning of oil and coal (fossil fuels) also contributes to smog. This air pollution destroys plants, damages buildings and creates oxidation on iron.

4. Petroleum refineries release hydrocarbons and various particulates that pollute the air.

5. Some power lines are not insulated and are high voltage. This creates air pollution.

6. Pesticides used to kill indoor and outdoor pests, insecticides used to kill insects and herbicides use to kill weeds all cause air pollution.

7. Radioactive fallout causes air pollution from the nuclear energy dispersed, which is a dust.

8. Dust from fertilizers used to help plants grow causes air pollution.

9. Sick building syndrome (SBS) is the term used when there is indoor air pollution. This happens when there is not enough ventilation to disburse the toxic fumes from new carpet, paint and/or cleaning chemicals that are used indoors. Mold can also cause SBS.

10. Mining causes air pollution by releasing a variety of particles.

11. Mills and plants, include paper mills, chemical plants, iron mills, steel mills, cement plants and asphalt plants, release emissions into the air causing air pollution.

20.3.2 Central and State Pollution Control Boards

Section 3 and 4 of the Air (Prevention and Control of Pollution) Act, 1981 provides that in any State in which the Water (Prevention and Control of Pollution) Act, 1974, is in force and the State Government has constituted for that State a State Pollution Control Board under Section 3 and 4 of that Act, such State Board shall be deemed to be the State Board for the prevention and control of air pollution constituted under Section 4 and 5 of this Act, and accordingly that State Pollution Control Board shall without prejudice to the exercise and

performance of its powers and functions under that Act, exercise the powers and perform the functions of the State Board for the prevention and control of air pollution under this Act.

Constitution of State Boards

With regard to the constitution of State Board for prevention and control of pollution Section 5 of the Air (Prevention and Control of Pollution) Act, 1981, lays down the following provisions

Section 5(1) : In any State in which the Water (Prevention and Control of Pollution) Act, 1974 is not in force or that Act is in force but the State Government has not constituted a State Pollution Control Board 'under that Act, the State Government shall, with effect from such date as it may, by notification in the Official Gazette, appoint, constitute a State Board for the prevention and control of air pollution under such name as may be specified in the notification, to exercise the powers conferred on, and perform the functions assigned to that Board under this Act.

Section 5(2): A State Board constituted under this Act shall consist of the following members, namely

(a) A Chairman, being a person having special knowledge or practical experience in respect of matters relating to environmental protection to be nominated by the State Government, Provided that the Chairman-may be either whole-time or part-time as the State Government may think fit;

(b) Such number of officials, not exceeding five, as the State Government may think fit, to be nominated by the State Government to represent that Government;

© Such number of persons, not exceeding five, as the State Government may think fit, to be nominated by the State Government from amongst the members of the local authorities functioning within the State;

(d) Such number of non-officials, not exceeding three, as the State Government may think fit to be nominated by the State Government to represent the interests of agriculture, fishery or industry or trade or labour or any other interest, which in the opinion of that Government, ought to be represented;

(e) Two persons to represent the companies or corporations owned, controlled or managed be the State Government, to be nominated by that Government;

(f) A full-time member-secretary having such qualifications, knowledge and experience of scientific, engineering or management aspects of pollution control (as may be prescribed, to be appointed by the State Government :

Provided that the State Government shall ensure that not less than two of the members are persons having special knowledge or practical experience in respect of matters relating to the improvement of the quality of air or the prevention, control or abatement of air pollution.

20.3.3 Powers and Functions of Central Board

The powers and functions of the Central Board have been provided under Section 16 of the Air (Prevention and Control of Pollution) Act, 1981. The main functions of the Central Board shall be to improve the quality of air and to prevent, control or abate air pollution in the country.

In particular and without prejudice to the generality of the foregoing Junctions, the Central Board may-

- Advice the Central Government on any matter concerning the improvement of quality of air and the prevention, control or abatement of air pollution;
- Plan and cause to be executed a nation-wide programme for the prevention, control or abatement of air pollution;
- Co-ordinate the activities of the State Boards and resolve dispute among them.
- Provide technical assistance and guidance to the State Boards; carry out and sponsor investigations and research relating to problems of air pollution and prevention, control or abatement or air pollution;
- Plan and organize the training of persons engaged or to be engaged in programmes for the prevention, control or abatement of air pollution;
- Organize through mass media a comprehensive programme regarding the prevention, control or abatement of air pollution;
- Collect, compile and publish technical and statistical data relating to air pollution and the measures devised for its effective prevention, control or abatement and prepare manuals, codes or guides relating to prevention, control or abatement of air pollution;
- Lay down standards for the quality of air;

- Collect and disseminate information in respect of matter relating to air pollution;
- Perform such other functions as may be prescribed.

20.3.4 Functions of State Boards

Section 17 of the Air (Prevention and Control of Pollution) Act, 1981 deals with the functions of Sate Boards which follows as under-

- To plan comprehensive programme for the prevention, control or abatement of air pollution and to secure the execution thereof;
- To advice the State Government on any matter concerning the prevention, control or abatement of air pollution;
- To collect and disseminate information relating to air pollution;
- To collaborate with the Central Board in organizing the training of persons engaged or to be engaged in programmes relating to prevention, control or abatement of air pollution and to organize mass education programme relating thereto;
- To inspect, at all reasonable times, any control equipment, industrial plant or manufacturing process and to give, by order, such directions to such persons as it may consider necessary to take steps for the prevention, control or abatement of air pollution;
- To inspect air pollution control areas at such intervals as it may think necessary, assess the quality of air therein and take steps for the prevention, control or abatement of air pollution in such areas;
- To lay down, in consultation with Central Board and having regard to the standards for the quality of air laid down by the Central Board, standards for emission of air pollutants into the atmosphere from industrial plants and automobiles or for the discharge of any air pollutant into the atmosphere from any other source whatsoever not being a ship or an aircraft, Provided that different standards for emission may be laid down under this clause for different industrial plants having regard to the quantity and composition of emission of air pollutants into the atmosphere from such industrial plants;
- To advice the State Government with respect to the suitability of any premises or location for carrying on any industry which is likely to cause air pollution.

- To perform such other functions as may be prescribed or as may, from time to time, be entrusted to it by the Central Board or the State Government;
- To do such other things and to perform such other acts as it may think necessary for the proper discharge of its functions and generally for the purpose of carrying into effect the purpose of this Act.

20.3.5 Power to declare air pollution control areas

Section 19 of the Air (Prevention and Control of Pollution) Act, 1981 empowers the State Government to declare any area or areas as air pollution control area or areas for the purpose of this Act. The provisions of Section 19 of the Act follow as under

Section 19(1): The State Government may, after consultation with the State Board, by notification in the Official Gazette, declare in such manner as may be prescribed, any area or areas within the State as air pollution control area or areas for the purpose of this Act.
Section 19(2): the State Government may, after consultation with the State Board, by notification in the Official Gazette-

- Alter any air pollution control area whether by way of extension or reduction;
- Declare a new air pollution control area in which may be merged one or more existing air pollution control areas of any part or parts thereof.

Section 19(3) : If the State Government, after consultation with the State Board, is of opinion that the use of any fuel, other ,than an approved fuel, in any air pollution control area or part thereof, may cause or is likely 10 cause air pollution, it may, by notification in the Official Gazette, prohibit the use of such fuel in such area or part thereof witl1 effect from such date (being not less than. Three months from the date of the publication of the notification) as may be specified in the notification.

Section 19(4): The State Government may, after consultation with the State Board, by notification in the Official Gazette, direct that with effect from such date as may be specified therein, on appliance, other than an approved appliance, shall be used in the premises, situated in an air pollution control area.

Section 19(5): If the State Government, after consultation with the State Board, is of opinion that the burning of any material (not being fuel) in any air pollution control area or part thereof may cause or is likely to cause air pollution, it may, by notification in the Official Gazette, prohibit the burning of such material in such area or part thereof.

20.3.6 Power of Board to restrain persons from causing air pollution

Section 22-A of the Act deals with the power of the Board to restrain persons from causing air pollution by making an application to the Court. This power of the State Board is inserted by Section 11 of the Act 47 of 1987 which came into force from April 1, 1988.

Section 22-A(1) : Where it is apprehended by a Board that emission of an air pollutant, in excess of the standards laid down by the State Board under Clause (g) of Sub-section (1) of Section 17, is likely occur by reason of any person operating an industrial plant or otherwise in any air pollution control area, the Board may make an application to a Court not inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the 1st Class for restraining such person from emitting such air pollutant.

Section 22-A (2): On receipt of the application of the Board to restrain such person from emitting such air pollutant, the Court may make such order as it deems fit.

Section 22-A(3) : Where under Sub-section (2), the Court makes an order restraining any person from discharging or causing or permitting to be discharged the emission of any air pollutant, it may, in that order

- Direct such person to desist from taking such action' as is likely to cause emission;
- Authorise the Board, if the direction under Clause (a) is not complied with by the person to whom such direction is issued, to implement the direction in such manner as may be specified by the Court.

Section 22-A (4): All expenses incurred by the Board, if in implementing the direction of the Court under Clause (b) 'of Sub-section (3) shall be recoverable from the person concerned as arrears of land revenue or of public demand.

20.3.7 Punishment and Penalties

Section 37, 38 and 39 of the Air (Prevention and Control of Pollution) Act, 1981 deals with the offences committed under this Act and the penalties thereof.

Penalties for certain acts

Section 38 of the Act deals with the penalties for certain acts which provides that whoever –

- Destroys, pulls down, removes, injures or defaces any pillar, post or stake fixed in the ground or any notice or other matter put up, inscribed or placed, by or under the authority of the Board; or
- Obstructs any person acting under the orders or directions of the Board from exercising his powers and performing his functions under this Act; or
- Damages any works or property belonging to the Board; or
- Fails to furnish to the Board or any Officer or other employee of the Board any information required by the Board or such Officer or other employee for the purpose of this Act; or
- Fails to intimate the occurrence of the emission of air pollutants into the atmosphere in excess of the standards laid down by the State Board or the apprehension of such occurrence.
- In giving any information which he is required to give under this Act, makes' a statement which is false in any material particular; or
- For the purpose of obtaining any consent under Section 21, makes a statement which is false in any material particular;
- Shall be punishable with imprisonment for a term which may extend to three months or with fine which may extend to ten thousand rupees or with both.

Penalty for contravention of certain provisions of this Act- In this regard Section 39 of the Act improvises that whoever contravenes any of the provisions of this Act or any directions issued there under, for which no penalty has been elsewhere provided in this Act, shall be punishable with imprisonment for a term which may extend to three months or with fine which may extend to ten thousand rupees or with both, and in the case of continuing contravention, with an additional fine which may extend to five thousand rupees for every day during which such contravention continues after conviction for the first such contravention.

20.4 Meaning, Causes and Effects of Noise pollution

Noise pollution is excessive, displeasing human, animal, or machine-created environmental noise that disrupts the activity or balance of human or animal life. The word noise may be from the Latin word nauseas, which means disgust or discomfort. The source of most outdoor noise worldwide is mainly construction and transportation systems, including motor vehicle noise, aircraft noise, and rail noise. Poor urban planning may give rise to noise pollution, since side-by-side industrial and residential buildings can result in noise pollution in the residential area.

High noise levels can contribute to cardiovascular effects in humans, a rise in blood pressure, and an increase in stress and vasoconstriction, and an increased incidence of coronary artery disease. In animals, noise can increase the risk of death by altering predator or prey detection and avoidance, interfere with reproduction and navigation, and contribute to permanent hearing loss.

Thus, noise simpliciter means any unwanted sound. Physically sound is a mechanical disturbance propagated as' a wave motion in 'air and other elastic or mechanical media such as water or steel. The human ear is very sensitive to the sound waves. The noise is measured in decibels. In logarithmic scale, decibd (db) is the standard unit for measurement of sound.

The following noise levels are considered acceptable-

Industrial	Workshop Laboratory	40-60 db 40-50 bd
Hospital	Wards	20-35 db

Residential	Bedroom Living Room	25 db 40 db
Educational	Class Room Library	30-40 db 35-45 db
Commercial	Office Conference Room	30-45 db 40-45 db

Causes of Noise Pollution

The sources of noise are more in urban and industrial areas than in rural areas. The sources in general may be stationary or mobile.

1. Stationary Sources

Use of loudspeakers on various occasions like festivals, elections, worships in temples, mosques and during advertisements, mining operations, use of bulldozers, drillers and dynamites to break rocks, household gadgets like vacuum cleaner, TV, radio, stereo, grinder, mixer etc., common vegetable and fish markets.

2. Mobile Sources

Road traffic, railway traffic, air traffic, navigation etc the sources of noise can be classified in following categories:

(1) Transportation / Traffic noise

(2) Industrial noise

(3) Noise from construction work

(4) Neighbourhood noise

1. Transportation / Traffic Noise

The main threat of noise comes from transport. A survey in Delhi, Mumbai and Kolkata showed that daytime noises varied from 60 dB (A) in busy localities. In some heavy traffic areas, the average noise level reached up to 90 dB (A) even at nights.

(a) Road Traffic or Highway Noise

The noise generated from highway traffic is one of the major sources of noise pollution. Highway noises are of two types, viz., noises generated by individual vehicles and noises generated by a continuous flow of vehicles of all types.

The noises from individual vehicles include noise from engine and transmission, exhaust noise, noise due to slamming of car doors and use of horn. Traffic speed is one of the major causes of noise. The other factors on which traffic noise depends are traffic density and a number of operating factors / conditions/type of vehicle. Heavy diesel engine vehicles are the noisiest vehicles on roads. It can be observed that sports car and motor cycles are notorious noise producers.

(b) Aircraft Noise

Aircraft noise differs from road traffic noise in the sense that it is not continuous but intermittent. Noise is at a maximum during take-off and landing. Major cities around the world have banned or reduced flights at night and also prescribed noise limits.

(c) Rail Traffic Noise

Noise from rail traffic is not a serious nuisance as compared to the road traffic and airport noise. The noise produced is generally, of lower frequency than that of road vehicles and further, most railway tracks run through rural areas. The impact of noise pollution by trains is felt maximum in buildings located beside railway tracks. The normal ambient noise level near rail tracks went up by 10-20 dB (A) during train movement.

2. Industrial Noise

In industries, noise is the by-product of energy conversion. The compressors, generators, furnaces, looms, grinding mills, release valves and exhaust fans are the most offending noise sources. The common noise level in most units is 80-120 dB(A), which is really hazardous. Studies showed that 1.3 per cent of industrial workers suffer from tinnitus for noise exposure levels up to 80 dB.

3. Noise from Construction Work

Noise from construction sites is generally far worse than the noise originating from factories. There are two reasons for this - one is that construction (of roads, bridges, buildings, dams

etc.) may become necessary anywhere and the other reason is that construction equipments are inherently noisy.

4. Neighbourhood Noise

It includes a variety of noise sources which disturb and annoy general public. The most I prominent is the indiscriminate use of loudspeakers in public functions, entertainments, festivals, I elections etc. The other sources include vacuum cleaners, TV, radio sets and washing machines I etc. During the festivals especially Dipavali, fireworks push up the noise level up to 80-100 I dB(A) during evening hours, against the normal level of 50 dB(A).

Effects of Noise Pollution

The presence of undesirable sound in the atmosphere is considered as a form of noise pollution because it lowers the quality of life. The unwanted sound may adversely affect the health and well-being of individuals or the population continuous exposure to noise levels much above 100db has an adverse effect on hearing ability within a fairly short time. Noise pollution is also considered as slow death. According to Prof. Gral, more than 155db of sound may burn the skin and 198db may be cause of death. Noise impairs the health of people psychologically and physiologically. In this regard Dr. Sanual Rosen has observed that an unexpected or unwanted noise can cause the pupils to dilate, paling of the skin, dryness of mucous membranes, initial spasm and adrenalin secretion. In other words it disturbs biological organisms and their functioning.

The psychological effects include the high level of noise, causes may behavioural changes among human as well as animals. In human beings it creates fatigue, tension-related diseases, improper speech, annoyance, mental disorders, irritation, low efficiency and frequent errors, sleep inference etc. In so many cases it is medically confirmed that noise causes a loss of nervous energy. The noise reactions vary from individual to individual.

Noise pollution creates adverse physiological effects on human health. It include annoyance, strains and stresses, irritation anxiety which cause changes in hormone contents of blood which in turn may introduce changes in human bodies. The physiological effects are not only on human beings but on birds and animals also. Due to noise pollution, sometimes, birds stop laying eggs and breeding and animals stop mating in the season.

The Supreme Court has observed that problem of noise pollution has become more serious with the increasing trend of industrialization, urbanization and moderation and having many evil effects including danger to the health. It may cause interruption of sleep, affect communication, loss of efficiency, hearing loss or deafness, high blood-pressure, depression, irritability, fatigue, gastro-intestinal problems, allergy, distraction, mental stress, annoyance etc. This .also affects animals alike. The extent of damage depends upon the duration and intensity of the noise.

20.5 Wild Life (Protection) Act-1972

Constitution of Wild Life Advisory Board- The provisions with regard to the constitution of Wild Life Advisory Board have been made under Section 6 of the Wild Life (Protection) Act-1972 which improvises as under-

Section 6(1) : The State Government or, in the case of a Union territory, the Administrator, shall, as soon as may be after the commencement of this Act, constitute a Wild Life Advisory Board consisting of the following members, namely- .

- The Minister in charge of Forests in the State or Union territory, or if there is no such Minister, the Chief Secretary to the State Government or as the case may be, the Chief Secretary of the Government of Union territory, who shall be the Chairman;
- Two members of the State Legislature or in the case of Union territory having a Legislature, two members of the Legislature of the Union territory as the case may be;
- Secretary to the State Government or the Government of the Union territory, in charge of forests;
- Chief Conservator of Forests, ex officio;
- An Officer to be nominated by the Director;
- Chief Wild Life Warden, ex officio;
- Such other Officers and non officials, not exceeding fifteen, who in the opinion of the State Government are interested in the protection of wild life. .

Section 6(2): The State Government shall appoint Chief Conservator of Forests or Chief Wild Life Warden as the Secretary of the Board.

Section 6(3): The term of office of the members of the Board referred to in Clause (g) of Sub-section (1) and the manner of filling vacancies among them shall be such as may be preserved.

Section 6(4): The members shall be entitled to receive such-allowances in respect of expenses incurred in the performance of their duties as the State Government may prescribe.

Duties of the Board-According to Section 8 it shall be the duty of the Wild Life Advisory Board to advise the State Government

- In the selection of areas to be declared as sanctuaries, National Parks, game reserves and closed areas and the administration thereof;
- In formulation of the policy in granting licences and permits under this Act;
- In any matter relating to the amendment of any Schedule; and-
- In any other matter connected with the protection of wild life, which may be referred to it by the State Government.

20.6 Summary

The enhanced pace of developmental activities and rapid urbanization have resulted in stress on natural resources and quality of life. The trend of increasing pollution in various environmental media is evident from the deteriorating air and water quality, higher noise levels, increasing vehicular emission etc. The Central, State and Joint Board for Prevention and Control of Water Pollution is constituted under The Water (Prevention and Control of Pollution) Act, 1974 to control over water pollution. Similarly, The Central and State Board for Prevention and Control of Air Pollution is constituted under The Air (Prevention and Control of Pollution) Act, 1981 to control over air pollutants with power of imposing penalties. The provisions with regard to the constitution of Wild Life Advisory Board have been made under Section 6 of the Wild Life (Protection) Act-1972. To give effect to various measures and policies on ground, multi-pronged approach is adopted which includes stringent regulations, development of Environmental Standards, Control of Vehicular Pollution and preparation of Zoning Atlas for Spatial Environmental Planning including Industrial Estates etc. But still there is need to aware the common people to check over the environmental pollution.

20.7 Glossary

Raw sewage: Untreated wastewater and its contents.

Sewage: The used water and solids that flow from homes through sewers to a wastewater treatment plant. The preferred term is wastewater.

Streambed: The channel through which a natural stream or river runs or once ran through.

Waste exchange: Arrangement in which companies exchange their wastes for the benefit of both parties.

Waste stream: The total flow of solid waste from homes, businesses, institutions, and manufacturing plants that are recycled, burned, or disposed of in landfills, or segments thereof such as the "residential waste stream" or the "recyclable waste stream."

Transient water system: A non-community water system that does not serve 25 of the same nonresident persons per day for more than six months per year. Also called a transient non-community water system (TNCWS).

Oxidant: A substance containing oxygen that reacts chemically in air to produce a new substance; the primary ingredient of photochemical smog.

Ambient air: Any unconfined portion of the atmosphere: open air, surrounding air.

20.8 check your progress

True /False questions

1. The main function of the Central Board shall be to promote cleanliness of streams and wells in different areas of the States according to Water (Prevention and Control of Pollution) Act, 1974. **T/F**
2. Noise levels much above 100db have an adverse effect on hearing ability within a fairly short time. **T/F**
3. Central Board cannot co-ordinate the activities of the State Boards and resolve dispute among them. **T/F**
4. Wild Life Advisory Board has been made under Section 6 of the Wild Life (Protection) Act-1972. **T/F**

5. Without the consent of State board any person begin to made any new discharge or sewage. **T/F**

20.9 Answers to check your progress

1. T 2. T 3. F 4. T 5. F

20.10 Terminal Questions

1. Discuss the constitution and functions of Central Board for Prevention and Control of pollution under the Water (Prevention and control of Pollution) Act, 1974.

2. Discuss the constitution and functions of State Board for Prevention and Control of pollution under the Water (Prevention and control of Pollution) Act, 1974.

3. What restrictions are imposed on new outlets and new discharges under the Water (Prevention and control of Pollution) Act, 1974? How may consent be obtained for bringing into use any new or altered outlet for the discharge of sewage etc?

4. Discuss the power of State Board to restrain persons from causing air pollution under the Air (Prevention and Control of Pollution) Act, 1981.

5. Explain the provisions of the Air (Prevention and Control of Pollution) Act, 1981 with regard to the offences and penalties.

6. Explain the functions of State Boards which are provided under the Air (Prevention and Control of Pollution) Act, 1981.

7. Write Notes on the following

   a. Wild Life (Protection) Act-1972

   b. Noise pollution, its causes and effects

   c. Causes of water pollution

20.11 References/Bibliography

Leelakrishan P, Environmental Law in India, LexisNexis 2010**.**

Tiwari A. K**,** Environmental Law in India, Eastern Book Corporation, 2006.

http://www.ceeraindia.org/documents/lib_tabofcon_160300.htm

http://www.ceeraindia.org/documents/lib_c2s1_water_090300.htm

http://www.ceeraindia.org/documents/lib_c2s6_Air81_090300.htm

http://www.ceeraindia.org/documents/lib_c4s4_forest_160300.htm

http://www.ceeraindia.org/documents/noisepollutionoti.htm

P.B. Sahasranaman, Handbook of Environmental Law in India, Oxford University Press, 2008.

Unit – 21: Basic Principles and Acquisition of IPRs

21.1 Introduction

21.2 Meaning and Nature of IPR

21.3 Advantages of Intellectual Property Rights

21.4 Different types of IPRs

21.4.1 Patents

21.4.2 Basic Principles of Patent Law

21.4.3 Copyrights

21.4.4 Basic Principles of Copyright

21.4.5 Industrial Design

21.4.6 Basic Principles of Industrial Design

21.4.7 Layout Designs

21.4.8 Trademarks

21.4.9 Basic Principles of Trademarks

21.4.10 Protection of Geographical Indications

21.4.11 Protecting New Plant Variety

21.5 Summary

21.6 Glossary

21.7 Check your Progress

21.8 Answers to check your progress

21.9 Terminal Questions

21.10 Suggested Readings

Objectives

After reading this unit you will be able to:

- Explain the meaning, nature and objectives of IPR.
- Describe the advantages of IPR.
- Describe different IPRs, their features and principles.

21.1 Introduction

With the advent of the new knowledge economy, the old and some of the existing management constructs and approaches would have to change. The knowledge economy places a tag of urgency on understanding and managing knowledge based assets such as innovations and know-how. The time for grasping knowledge has become an important parameter for determining the success of an institution, enterprise, government and industry; the shorter the time better are the chances of success.

Intellectual property rights (IPR) have become important in the face of changing trade environment which is characterized by the following features namely global competition, high innovation risks, short product cycle, need for rapid changes in technology, high investments in research and development (R&D), production and marketing and need for highly skilled human resources. Geographical barriers to trade among nations are collapsing due to globalization, a system of multilateral trade and a new emerging economic order. It is therefore quite obvious that the complexities of global trade would be on the increase as more and more variables are introduced leading to uncertainties. Many products and technologies are simultaneously marketed and utilized in many countries. With the opening up of trade in goods and services intellectual property rights (IPR) have become more susceptible to infringement leading to inadequate return to the creators of knowledge. Developers of such products and technologies would like to ensure R&D costs and other costs associated with introduction of new products in the market are recovered and enough profits are generated for investing in R&D to keep up the R&D efforts.

Creating, obtaining, protecting and managing intellectual property must become a corporate activity in the same manner as the raising of resources and funds. The knowledge revolution will demand a special pedestal for intellectual property and treatment in the overall decision-

making process. It is also important to realize that each product is amalgamation of many different areas of science and technologies. In the face of the competition being experienced by the global community, many industries are joining hands for sharing their expertise in order to respond to market demands quickly and keeping the prices competitive. In order to maintain a continuous stream of new ideas and experimentations, public private partnership in R&D would need to be nurtured to arrive at a win-win situation. Therefore all publicly funded institutions and agencies will have to come to terms with the new ground realities and take positive steps to direct research suitably to generate more intellectual property rights, protect and manage them efficiently.

21.2 Meaning and Nature of IPR

What is an IPR?

Intellectual Property Rights are legal rights, which result from intellectual activity in industrial, scientific, literary & artistic fields. These rights Safeguard creators and other producers of intellectual goods & services by granting them certain time-limited rights to control their use. Protected IP rights like other property can be a matter of trade, which can be owned, sold or bought. These are intangible and non exhausted consumption.

Nature of Intellectual Property Rights

IPR are largely territorial rights except copyright, which is global in nature in the sense that it is immediately available in all the members of the Berne Convention. These rights are awarded by the State and are monopoly rights implying that no one can use these rights without the consent of the right holder. It is important to know that these rights have to be renewed from time to time for keeping them in force except in case of copyright and trade secrets. IPR have fixed term except trademark and geographical indications, which can have indefinite life provided these are renewed after a stipulated time specified in the law by paying official fees.

Trade secrets also have an infinite life but they don't have to be renewed. IPR can be assigned, gifted, sold and licensed like any other property. Unlike other moveable and

immoveable properties, these rights can be simultaneously held in many countries at the same time.

IPR can be held only by legal entities i.e., who have the right to sell and purchase property. In other words an institution, which is not autonomous may not in a position to own an intellectual property. These rights especially, patents, copyrights, industrial designs, IC layout design and trade secrets are associated with something new or original and therefore, what is known in public domain cannot be protected through the rights mentioned above. Improvements and modifications made over known things can be protected. It would however, be possible to utilize geographical indications for protecting some agriculture and traditional products.

21.3 Advantages of Intellectual Property Rights

Intellectual property rights help in providing exclusive rights to creator or inventor thereby induces them to distribute and share information and data instead of keeping it confidential. It provides legal protection and offers them incentive of their work. Rights granted under the intellectual property act helps in socio and economic development.

21.4 Different types of IPRs

Intellectual property rights as a collective term includes the following independent IP rights which can be collectively used for protecting different aspects of an inventive work for multiple protection:-

- Patents
- Copyrights
- Trademarks
- Registered (industrial) design
- Protection of IC layout design,
- Geographical indications, and
- Protection of undisclosed information

21.4.1 Patents

A patent is an exclusive right granted by a country to the owner of an invention to make, use, manufacture and market the invention, provided the invention satisfies certain conditions stipulated in the law. Exclusive right implies that no one else can make, use, manufacture or market the invention without the consent of the patent holder. This right is available for a limited period of time. In spite of the ownership of the rights, the use or exploitation of the rights by the owner of the patent may not be possible due to other laws of the country which has awarded the patent. These laws may relate to health, safety, food, security etc. Further, existing patents in similar area may also come in the way.

A patent in the law is a property right and hence, can be gifted, inherited, assigned, sold or licensed. As the right is conferred by the State, it can be revoked by the State under very special circumstances even if the patent has been sold or licensed or manufactured or marketed in the meantime. The patent right is territorial in nature and inventors/their assignees will have to file separate patent applications in countries of their interest, along with necessary fees, for obtaining patents in those countries. A new chemical process or a drug molecule or an electronic circuit or a new surgical instrument or a vaccine is a patentable subject matter provided all the stipulations of the law are satisfied.

21.4.2 Basic Principles of Patent Law

The first Indian patent laws were first promulgated in 1856. These were modified from time to time. New patent laws were made after the independence in the form of the Indian Patent Act 1970. The Act has now been radically amended to become fully compliant with the provisions of TRIPS. The most recent amendment was made in 2005 which were preceded by the amendments in 2000 and 2003. While the process of bringing out amendments was going on, India became a member of the Paris Convention, Patent Cooperation Treaty and Budapest Treaty.

The salient and important features of the amended Act are explained here:

1. Definition of invention

Invention means a new product or process involving an inventive step and capable of industrial application. New invention means any invention or technology which has not been anticipated by publication in any document or used in the country or elsewhere in the world

before the date of filing of patent application with complete specification i.e., the subject matter has not fallen in public domain or it does not form part of the state of the art.

Inventive step involves technical advance as compared to existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art. “Capable of industrial application means that the invention is capable of being made or used in an industry"

Novelty

An invention will be considered novel if it does not form a part of the global state of the art. Information appearing in magazines, technical journals, books, newspapers etc. constitutes the state of the art. Oral description of the invention in a seminar/conference can also spoil novelty.

Novelty is assessed in a global context. An invention will cease to be novel if it has been disclosed in the public through any type of publications anywhere in the world before filing a patent application in respect of the invention. Therefore it is advisable to file a patent application before publishing a paper if there is a slight chance that the invention may be patentable. Prior use of the invention in the country of interest before the filing date can also destroy the novelty.

Novelty is determined through extensive literature and patent searches. It should be realized that patent search is essential and critical for ascertaining novelty as most of the information reported in patent documents does not get published anywhere else. For an invention to be novel, it need not be a major breakthrough. No invention is small or big. Modifications to the existing state of the art, process or product or both, can also be candidates for patents provided these were not 4earlier known. In a chemical process, for example, use of new reactants, use of a catalyst, new process conditions can lead to a patentable invention.

Inventiveness (Non-obviousness)

A patent application involves an inventive step if the proposed invention is not obvious to a person skilled in the art i.e., skilled in the subject matter of the patent application. The prior art should not point towards the invention implying that the practitioner of the subject matter could not have thought about the invention prior to filing of the patent application. Inventiveness cannot be decided on the material contained in unpublished patents. The

complexity or the simplicity of an inventive step does not have any bearing on the grant of a patent. In other words a very simple invention can qualify for a patent. If there is an inventive step between the proposed patent and the prior art at that point of time, then an invention has taken place.

Usefulness

An invention must possess utility for the grant of patent. No valid patent can be granted for an invention devoid of utility. The patent specification should spell out various uses and manner of practicing them, even if considered obvious. If you are claiming a process, you need not describe the use of the compound produced thereby. Nevertheless it would be safer to do so. But if you claim a compound without spelling out its utility, you may be denied a patent.

2. Non patentable inventions

An invention may satisfy the conditions of novelty, inventiveness and usefulness but it may not qualify for a patent under the following situations:

(i) An invention which claims anything obviously contrary to well established natural laws e.g. different types of perpetual motion machines.

(ii) An invention whose intended use or exploitation would be contrary to public order or morality or which causes serious prejudice to human, animal or plant life or health or to the environment e.g., a process for making brown sugar will not be patented.

(iii) The mere discovery of a scientific principal or formulation of an abstract theory e.g Raman effect and Theory of Relativity cannot be patented.

(iv) The mere discovery of a new form of a known substance which does not result in enhancement of the known efficacy of that substance or the mere discovery of any new property or new use of a known substance or the mere use of a known process, machine or apparatus unless such a known process results in a new product or employs at least one new reactant. For the purposes of this clause, salts, esters, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of

known substance shall be considered to be the same substance unless they differ significantly in properties with regard to efficacy.

(v) A substance obtained by a mere admixture resulting only aggregation of the properties of the components thereof or a process for producing such substance.

(vi) The mere arrangement or rearrangement or duplication of features of known devices each functioning independently of one another in a known way. If you put torch bulbs around an umbrella and operate them by a battery so that people could see you walking in rain when it is dark, then this arrangement is patentable as bulbs and the umbrella perform their functions independently.

(vii) A method of agriculture or horticulture. For example, the method of terrace farming cannot be patented.

(viii) Any process for medical, surgical, curative, prophylactic, diagnostic, therapeutic or other treatment of human beings, or any process for a similar treatment of animals to render them free of disease or to increase economic value or that of their products. For example, a new surgical technique for hand surgery for removing contractions is not patentable.

(ix) Discovery of any living thing or non-living substance occurring in nature.

(x) Mathematical or business methods or a computer program.

(xi) Plants and animals in whole or any part thereof other than microorganisms but including seeds, varieties and species and essentially biological processes for production and propagation of plants and animals.

(xii) A presentation of information.

(xiii) Topography of integrated circuits.

(xiv) A mere scheme or rule or method of performing mental act or method of playing games.

(xv) An invention which, in effect, is traditional knowledge or which is aggregation or duplication of known component or components.

3. Term of the patent

Term of the patent will be 20 years from the date of filing for all types of inventions.

4. Applications

In respect of patent applications filed, following aspects will have to be kept in mind:-

- Claim or claims can now relate to single invention or group of inventions linked so as to form a single inventive concept.
- Patent application will be published 18 months after the date of filing.
- Applicant has to request for examination 12 months within publication or 48 months from date of application, whichever is later.

No person resident in India shall, except under the authority of a written permit sought in the manner prescribed and granted by or on behalf of the Controller, make or cause to be made any application outside India for the grant of a patent for an invention unless (a) an application for a patent for the same invention has been made in India, not less than six weeks before the application outside India; and (b) either no direction has been given under the secrecy clause of the Act or all such directions have been revoked.

5. Provisional Specification

A provisional specification is usually filed to establish priority of the invention in case the disclosed invention is only at a conceptual stage and a delay is expected in submitting full and specific description of the invention. Although, a patent application accompanied with provisional specification does not confer any legal patent rights to the applicants, it is, however, a very important document to establish the earliest ownership of an invention. The provisional specification is a permanent and independent scientific cum legal document and no amendment is allowed in this.

No patent is granted on the basis of a provisional specification. It has to be a followed by a complete specification for obtaining a patent for the said invention. Complete specification must be submitted within 12 months of filing the provisional specification. This period can be extended by 3 months. It is not necessary to file an application with provisional specification before the complete specification. An application with complete specification can be filed right at the first instance.

6. Complete Specification

It may be noted that a patent document is a techno-legal document and it has to be finalized in consultation with an attorney. Submission of complete specification is necessary to obtain a patent. Contents of a complete specification would include the following:

- Title of the invention.
- Field to which the invention belongs.
- Background of the invention including prior art giving drawbacks of the known inventions & practices.
- Complete description of the invention along with experimental results.
- Drawings etc. essential for understanding the invention.
- Claims, which are statements, related to the invention on which legal proprietorship is being sought. Therefore the claims have to be drafted very carefully.

7. Compulsory license

Any time after three years from date of sealing of a patent, application for compulsory license can be made provided:

- Reasonable requirements of public have not been met.
- Patented invention is not available to public at a reasonably affordable price.
- Patented invention is not worked in India among other things, reasonable requirements of public are not satisfied if working of patented invention in India on a commercial scale is being prevented or hindered by importation of patented invention.

Applicant's capability including risk taking, ability of the applicant to work the invention in public interest, nature of invention, time elapsed since sealing, measures taken by patentee to work the patent in India will be taken into account. In case of national emergency or other circumstances of extreme urgency or public non commercial use or an establishment of a ground of anti competitive practices adopted by the patentee, the above conditions will not apply.

A patentee must disclose the invention in a patent document for anyone to practice it after the expiry of the patent or practice it with the consent of the patent holder during the life of the patent.

8. Patenting of microbiological inventions

The Indian Patent Act has now a specific provision in regard to patenting of microorganisms and microbiological processes. It is now possible to get a patent for a microbiological process and also products emanating from such processes.

As it is difficult to describe a microorganism on paper, a system of depositing strain of microorganisms in some recognized depositories was evolved way back in 1949 in USA. An international treaty called "Budapest Treaty" was signed in Budapest in 1973 and later on amended in 1980. India became a member of this Treaty, with effect from December 17, 2001.

This is an international convention governing the recognition of deposits in officially approved culture collections for the purpose of patent applications in any country that is a party to this treaty. Because of the difficulties and virtual impossibility of reproducing a microorganism from a description of it in a patent specification, it is essential to deposit a strain in a culture collection centre for testing and examination by others.

An inventor is required to deposit the strain of a microorganism in a recognized depository, which assigns a registration number to the deposited microorganism. This registration number needs to be quoted in the patent application dealing with the microorganism.

Obviously a strain of microorganism is required to be deposited before filing a patent application. It may be observed that this mechanism obviates the need of describing a microorganism in the patent application. Further, samples of strains can be obtained from the depository for further working on the patent. There are many international depositories in different countries such as ATCC, DSM etc. which are recognized under the Budapest Treaty.

The Institute of Microbial Technology (IMTEC), Chandigarh is the first Indian depository set up under the Budapest Treaty.

9. Mail box provision

TRIPS requires that countries, not providing product patents in respect of pharmaceuticals and chemical inventions have to put in a mechanism for accepting product patent applications with effect from 1 January 1995. Such applications will only be examined for grant of patents, after suitable amendments in the national patent law have been made. This mechanism of accepting product patent applications is called the "mail box" mechanism. This system has been in force in India and now such applications are being taken up for examination.

10. Exclusive Marketing Right

TRIPS requires that member countries of the WTO not having provision in their laws for granting product patents in respect of drugs and agrochemical, must introduce Exclusive

Marketing Rights (EMR) for such products, if the following criteria are satisfied:

- A patent application covering the new drug or agrochemical should have been filed in any of the WTO member countries after 1 January 1995.
- A patent on the product should have been obtained in any of the member countries (which provides for product patents in drugs and agrochemical) after 1 January 1995.
- Marketing approvals for the product should have been obtained in any of the member countries.
- A patent application covering the product should have been filed after 1 January 1995 in the country where the EMR is sought.
- The applicant should apply seeking an EMR by making use of the prescribed form and paying requisite fee.

EMR is only a right for exclusive marketing of the product and is quite different from a patent right. It is valid up to a maximum period 5 years or until the time the product patent laws come into effect. As per the 2005 amendments in the Patents Act, the provision of EMR is no longer required. However, these rights were awarded in India from time to time and there have been some litigation as well where the courts came up with quick decisions.

11. **Timing for filing a patent application**

Filing of an application for a patent should be completed at the earliest possible date and should not be delayed. An application filed with provisional specification, disclosing the essence of the nature of the invention helps to register the priority by the applicant. Delay in filing an application may entail some risks like :

- Other inventors might forestall the first inventor by applying for a patent for the said invention, and
- There may be either an inadvertent publication of the invention by the inventor himself/herself or by others independently of him/her.

Publication of an invention in any form by the inventor before filing of a patent application would disqualify the invention to be patentable. Hence, inventors should not disclose their inventions before filing the patent application. The invention should be considered for publication after a patent application has been filed. Thus, it can be seen that there is no

contradiction between publishing an inventive work and filing of patent application in respect of the invention.

21.4.3 Copyrights

Copyright is a right, which is available for creating an original literary or dramatic or musical or artistic work. Cinematographic films including sound track and video films and recordings on discs, tapes, perforated roll or other devices are covered by copyrights. Computer programs and software are covered under literary works and are protected in India under copyrights. The Copyright Act, 1957 as amended in 1983, 1984, 1992, 1994 and 1999 governs the copyright protection in India. The total term of protection for literary work is the author's life plus sixty years. For cinematographic films, records, photographs, posthumous publications, anonymous publication, works of government and international agencies the term is 60 years from the beginning of the calendar year following the year in which the work was published. For broadcasting, the term is 25 years from the beginning of the calendar year following the year in which the broadcast was made.

21.4.4 Basic Principles of Copyright

Copyright gives protection for the expression of an idea and not for the idea itself. For example, many authors write textbooks on physics covering various aspects like mechanics, heat, optics etc. Even though these topics are covered in several books by different authors, each author will have a copyright on the book written by him / her, provided the book is not a copy of some other book published earlier. India is a member of the Berne Convention, an international treaty on copyright. Under this Convention, registration of copyright is not an essential requirement for protecting the right. It would, therefore, mean that the copyright on a work created in India would be automatically and simultaneously protected through copyright in all the member countries of the Berne Convention. The moment an original work is created, the creator starts enjoying the copyright. However, an undisputable record of the date on which a work was created must be kept. When a work is published with the authority of the copyright owner, a notice of copyright may be placed on publicly distributed copies.

The use of copyright notice is optional for the protection of literary and artistic works. It is, however, a good idea to incorporate a copyright notice. As violation of copyright is a cognizable offence, the matter can be reported to a police station. It is advised that registration of copyright in India would help in establishing the ownership of the work. The registration can be done at the Office of the Registrar of Copyrights in New Delhi. It is also to be noted that the work is open for public inspection once the copyright is registered.

Computer program in the Copyright Act has been defined as a set of instructions expressed in words, codes, schemes or any other form, including a machine-readable medium, capable of causing a computer to perform a particular task or achieve a particular result. It is obvious that algorithms, source codes and object codes are covered in this definition. It is advisable to file a small extract of the computer program at the time of registration rather than the full program. It is important to know that the part of the program that is not being filed would remain a trade secret of the owner but would have to be kept well guarded by the owner. It may be noted that computer programs will become important in the area of medicines when one talks about codification of DNA and gene sequencing. Generally, all copyrightable expressions embodied in a computer program, including screen displays, are protectable.

However, unlike a computer program, which is a literary work, screen display is considered an artistic work and therefore cannot be registered through the same application as that covering the computer program. A separate application giving graphical representation of all copyrightable elements of the screen display is essential. In the digital era, copyright is assuming a new importance as many works transacted through networks such as databases, multi media work, music, information etc. are presently the subject matter of copyright.

1. Coverage provided by copyright

(i) Literary, dramatic and musical work. Computer programs/software is covered within the definition of literary work.

(ii) Artistic work

(iii) Cinematographic films, which include sound track and video films.

(iv) Recording on any disc, tape, perforated roll or other device.

2. Infringement of copyright

Copyright gives the creator of the work the right to reproduce the work, make copies, translate, adapt, sell or give on hire and communicate the work to public. Any of these activities done without the consent of the author or his assignee is considered infringement of the copyright. There is a provision of 'fair use' in the law, which allows copyrighted work to be used for teaching and research and development. In other words making one photocopy of a book for teaching students may not be considered an infringement, but making many

photocopies for commercial purposes would be considered an infringement. There is one associated right with copyright, which is known as the 'moral right', which cannot be transferred and is not limited by the term. This right is enjoyed by the creator for avoiding obscene representation of his /her works.

Following acts are considered infringement of copyrights:-

(a) In the case of literary, dramatic or musical work, not being a computer program:

- To reproduce the work in any material form including the storing of it in any medium by electronic means
- To issue copies of the work to the public not being copies already in circulation
- To perform the work in public, or communicate it to the public
- To make any cinematography film or sound recording in respect of the work
- To make any translation of the work; to make any adaptation of the work
- To do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in Sub-clauses.

(b) In the case of computer program:

- To do any acts specified in clauses (a);
- To sell or give on hire, or offer for sale or hire any copy of the computer program, regardless of whether such copy has been sold or given on hire on earlier occasions.

(c) In the case of an artistic work

- To reproduce the work in any material form including depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work.
- To communicate the work to the public.
- To issue copies of the work to the public not being copies already in circulation.
- To include the work in any cinematography film.
- To make any adaptation of the work.
- To do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses.

(d) In the case of a cinematography film:

- To make a copy of the film including a photograph of. any image forming part thereof;
- To sell or give on hire or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;
- To communicate the film to the public;

(e) In the case of sound recording:

- To make any other sound recording embodying it.
- To sell or give on hire or offer for sale or hire, any copy of the, sound recording, regardless of whether such copy has been sold or given on hire on earlier occasions;
- To communicate the sound recording to the public.

Explanation: - For the purpose of this section, a copy which has been sold once shall be deemed to be a copy already in circulation.

3. Transfer of copyright

The owner of the copyright in an existing work or prospective owner of the copyright in a future work may assign to any person the copyright, either wholly or partially in the following manner.

- For the entire world or for a specific country or territory; or
- For the full term of copyright or part thereof ; or
- Relating to all the rights comprising the copyright or only part of such rights.

4. Computer program

A Computer includes any electronic or similar device having information processing capabilities. Computer program means a set of instructions expressed in words, codes, schemes or any other form, including a machine-readable medium, capable of causing a computer to perform a particular task or achieve a particular result. It is now possible to have copyrights both on object code and source code. Generally, all copyrightable expressions

embodied in a computer program, including screen displays, are protectable. However, unlike a computer program, which is a literary work, screen displays are artistic work and cannot therefore be registered in the same application as that covering the computer program. A separate application giving graphic representation of all copyrightable elements of the screen display is necessary.

In the case of a program made in the course of author's employment under a contract of service or apprenticeship, the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright. However, works created by third parties on commission do not automatically vest the copyright in the commissioning party. If the third party is an independent contractor, it is essential for the commissioning party to obtain the copyright through a written deed of assignment. It is a common misconception that the copyright automatically belongs to the commissioning party. Thus, it is only where the developer is an employee creating the work under a contract of service that the rights belong to the employer.

5. Special provisions for computer programs

Following tasks will not be considered infringement as they are legally allowed under the Indian laws:-

The doing of any act necessary to obtain information essential for operating inter-operability of an independently created computer program with other programs by a lawful possessor of a computer program provided that such information is not otherwise readily available;

- The observation, study or test of functioning of the computer program in order to determine the ideas and principles which underline any elements of the program while performing such acts necessary for the functions for which the computer program was supplied;

- The making of copies or adaptation of the computer program from a personally, legally obtained copy for non-commercial personal use.

One of the important requirements of copyright is that the work / expression should be fixed in a tangible medium for copyright protection. Protection attaches automatically to an eligible work of authorship, the moment the work is sufficiently fixed. A work is fixed when it is

sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than a transitory duration. A work may be fixed in words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia; may be embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other stable form; and may be capable of perception either directly or by means of any machine or device now known or later developed. Basically, the fixation of a work should allow perceiving, reproducing, or communicating the work either directly or through some machine. For instance, floppy disks, compact discs (CDs), CD-ROMs, optical disks, compact discs-interactive (CD-Is), digital tape, and other digital storage devices are all stable forms in which works may be fixed and from which works may be perceived, reproduced or communicated by means of a machine or device.

A simultaneous fixation (or any other fixation) meets the requirements if its embodiment in a copy or phonogram record is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. "Works are not sufficiently fixed if they are "purely evanescent or transient" in nature, "such as those projected briefly on a screen, shown electronically on a television or cathode ray tube, or captured momentarily in the 'memory' of a computer." Electronic network transmissions from one computer to another, such as e-mail, may only reside on each computer in RAM (random access memory), but that has been found to be sufficient fixation.

21.4.5 Industrial Design

We see so many varieties and brands of the same product (e.g. car, television, personal computer, a piece of furniture etc.) in the market, which look quite different from each other. If the products have similar functional features or have comparable price tags, the eye appeal or visual design of a product determines the choice. Even if the similarities are not close, a person may decide to go for a more expensive item because that item has a better look or colour scheme.

What is being said is that the external design or colour scheme or ornamentation of a product plays a key role in determining the market acceptability of the product over other similar products. If you have a good design that gives you an advantage, then you must have a system to protect its features otherwise there would be wide scale imitation.

21.4.6 Basic Principles of Industrial Design

Design as per the Indian Act means the features of shape, configuration, pattern, ornament or composition of lines or colors applied to any article - whether in two dimensional or three dimensional or in both forms - by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but it does not include any mode or principle of construction or anything which is in substance a mere mechanical device. In this context an article means any article of manufacture and any substance, artificial, or partly artificial and partly natural; and includes any part of an article capable of being made and sold separately. Stamps, labels, tokens, cards, etc cannot be considered an article for the purpose of registration of design because once the alleged design i.e., ornamentation is removed only a piece of paper, metal or like material remains and the article referred to ceases to exist. An article must have its existence independent of the designs applied to it. So, the design as applied to an article should be integral with the article itself.

- **The essential requirements for the registration of design**

1. The design should be new or original, not previously published or used in any country before the date of application for registration. The novelty may reside in the application of a known shape or pattern to a new subject matter. However, if the design for which the application is made does not involve any real mental activity for conception, then registration may not be considered.

2. The design should relate to features of shape, configuration, pattern or ornamentation applied or applicable to an article. Thus, designs of industrial plans, layouts and installations are not registrable under the Act.

3. The design should be applied or applicable to any article by any industrial process. Normally, designs of artistic nature such as painting, sculptures and the like which are not produced in bulk by any industrial process are excluded from registration under the Act.

4. The features of the designs in the finished article should appeal to and are judged solely by the eye. This implies that the design must appear and should be visible on the finished article, for which it is meant. Thus, any design in the inside arrangement of a box, money purse or almirah may not be considered for showing such articles in the open state, as those articles are generally put in the market in the closed state.

5. Any mode or principle of construction or operation or anything, which is in substance a mere mechanical device, would not be a registrable design. For instance, a key having its novelty only in the shape of its corrugation or bend at the portion intended to engage with levers inside the lock it is associated with, cannot be registered as a design under the Act. However, when any design suggests any mode or principle of construction or mechanical or other action of a mechanism, a suitable disclaimer in respect thereof is required to be inserted on its representation, provided there are other registrable features in the design.

6. The design should not include any trademark or property mark or artistic works.

7. It should be significantly distinguishable from known designs or combination of known designs.

8. It should not comprise or contain scandalous or obscene matter.

- **Duration of the registration of a design**

The total term of a registered design is 15 years. Initially the right is granted for a period of 10 years, which can be extended, by another 5 years by making an application and by paying a fee of Rs. 2000/- to the Controller before the expiry of initial 10 years period. The proprietor of design may make the application for such extension even as soon as the design is registered.

- **Strategy for protection**

First to file rule is applicable for registrability of design. If two or more applications relating to an identical or a similar design are filed on different dates, the first application will be considered for registration of design. Therefore the application should be filed as soon as you are ready with the design. After publication in the official gazette on payment of the prescribed fee of Rs. 500/- all registered designs are open for public inspection. Therefore, it is advisable to inspect the register of designs to determine whether the design is new or not. There is yet another important provision for ensuring that the design is different from anything published any where in the world. This is quite a strict condition. There would be many designs, which are not protected, and these would not be part of any database

maintained by design offices. An applicant has to take the responsibility of ensuring that he has done an extensive search and satisfied himself of the novelty of his design. However, in practice as the cost involved in filing and obtaining a design registration is not high, a design application is made if the stakes involved are not high and you have not copied any design. The application for registration of design can be filed by the applicant himself or through a professional person (i.e. patent agent, legal practitioner etc.). An agent residing in India has to be employed by the applicants not resident of India.

21.5.7 Layout Designs

Layout designs (topographies) of integrated circuits are a field in the protection of intellectual property.

Like most of the other forms of intellectual property, IC layout designs are creations of the human mind. They are usually the result of an enormous investment, both in terms of the time of highly qualified experts, and financially. There is a continuing need for the creation of new layout-designs which reduce the dimensions of existing integrated circuits and simultaneously increase their functions. The smaller an integrated circuit, the less the material needed for its manufacture, and the smaller the space needed to accommodate it. Integrated circuits are utilized in a large range of products, including articles of everyday use, such as watches, television sets, washing machines, automobiles, etc., as well as sophisticated data processing equipment.

The possibility of copying by photographing each layer of an integrated circuit and preparing masks for its production on the basis of the photographs obtained is the main reason for the introduction of legislation for the protection of layout-designs.

Because of the functional nature of the mask geometry, the designs cannot be effectively protected under copyright law (except perhaps as decorative art). Similarly, because individual lithographic mask works are not clearly protectable subject matter, they also cannot be effectively protected under patent law, although any processes implemented in the work may be patentable. So since the 1990s, national governments have been granting copyright-like intellectual property rights conferring time-limited exclusivity to reproduction of a particular layout.

21.4.8 Trademarks

A trademark is a distinctive sign, which identifies certain goods or services as those produced or provided by a specific person or enterprise. Trademarks may be one or combination of words, letters, and numerals. They may also consist of drawings, symbols, three dimensional signs such as shape and packaging of goods, or colours used as distinguishing feature. Collective marks are owned by an association whose members use them to identify themselves with a level of quality. Certification marks are given for compliance with defined standards. (Example ISO 9000.). A trademark provides to the owner of the mark by ensuring the exclusive right to use it to identify goods or services, or to authorize others to use it in return for some consideration (payment).

Well-known trademark in relation to any goods or services, means a mark which has become so to the substantial segment of the public which uses such goods or receives such services that the use of such mark in relation to other goods or services would be likely to be taken as indicating a connection in the course of trade or rendering of services between those goods or services and a person using the mark in relation to the first-mentioned goods or services.

21.4.9 Basic Principles of Trademarks

Enactment of the Indian Trademarks Act 1999 is a big step forward from the Trade and Merchandise Marks Act 1958 and the Trademark Act 1940. The newly enacted Act has some features not present in the 1958 Act and these are:-

1. Registration of service marks, collective marks and certification trademarks.
2. Increasing the period of registration and renewal from 7 years to 10 years.
3. Allowing filing of single application for registration in more than one class.
4. Enhanced punishment for offences related to trademarks.
5. Exhaustive definitions for terms frequently used.
6. Simplified procedure for registration of registered users and enlarged scope of permitted use.
7. Constitution of an Appellate Board for speedy disposal of appeals and rectification applications which at present lie before High Court.

- **Well-known trademarks and associated trademarks**

A well-known trademark in relation to any goods or services means a mark which has become known to the substantial segment of the public that uses such goods or receives such services. Associated Trademarks are, in commercial terms, marks that resemble each other and are owned by the same owner, but are applied to the same type of goods or services. For example, a company dealing in readymade garments may use associated marks for shirts, trousers etc. means trademarks deemed to be, or required to be, registered as associated trademarks under this Act.

- **Service Marks**

The Indian Act of 1958 did not have any reference to service marks. Service means service of any description that is made available to potential users and includes the provision of services in connection with the business of industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising. Marks used to represent such services are known as service marks.

- **Certification Trademarks and Collective Marks**

A certification trade mark means a guarantee mark which indicates that the goods to which it is applied are of a certain quality or are manufactured in a particular way or come from a certain region or uses some specific material or maintains a certain level of accuracy. The goods must originate from a certain region rather from a particular trader. Certification marks are also applicable to services and the same parameters will have to be satisfied. Further these marks are registrable just like any other trademark. Agmark used in India for various food items is a kind of certification mark although it is not registered as a certification mark; the concept of certification mark was not in vogue at the time of introduction of Agmark.

A collective mark means a trademark distinguishing from those of others, the goods or services of members of an association of persons (not being a partnership within the meaning of the Indian Partnership Act, 1932), which is the proprietor of the mark.

- **Term of a registered trademark**

The initial registration of a trademark shall be for a period of ten years but may be renewed from time to time for an unlimited period by payment of the renewal fees.

21.4.10 Protection of Geographical Indications

Indications which identify a good as originating in the territory of a member or a region or a locality in that territory, where a given quality reputation or other characteristics of the good is attributable to its geographical origin. The concept of identifying GI and protecting them is a new concept in India, perhaps in most developing countries, and has come to knowledge in these countries after they signed the TRIPS Agreement. It may be noted that properly protected GI will give protection in domestic and international market. Stipulations of TRIPS would be applicable to all the member countries. According to TRIPS, GI which is not or cease to be protected in its country of origin or which has fallen into disuse in that country cannot be protected. Homonymous GI for wines will get independent protection. Each state shall determine conditions under which homonymous indications will be differentiated from each other.

21.4.11 Protecting new plant variety

New plant varieties can now be protected in India under the New Plant Variety and Farmers Rights Protection Act in 2001. New plant varieties cannot be protected through patents. However, the Act has not become operational as subsidiary legislation is yet to be put in place. India has enacted the which, in addition to meeting the technical features of UPOV, provides rights to farmers to use the seeds from their own crops for planting the next crop. Further, there are provisions for benefit sharing with farmers, penalty for marketing spurious propagation material and protecting extant varieties. There is a provision for protecting extant variety and farmers' varieties as well. The total period for protection is 10 years from the date of registration.

There are 5 main criteria to arrive at a decision whether a plant variety is really new or not. These are:

- Distinctiveness
- Uniformity
- Stability

- Novelty and
- Denomination

The variety shall be deemed to be distinct if it is clearly distinct from any other variety whose existence is a matter of common knowledge at the time of filing of the application. The variety shall be deemed to be uniform if, subject to the variation that may be accepted from the particular features of its propagation, it is sufficiently uniform in its relevant characteristics. The variety shall be deemed to be stable if its relevant characteristics remain unchanged after repeated propagation or, in the case of a particular cycle of propagation at the end of each such cycle. The variety shall be deemed to be new if, at the date of filing of the application for breeder's right, propagating or harvesting material of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder for the purpose of exploitation of the variety. The variety shall be designated by a denomination, which will be its generic designation. The premise that the variety denomination must be its generic designation class for a requirement that 'denomination must enable the variety to be identified.

21.5 Summary

In this unit we studied about intellectual property rights, their nature, advantages and different types of IPRs. Intellectual Property Rights are legal rights, which result from intellectual activity in industrial, scientific, literary & artistic fields. These rights Safeguard creators and other producers of intellectual goods & services by granting them certain time-limited rights to control their use. Protected IP rights like other property can be a matter of trade, which can be owned, sold or bought. These are intangible and no exhausted consumption. **Intellectual** property rights help in providing exclusive rights to creator or inventor thereby induces them to distribute and share information and data instead of keeping it confidential. It provides legal protection and offers them incentive of their work. Intellectual property rights as a collective term includes the various independent IP rights which can be collectively used for protecting different aspects of inventive work for multiple protection such as patents, trademarks, copyrights, industrial designs, geographical indication, protection of layout designs and protection of new plant law varieties. IPR have

fixed term except trademark and geographical indications, which can have indefinite life provided these are renewed after a stipulated time specified in the law by paying official fees.

21.6 Glossary

Assigned Duty: Duty, within an employee's Scope of Employment that an employer assigns to an employee. Such a duty or activity is under the control, direction, specific authorization or supervision of the employer.

Consideration: Any form of payment, whether cash, Equity or other item or thing of value.

Improvement(s): Intellectual Property that was developed while using or practicing an existing Intellectual Property or is directly dependent upon the claims of a basic patent.

Invention: Any discovery, process, composition of matter, article of manufacture, know-how, design, model, technological development, biological material, strain, variety, culture of any organism, or portion, modification, translation, or extension of these items, and any mark used in connection with these items.

Know How: Knowledge pertaining to Improvements, discoveries, Intellectual Property, Research Data, instructions, processes, protocols, formulas, information and trade secrets.

Mask Works: A series of related images representing a predetermined, three-dimensional pattern of metallic, insulating, or semi-conducting layers of a semiconductor chip product.

Joint Ownership: Ownership in Intellectual Property by more than one party.

Material Recipient: An institution, party, or individual receiving original Tangible Research Property under the terms of a Material Transfer Agreement (MTA).

21.7 Check your progress

1. Which of the following is not a focus of intellectual property?

(a) To protect the product of mental effort

(b) To give the creator the right to benefit from it

(c) To encourage the free flow of new ideas.

(d) To prevent people from copying others' ideas.

(e) To outline the rights and responsibilities of the inventor and the users of the invention.

2. Which of the following is not specifically protected by intellectual property legislation?

(a) Patents

(b) Trade Secrets

(c) Copyrights

(d) Industrial designs

(e) Trademarks

3. Which of the following cannot be protected by copyrights?

(a) Computer software and hardware.

(b) Literary works.

(c) Musical composition

(d) Graphic works

(e) Folklore

4. In patent law, the invention must have which of the following characteristics?

(a) The invention cannot have been in use by others.

(b) The invention must have unique qualities.

(c) The invention must be a concrete thing that can be constructed.

(d) The invention must be something new and be invented by the inventor herself.

(e) All of the above

5. Which remedy is not likely to be awarded, when intellectual property rights are infringed?

(a) Interlocutory injunction.

(b) An accounting

(c) Specific performance

(d) Damages

(e) Anton Piller order

6. In an action to protect the trademark, which of the following civil remedies are available.

(a) An order giving the custody of infringing products to the owner of the trademark.

(b) A permanent injunction

(c) Punitive damages

(d) Damage of an accounting

(e) All of the above

7. Which of the following is not true with respect to an industrial design which can be registered under the industrial design act?

(a) The product must be original and not a copy.

(b) The item can be similar to some product already on the market.

(c) It makes a manufactured article distinct in some way

(d) The distinctive feature can be ornamental in nature

(e) It must be a unique shape, pattern or ornament.

8. Which of the following is true with regard to the law of trade secrets and breach of confidence?

(a) Trade secret protection is seldom used because it is governed by a difficult-to-understand federal statute.
(b) A person cannot be accused of wrongful disclosure of confidential information if, when disclosed, it was no longer confidential.
(c) An Anton Piller order is a court order requiring a person who stole and used a trade secret to make an accounting of all the profit realized from its use
(d) The subject matter protected by the law of trade secrets is set out in the provincial trade secrets act
(e) None of the above

21.8 Answers to check your progress

1. d) 2. b) 3. e) 4. e) 5. c) 6. e) 7. b) 8. b)

21.9 Terminal Questions

1. Define Intellectual property right. Explain their nature and advantages.
2. What can be patented? Explain the basic principles of patent law.
3. How does copyright protection differ from patent protection? Can computer software be protected by copyright?
4. What are the defenses to patent infringement?
5. Write notes on the following:
    a) Patenting of microbiological inventions
    b) Non patentable inventions
    c) Infringement of copyrights
6. What is industrial design? Explain basic principles of industrial design.
7. Write notes on:
    a) Protection of Geographical Indications
    b) Protecting new plant variety
    c) Certification Trademarks and Collective Marks
    d) Layout Designs

21.10 Suggested Readings

Gupta T. S, Intellectual property law in India, Kumar law international, 2011

Myneni S. R, Law of Intellectual Property, Asia Law House Hyderabad, 2001

Narayan, P.S, Intellectual property law in India, Gogia Law Agency, Hyderabad, 2001

Mittal D.P, New law of trademarks and geographical indication of goods, Taxmnan allied services, New Delhi, 2000.

http://en.wikipedia.org/wiki/Intellectual_property

http://indiainbusiness.nic.in/investment/ipr.htm

http://ipindia.nic.in/ipr/patent/patents.htm

http://www.pfc.org.in/workshop/workshop.pdf

Unit – 22: Ownership and Enforcement of IPRs

22.1 Introduction

22.2 Ownership and Protection of Intellectual Property Rights in India

22.3 The TRIPS Agreement

22.4 Significance of Intellectual Property Ownership for Developing Countries

22.5 IPR-Enforcement Law in India

22.6 Enforcement Mechanism available under the Indian Law

22.7.1 Patent

22.7.2 Trademark

22.7.3 Impounding of Goods Bearing Counterfeit Marks

22.7.4 Copyright

22.7.5 Design

22.7 Utility Model of Invention

22.8 Trade Secrets Protection

22.9 Provisional Measures of IPR

22.10 Summary

22.11 Glossary

22.12 Check your Progress

22.13 Answers to check your progress/SAQ

22.14 Terminal Questions

22.15 Suggested Readings

Objectives

After reading this unit you will be able to:

- Explain the meaning and significance of intellectual property ownership and enforcement.
- Discuss IPR enforcement law in India.
- Describe Enforcement Mechanism available under the Indian Law.
- Explain utility model of invention.
- Describe provisional measures of IPR

22.1 Introduction

Intellectual property right is a legal concept that confers rights to owners and creators of the work, for their intellectual creativity. Such rights can be granted for areas related to literature, music, invention etc, which are used in the business practices. In general, the intellectual property law offers exclusionary rights to the creator or inventor against any misappropriation or use of work without his/her prior knowledge. Intellectual property law establishes equilibrium by granting rights for limited duration of time. Every nation has framed its own intellectual property laws. But on international level it is governed by the World Intellectual Property Organization (WIPO). The Paris Convention for the Protection of Industrial Property in 1883 and the 'Berne Convention for the Protection of Literary and Artistic Works' in 1886 were first conventions which have recognized the importance of safeguarding intellectual property. Both the treaties are under the direct administration of the WIPO.

Intellectual Property (IP) laws are extremely important for the scientific development of a country. Strong Intellectual Property legislation ensures the progress in varied fields and result in the growth of a country's knowledge bank. It is of utmost importance that the strong IP laws must be ably supported by an equally strong enforcement mechanism. Fair, strong and non- discriminatory Intellectual Property Rights (IPRs) enforcement creates economic incentives that encourage innovation. A strong IPR regime helps attract new investment and allows innovators to develop new technologies. It is, therefore imperative that any law providing for the protection of intellectual property also provides strategic remedies for prevention of it's infringement through effective enforcement measures.

22.2 Ownership and Protection of Intellectual Property Rights in India

India has defined the establishment of statutory, administrative and judicial framework for protecting the intellectual property rights in the Indian territory, whether they connotes with the copyright, patent, trademark, industrial designs or with other parts.

Tuning with the changing industrial world, the intellectual property rights have continued to strengthen its position in the India. In 1999, the government has passed the important legislation in relation to the protection of intellectual property rights on the terms of the worldwide practices and in accordance to the India's obligations under the Trade Related Aspects of Intellectual Property Rights. It consists of -

- The Patents(Amendment) Act, 1999 which was passed on 10th March, 1999 in the Indian Parliament for amending the Patents Act of 1970 which in turns facilitate to establish the mail box system for filing patents and accords with the exclusive marketing rights for the time period of 5 years.
- The Trade Marks Bill, 1999 was passed in the India parliament during the winter session for replacing the Trade and Merchandise Marks Act, 1958. It was passed on 23rd December, 1999.
- The Copyright (Amendment) Act, 1999 was passed by both upper house and lower house of the Indian parliament and was later on signed by the Indian president on 30th December, 1999.
- The sui generis legislation was approved by both houses of the Indian parliament on 23rd December, 1999 and was named as the Geographical Indications of Goods (Registration & Protection) Bill, 1999.
- The Industrial Designs Bill, 1999 was passed in the Upper House of the Indian parliament for replacing the Designs Act, 1911.
- The Patents (Second Amendment) Bill, 1999 was introduced in the upper house of the parliament for further amending the Patents Act 1970 and making it compliance with the TRIPS.

Along with the above legislative measures, the Indian government has introduced several changes for streamlining and bolstering the intellectual property administration system in the

nation. Several projects concerning to the modernizing of the patent information services and trademark registry have been undergone with the help of the World Intellectual Property Organization/ United Nations Development Programme.

22.3 The TRIPS Agreement

The International community around the early 1990 came to realize the importance of IPRs and their effective enforcement for the growth and prosperity of any country. Fall out of this realization was the Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement which was signed at the Uruguay round of the WTO in 1994 and which came into force on 1st January 1995. The world view on the need for enforcement and protection of intellectual property rights crystallized in the form of TRIPs Agreement. The objective of the TRIPs Agreement as laid down in Article 7 of the Agreement, states as under:

"The protection and enforcement of IPR should contribute to promotion of technological innovation and to transfer and dissemination of technology, to the mutual advantage of producers and uses of technological knowledge and in a manner conducive to social and economic welfare and to a balance of rights and obligations."

22.4 Significance of Intellectual Property Ownership for Developing Countries

Management of Intellectual Property Rights owners (IPRs) has assumed an increasingly important role in deciding the technological prospects of a developing country like ours. The World Trade Organization (WTO) agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) has laid down certain minimum standards for protection and enforcement of intellectual rights, requiring member countries to practice effective and adequate protection of intellectual property rights with a view to promoting fair international trade. However, it is the discretion of the member country to decide how to implement the provisions of the agreement within its own legal framework and practice.

IPR exploitation and IPR protection are crucial factors that have a direct impact on how well a country performs in a new economic environment. Moreover, technological self-reliance is of utmost importance to a developing country like India- seeking to harness technology for economic growth and development. Ownership of intellectual property also helps check free-

riding on intellectual assets and provides innovators with an incentive to engage in inventive activities. India has realized this fact, and has therefore taken all the necessary measures to ensure a strong IPR regime. The country has made significant investments on the legislative as well as legal and institutional aspects towards meeting this end.

Newgen understands the importance of IPR protection, and this is evident from the fact that the Indian Patents Office, in its annual report for 2009-2010, has listed the company as one the top 5 Indian applicants for patents in the field of Information Technology. Further, the company has filed patents wherever applicable and secured IPR for other innovations, through Copyrights and Trademarks for its products.

22.5 IPR-Enforcement Law in India

"Intellectual Property Rights" is an extension of Common Law concept of ownership. Ideas, concepts, expression, intellect, creativity, the intangible forms of human capabilities are treated as tangible property capable of being owned by their creators in the same manner as any tangible object is and, therefore, like any other property, need to be protected by law. Lately due to globalization, easy accessibility to information, technology, development of innovative models of business and shrinking of trade barriers by formation of groups and associations of countries like EU, SAARC, NAFTA, G-8 etc. intellectual property has acquired a trans-boundary effect making it increasingly vulnerable to infringement.

The general laws in relation to Intellectual Property Enforcement in India are mainly the following:

- Code of Civil Procedure
- Indian Penal Code
- The Civil and Criminal Rules of Practice.

While Civil Procedure Code provides for the civil remedies and enforcement through civil courts, the Indian Penal Code provides for penal remedies. The rules of practice of the trail courts, High Courts and the Supreme Court of India set the finalities of the enforcement procedure. India follows common law tradition and judicial precedents do have binding force. Hence the decision of the Supreme Court binds the Lower judiciary of the country.

The IP laws do provide for statutory enforcement mechanisms. The most important of the Indian Intellectual Property Laws are:-

- The Patent Act, 1970
- The Trade Mark Act, 1999
- The Copyright Act,1957
- The Design Act,2000

The above legislations are supported by the relevant Rules there under and these rules are:-

- The Patent Rules, 1972 as amended by Patents (Amendment) Act of 1999.
- The Trade Mark Rules,2001
- The Copyright rules, 1958 and
- The Design rules,2001
- The main post WTO Intellectual Property Legislations are:-
- The Geographical Indication Act,1999
- The Semi Conductor Integrated Circuit Lay Out-Design Act, 2000

The geographical indications rules provide for the administrative mechanism for registration and enforcement of geographical Indications. The Semi Conductor Integrated Circuits Lay out Design Act, 2000 the under the Act were notified in the official gazette on 11th of December 2001to support the administrative mechanism there under.

The Information Technology Act, 2000 also plays an important role in relations to areas of inter phase between information Technology and IPR.

22.6 Enforcement Mechanism available under the Indian Law

22.6.1 Patent

A suit for enforcing a patent has to be filed before a District Court having jurisdiction to try the suit .The right to move to the court of law to enforce a patent is vested with any person who holds a valid claims on the subject matter of the patent. The relief that a court may grant in a patent infringement suit, would be either damages or account of profits.

In deciding whether an act amounts to infringement of a patent, courts generally take into account various factors, which includes:-

- **The scope of claim**

Whether the act amounts to any of the recognized rights under the scope of the patent. Whether the alleged act of the infringement constitutes an infringement of the monopoly recognized under the patents. The Onus of the establishing the infringement is on the plaintiff. Under certain circumstances the Onus of proving an infringement of a process claim is shifted to the defendant.

A suit for the infringement of a patent can be instituted only after the sealing of the patent. Damages caused in respect of infringement during the period between the date of advertisement of acceptance and the date of the sealing may be cleared in the suit. In an action for infringement of a patent a defendant may plead any of the following defenses:-

(a) Denial of infringement.
(b) Plaintiff is not entitled sue for infringement.
(c) License to use the invention express or implied.
(d) Estoppel
(e) Existence of an unlawful contract.
(f) Claims invalid on account of lack of novelty and non- obviousness.
(g) Innocent infringement in cases against a claim for damages or account of profit.

It is common and possible for the plaintiff to move an interim application for temporary injunction. The court may on the basis of prima facie evidence grant a temporary injunction restraining the infringer from working the invention. The procedure concerning infringement action must confine to the Civil Procedure Code, if the suit is filed before a District Court and if the matter is before the High Court the rule of practice of the court also shall apply. The main reason for a possible delay in getting orders in a patent infringement suit is the provision for preferring appeals from interim order of trial courts. This makes the main suit to remain pending without entering the trial stage and final order.

22.6.2 Trade Mark

Under Trade Marks Act, 1999 both civil and criminal remedies which are available for taking action against infringement of client's trademark are as given below:

1. Civil Remedies

The Act provides that no action can be taken for infringement of an unregistered trademark in India. However, registration of a trademark does not affect any rights acquired under common law by the use of such mark. Therefore, in case of an unregistered trade mark, common law rights have been protected whereby the proprietor of a trade mark, whether registered or unregistered, may sue for passing off arising out of the use by the defendant of any trade mark which is identical with or deceptively similar to the plaintiff's trade mark, in the appropriate Court in India. Further it has to be established that the acts, actual or threatened, of the defendant are such that they are likely to result in passing off the goods of the defendant as the goods of the plaintiff.

The issues arising in a passing off action are as follows:

- Whether the plaintiff has established a goodwill or reputation in connection with a business, profession, service or any other activity, among the general public or among a particular class of people, prior to the first use of the defendant.
- Whether the defendants' activities or proposed activities amount to a misrepresentation which is likely to injure the business or goodwill of the plaintiff and cause or likely to cause damage to his business or goodwill.
- Whether the defendant succeeds in one or more of the defenses set up by him.

The Relief the Plaintiff is entitled to:

The relief which can be granted by a court in any suit for passing off includes an injunction subject to such terms, if any, as the court thinks fit and at the option of the plaintiff, either damages or an account of profits, together with or without any order for the delivery-up of the infringement labels and marks for destruction or erasure. The judicial precedents have established the following: -

I. In considering the balance of convenience, factors favourable to the plaintiff are:

- the plaintiff should be the first in the field;
- should institute proceedings without delay;
- plaintiff has built up goodwill by expending large sums in advertising;
- Injunction will not prevent defendant from marketing his product but it will only prevent him marketing it in such a way as to suggest that it is the same as the plaintiff's; and
- The plaintiff has not merely an arguable but a prima facie case.

II. Regarding relief's it is established that damages recoverable at law at times may not be adequate remedy to the plaintiff if the defendant is not restrained and the plaintiff ultimately succeeds at the trial in the following situations: -

- If there is a risk of loss of goodwill (goodwill lost may be goodwill lost for ever),
- If it is difficult to ascertain the loss of sales to the plaintiff, and
- If the defendants' product is inferior.

In the above instances Damages would not be an appropriate remedy because it would be exceedingly difficult to ascertain what proportion of the plaintiffs' trade would be lost through passing off as compared with lawful competition. Damages would also not be an appropriate remedy if the plaintiffs have an established business which is or may be under threat and the defendants have only just started to trade in competition, the balance of convenience would favour protection of the relatively long established against the new interloper.

According to the new meaning of passing off even if as a result of misrepresentation a real likelihood of confusion or deception of the public and consequent damage to the plaintiff is there then the relief shall be granted.

Transborder Reputation

The Indian judicial precedents have widely recognized and accepted the transborder reputation of the Marks even if they are not registered in India.

2. Criminal Remedies

The Act also provides for offences relating to a trademark, whether registered or unregistered. The Trade Marks Act enumerates the following offences:-

- Falsifying a Trade Mark;
- Falsely applying a Trade Mark;
- Making or possessing instruments for falsifying Trade Marks;
- Applying false trade description;
- Applying false indication of country of origin;
- Tampering with an indication of origin already applied to goods;
- Selling goods or possessing or exposing for sale of goods falsely marked;
- Removing piece goods etc.
- Falsely representing a trade mark as registered;
- Improperly describing a place of business as connected with the Trade Marks Office;
- Falsification of entries in the Register.

The complaint for any of the above offences must be filed before the Sessions Judge, Presidency Magistrate or Magistrate within whose territorial jurisdiction the offence is committed. The Complaint may be filed by anybody either directly with the Magistrate or through the concerned Police Station. Subsequent thereto, the provisions of the Criminal Procedure Code apply with respect to the proceedings.

The accused in respect of the offences 1 to 7 above is punishable with imprisonment for a term, which may extend to 2 years, or with fine, or with both. However, if the offence is pertaining to drugs [as defined under Drugs & Cosmetics Act] or food [as defined under Prevention of Food Adulteration Act] the offender shall be punishable with imprisonment for 3 years or fine or both. Offence No. 8 is punishable with a fine. Offence Nos. 9 & 10 is punishable with an imprisonment extending up to 6 months or with fine or both. Offence No. 11 is punishable with imprisonment for a term, which may extend to 2 years, or with fine, or with both.

22.6.3 Impounding of Goods Bearing Counterfeit Marks

Goods bearing false Trade Marks or false descriptions are prohibited from being imported into Indian under the Customs Act, 1962 and when imported are liable to detention or confiscation. In respect of any goods imported into India, if the Chief Customs Officer, upon representation made to him, has reasons to believe that the goods bear a false Trade Mark, he

may require the importer of goods or his agent to produce any documents in his possession relating to the goods and also to furnish information as to the name and address of the person by whom the goods are consigned to India and the name and address of the person to whom the goods were sent in India. Non-compliance of this requirement is punishable with fine. Though the statute refers only to registered trademark, the Customs Office is not prohibited from taking action against counterfeit of unregistered Trade Marks.

- **Criminal Remedies**

The Trade Marks Act, 1999 provides for a comprehensive scheme whereby those persons who un-authorized deal with the trade marks can be punished for various offences. The offences includes:-

- Falsifying and falsely applying trademarks.
- Selling goods or providing services to which false trademark or false trade description is applied.
- Removing piece goods etc. contrary to Sec81 which deals with stamping of piece goods, cotton yarn and threads.
- Falsely representing a trade mark as registered.
- Falsification of entries in the register; and
- Abetment in India, of acts done outside India etc.

- The punishment of these offences includes a minimum imprisonment of 6 months and minimum of Rs.50, 000 which may extent to a maximum of 3 years and Rs.20, 000 respectively. Section 105 of the Act provides for enhance penalty on second or subsequent conviction.
- **Administrative Remedies**

The Act also vests certain powers in the various administrative authorities to relief and remedies to the aggrieved persons. It is the Registrar who mostly exercises these powers under the guidance of the Central Government.

22.6.4 Copyright

Since India is a member to the Berne Convention and TRIPs, the proprietor of the trademark from another member country will get copyright protection in India.

In order to get copyright protection it is essential that there is a reproduction of substantial part of the original copyright label.

Infringement of copyright in respect of an artistic work consists in doing or authorizing the doing of any of the following acts without the consent or licence of the copyright owner:-

- To make an adaptation of the work;
- To include the work in any cinematographic film;
- To reproduce the work in any material form including the depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work;
- To communicate the work to the public;
- To do in relation to an adaptation of the work any of the acts specified in relation to the work in sub clause (1) to (4);
- To issue copies of the work to the public.

Civil Remedies:

Civil remedies for enforcement of the copyright including injunction, damages, account of profits, delivery of infringing marks and damages for conversion can be invoked by owner of copyright or in certain cases, publisher of the trademark label.

Suit for injunction: Restraining the impeding infringement or continuing infringement. The relief claimed may be in the form of perpetual injunction i.e. permanently restraining the defendant from infringing the copyright or may be in the form of mandatory injunction, directing the defendant to withdraw, hand-over or destroy the infringing works and articles.

Suit for damages: Damages can be claimed – (1) as an amount of loss sustained by the holder of copyright by reason of infringement. (2) as an amount representing the profits made by the infringer and (3) as an amount representing the value of infringing copies.

The first two reliefs' are alternative to one another i.e. one of the two but not both can be claimed, the third however, is in addition to one or the other of the first two.

Law presumes that all the infringing copies and plates are the property of the copyright holder and hence they are liable to be surrendered to the copyright holder

In case of account of profits, the infringer is required to hand over his ill- gotten grains to the party whose rights he has infringed and in the case of damages, he is required to compensate the party wronged for the losses that the party suffered.

Criminal Remedies:

The owner of the copyright and also any person can initiate criminal proceedings, by filing a complaint before the competent First Class Magistrate within whose jurisdiction, the plaintiff resides or the infringement takes place or deemed to have taken place. The procedure prescribed under Criminal Procedure Code applies to the proceedings before the criminal court. Court has the power to direct seizure of the infringing works as well as all other tools, accessories and containers etc., which are for the purpose of the Act treated as the property of the copyright holder and can, direct them to be handed over to him. On conviction, the Criminal Court can sentence the accused to an imprisonment upto 3 years and a fine extending upto Rs.2 lakhs. Recent amendment have made the imposition of punishment to a minimum term of 6 months and a fine of Rs.50,000 mandatory unless for special reasons to be recorded if the magistrate awards lesser punishment than the minimum.

Administrative Remedies:

An application can be made by the owner of the copyright in any work or by his duly authorized agent, to the Registrar of Copyright to ban the import of infringing copies of trade mark label which were earlier confiscated from infringer to the owner of the copyright.

22.6.5 Design

The Designs Law was recently amended. The Designs Act, 1911 was substituted with the Designs Act, 2000 as an outcome of TRIPS/WTO compliance. The law provides for an enforcement mechanism whereby unauthorized application of a registered design is made illegal. Also the importation for sale of any article the design of which is registered in India is made illegal. To expose or publish for the purposes of sale of any article on which a design is applied is also an illegal act as per the law in force.

The law provides for payment of damages by the infringer. The suit thereof must be instituted before a District Court. It is possible for the plaintiff to seek an interim relief and an injunction.

22.7 Utility Model of Invention

The utility model is the intellectual property right for protecting the inventions. It is somehow described as the statutory monopoly which is bestow upon for the fixed duration of time in exchange to the inventor for the offering of the sufficient teaching of the invention and permitting the other person, possessing the ordinary skills of the relevant art, of performing the invention. The rights granted under the utility model are somewhat identical to those conferred upon by the patent but are more considerable for using the term 'incremental inventions'. Sometimes words like 'petty patent', 'innovation patent', 'minor patent' and 'small patent' are used in reference of the utility model. Such models are considered to be more suitable particularly for the small scale enterprises, which in turns make the 'minor' improvements with the adaption of the existing products. Utility models are more commonly used for the mechanical innovations.

The utility model rights are recognized as the registered rights which provide the owner 'exclusivity' protection in terms of the invention. In general context the invention must be new and should encompasses the inventive step and able for lending itself to the industrial usage, which would be protected through the utility model. It is possible to grant utility model without following the lengthy process of examination. Unlike patents, utility model rights are granted for shorter time span; say 6 or 10 years, without the renewal or extension possibility and it follows less stringent requirements. These models are comparatively cheaper in obtaining and maintaining.

The utility model of German and Austrian is known as the "Gebrauchsmuster", which in turns have influenced the model of other nations like Japan. The utility model working in Indonesia and Finland is termed as 'Petty Patent'. Such models are deemed to be more suitable for small and medium size enterprises which make few improvements. These are primarily found to be used for mechanical innovations also.

The origin of utility model goes back to the period of 1891 in Germany where it was enacted with a motto of filling the gap. During that time the patent office of Germany provided patents only to those inventions which were new and showed some degree of creativeness. But it was found that there was good number of the technical solutions which consisted of the industrial creation having some technical or constructive complexity. Such small inventions were not patented but the German legislature was of the view that they deserved to be protected due to the possession of their high economic value. Therefore it was decided of creating the set of exclusive rights, other than the patents and which was appropriate for safeguarding such minor inventions. It comes in the form of the utility model rights.

Soon after many other nations also joined up the club in providing utility model in their respective territories. Like Poland, Japan, Spain, Italy, Portugal. Afterwards the list has also been extended with the adoption of the utility model by Greece, Finland, Denmark and Austria. Utility model safeguards the technical inventions which comply with the requirements of novelty and industrial usages with some sort of 'inventive' touch.

Usually the procedure of obtaining the utility model right requires fulfilment of simple registration procedure. There are some sort of formal requirements which are only required to fulfill for enjoying the utility model rights. The application is required to be divided as per the number of devices to be registered. Drawings which are required to be bring under the utility model protection should be attached with the applications along with the prescribed fees.

There is no particular system for checking the application for utility model registration. Instead of examining whether the filed application is novel or not, examiners check that the application meets the desired requirements and is not against the societal orders; application is clear with no misleading facts. If the application fails to comply with basic requirements then a notice will be sent to applicant and ask him to amend it. If the applicant fails to do so then the proposed application will no longer exist. Those applications which have been scrutinized and pass through the formality checking levels are required to be registered. The registration rights will be instituted without passing through any hard core examination. The applicant will pay registration fees.

After registering of utility rights same will be published in the official gazette to let the public know about any such utility model rights. Once all these requirements have been fulfilled, the person will be granted such rights. Generally the applicant can obtain utility model after the 6 months of the application filing. Different rules are followed in various nations across the world. In Spain, there comes an opposition stage after the formal examination of the application. The third party having the legitimate interests can oppose the utility model registration and can proof that the invention is missing one of the protection requirement prescribed by the law. Similarly in German, Austria, Finland and Denmark the applicant can ask the patent office for writing the 'report on the state of the art', which would help in determining that whether the invention is novel or not and whether it consists of the inventive skills or not. But such report does not have any legal enforcement and therefore office should provide utility model registration despite of what the report says.

22.8 Trade Secrets Protection

Trade secret points towards a formula, pattern, any instrument, design which is kept confidential and through which any business or trade can edge over its rival and can enjoy economic gain. Trade secrets can be anything from a chemical compound, manufacturing process, design or preserving materials or even a list of consumers or clients. It is also known as "confidential information" or "classified information". To be safeguarded under trade secrets, the matter should be 'secret'. Though the definition of trade secret is variable as per the jurisdiction but there are following elements that are found to be same -

- Is not known by the public.
- Provides some financial sort of gain to its holder.
- Involves reasonable efforts from the holder side for maintaining secrecy.
- Importance of data or information to him or for his rivals.
- The ease by which information could be learned or duplicated by others.

Any enterprise or an organization can safeguard its confidential data or information by entering into non disclosure agreement with its employees. Such law of protecting confidential matters offers monopoly in respect of any secret data and information. Trade secrets offer protection for an indefinite time period. Unlike patent it does not expire.

Every company invests its time and resources into discovering information regarding refinement of its various activities and operations. If other company will be allowed to use the same knowledge then the chance of first company survival and dominance into the industrial arena would be vitiated. When trade secrets are recognized then the inventor of such knowledge is entitled to consider that as part of the intellectual property.

Unlike of patent, copyright, there is no particular international treaty(s) for trade secrets. Moreover there is no global law for standardizing definition of trade secrets. Trade secrets are gaining recognition year by year in throughout the world. It has been said that the major technologies in the world are protected under the head of trade secret instead of patent. The 'North American Free Trade Agreement' (NAFTA) and the agreement on 'Trade Related Aspects of Intellectual Property' (TRIPs) ratified during the Uruguay round of the 'General Agreement on Tariffs and Trade' (GATT) have there specific provisions which point towards increase in the protection granted to trade secrets. Furthermore there has been a rising trend particularly in Asian nations of using the domestic statues which direct towards trade secrets protection.

Trade secrets are kept secret and thus not disclosed to the public at large. The owner or creator takes concurrent steps and prevent his knowledge from slipping out his hands to its rival side. In exchange of getting the chance to be appointed by the holder of trade secrets, a worker will ready to sign a contract not to disclose any material information and data of his employer. Any negligence or violation of the same will means an imposition of financial penalties. Other business associates or companies with whom the inventor is engaged are often signed a same contract and any negligence will lead to fine or penalties.

If any company by unlawful means try to find out trade secrets of other company then he will be held legally responsible under that country's act in which it has been happened. If trade secret has been obtained via industrial espionage, then it will be called illegal and the person or company involved in it shall be found guilty for legal liability.

22.9 Provisional Measures of IPR

1. The judicial authorities shall have the authority to order prompt and effective provisional measures:

(a) To prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance;

(b) To preserve relevant evidence in regard to the alleged infringement.

2. The judicial authorities shall have the authority to adopt provisional measures inaudita altera parte where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.

3. The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.

4. Where provisional measures have been adopted inaudita altera parte, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed.

5. The applicant may be required to supply other information necessary for the identification of the goods concerned by the authority that will execute the provisional measures.

6. Without prejudice to paragraph 4, provisional measures taken on the basis of paragraphs 1 and 2 shall, upon request by the defendant, be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority ordering the measures where a Member's law so permits or, in the absence of such a determination, not to exceed 20 working days or 31 calendar days, whichever is the longer.

7. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities

shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures.

8. To the extent that any provisional measure can be ordered as a result of administrative procedures, such procedures shall conform to principles equivalent in substance to those set forth in this Section.

22.10 Summary

In this unit we studied about significance of Intellectual Property Ownership and Enforcement Mechanism available under the Indian Law. In 1999, the government has passed the important legislation in relation to the protection of intellectual property rights on the terms of the worldwide practices and in accordance to the India's obligations under the Trade Related Aspects of Intellectual Property Rights. As a laws concerning intellectual property are already in place, the need of the hour is a specialized and tactful judiciary, which can deal with intellectual property rights issues with aptness keeping the national interest in mind and ensure effectiveness of enforcement system. Rights holder should be encouraged to participate in enforcement actions. The quantum of damages awarded by the court should be such that they not only compensate the right holder for the losses suffered, but should also act as a deterrent for infringers form engaging in illegal activities. Infringers can also be directed to take corrective advertising to indemnify the loss caused to the good will of the right holder.

22.11 Glossary

Plaintiff: Applicant

Infringement: Violation/ Breach

Trading Secret: Trading secret is close information to the public in the field of technology and / or business, has economic value because it is useful in the business activities, and kept secret by the owner of a trade secret.

Description: Description is the complete explanation of the invention asked for a patent. Writing a description or an explanation of the invention must be fully and clearly disclose an invention that can be understood by the expertise. Description of the invention should be

written in a good and correct Indonesian language. All of the words or phrases in the description should use a common language and terminology used in the field of technology.

Multiplication: Multiplication is the increasing of whole or part of the creation which are substantial by using the same materials or not, including permanent or temporarily adaptations.

Joint ownership: The term joint ownership refers, in general, to a situation in which two or more persons share interests in property rights. Such rights include all types of rights in moveable and immovable property. In Intellectual property law, all types of protected subject matter can be owned jointly.

22.12 Check your progress/ Self assessment questions (SAQ)

1. The origin of utility model goes back to the period of 1891 in ----------where it was enacted with a motto of filling the gap.

a) France
b) Germany
c) Italy
d) Kenya

2. The Designs Act, 1911 was substituted with the Designs Act, ---------- as an outcome of TRIPS/WTO compliance.

a) 2002
b) 2004
c) 2000
d) 2005

3. Intellectual Property (IP) laws are extremely important for the ----------development of a country.

a) Scientific
b) Historic

c) Technical

d) Financial

4. Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement which was signed at the Uruguay round of the WTO in 1994 and which came into force on ----------

a) 1st January 1985

b) 1st February 1999

c) 1st January 1975

d) 1st January 1995

5. Goods bearing false Trade Marks or false descriptions are prohibited from being imported into Indian under the Customs Act, ----------

a) 1968
b) 1962
c) 1987
d) 1986

6. The Trade Marks Bill, ---------- was passed in the India parliament during the winter session for replacing the Trade and Merchandise Marks Act, 1958.

a) 1998
b) 1997
c) 1999
d) 1996

7. A suit for enforcing a patent has to be filed before a ----------Court having jurisdiction to try the suit.

a) Supreme

b) High

c) District

d) Civil

8. Intellectual property laws on international level are governed by the World Intellectual Property Organization (WIPO**).** True/False

22.13 Answers to check your progress/SAQ

1. b) 2. c) 3. a) 4.d) 5. b) 6. d) 7. c) 8. True

22.14 Terminal Questions

1. Explain the meaning and significance of intellectual property ownership and enforcement especially for developing countries like India.
2. Describe in detail Enforcement Mechanism of intellectual property rights available under the Indian Law.
3. Discuss provisional measures of IPR in India.
4. Write notes on:
    a) TRIPS agreement
    b) Trade Secrets Protection
    c) Utility model of invention

5. Explain civil and criminal remedies which are available for taking action against infringement of client's trademark.

6. What are the civil, criminal and administrative remedies are available against violation of copyright?

22.15 Suggested Readings

Gupta T. S, Intellectual property law in India, Kumar law international,2011

Myneni S. R, Law of Intellectual Property, Asia Law House Hyderabad, 2001

Narayan, P.S, Intellectual property law in India, Gogia Law Agency, Hyderabad, 2001

Mittal D.P, New law of trademarks and geographical indication of goods, Taxmann allied services, New Delhi, 2000.

http://www.innovaccess.eu/documents/JointOwnershipinIntellectualPropertyRights_0000000649_00.xml.pdf

http://www.lexorbis.com/property-enforcement.html

http://en.wikipedia.org/wiki/Intellectual_property

http://indiainbusiness.nic.in/investment/ipr.htm

http://ipindia.nic.in/ipr/patent/patents.htm

www.**ipr**-policy.eu/media/.../Brand_**Enforcement**_Manual_FINAL.pdf

Unit –23: Patents and Trademarks

23.1 Introduction

23.2 Meaning and Features of Patent

23.3 Types of Patents

23.4 Patentable and Non Patentable Inventions in India

23.5 Commercialization and Disclosing of Inventions

23.6 Registration of a Patent in India

23.7 Trademarks meaning and classification

23.8 Salient Features of the Trademark Law in India

23.9 Trademarks Registration in India

23.10 Summary

23.11 Glossary

23.12 Check your Progress

23.13 Answers to check your progress/SAQ

23.14 Terminal Questions

23.15 Suggested Readings

Objectives

After reading this unit you will be able to:

- Explain the meaning, features and importance of Patents
- Describe Patentable and Non Patentable Inventions in India
- Describe different types and registration process of patents
- Know Commercialization and Disclosing of Inventions

- Explain the meaning of trademarks and their classification
- Describe registration process of trademarks and
- Know Salient Features of the New Trademark Law in India

23.1 Introduction

The word patent originates from the Latin patere, which means "to lay open". More directly, it is a shortened version of the term letters patent, which was a royal decree granting exclusive rights to a person, predating the modern patent system. Similar grants included land patents, which were land grants by early state governments in the USA, and printing patents, a precursor of modern copyright.

In modern usage, the term patent usually refers to the right granted to anyone who invents any new, useful, and non-obvious process, machine, article of manufacture, or composition of matter. Some other types of intellectual property rights are also referred to as patents in some jurisdictions. Industrial design rights are called design patents in the US, plant breeders' rights are sometimes called plant patents, and utility models are sometimes called petty patents or innovation patents. Examples of particular species of patents for inventions include biological patents, business method patents, chemical patents and software patents.

The procedure for granting patents, the requirements placed on the patentee, and the extent of the exclusive rights vary widely between countries according to national laws and international agreements. Typically, however, a patent application must include one or more claims defining the invention which must meet the relevant patentability requirements such as novelty and non-obviousness. The exclusive right granted to a patentee in most countries is the right to prevent others from making, using, selling, or distributing the patented invention without permission.

Under the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights, patents should be available in WTO member states for any invention, in all fields of technology, and the term of protection available should be a minimum of twenty years. In many countries, certain subject areas are excluded from patents, such as business methods and computer programs.

23.2 Meaning and Features of Patent

A patent is a form of intellectual property. It consists of a set of exclusive rights granted by a sovereign state to an inventor or their assignee for a limited period of time in exchange for the public disclosure of an invention.

A Patent may be defined as a legal monopoly, which is granted for a limited time by a country to the owner of an invention. Merely to have a patent does not give the owner the rights to use or exploit the patented invention. That right may still be affected by other laws such as health and safety regulation or the food and drugs regulation or even by other patents. The patent, in the eyes of the law, is a property right and it can be given away, inherited, sold, licensed and can even be abandoned. As it is conferred by the government, the government, in certain cases even after grant or even if it has been, in the meantime, sold or licensed, can revoke it.

Features of Patent

The patent has the following features

1. **Exclusive** Also known as the so-called exclusive monopoly or exclusivity. Patent by the government authorities according to the invention or the applicant's application that the inventions under the patent law in line with the conditions granted to the applicant or his legal assignee of an exclusive right. It all exclusive rights of patent holders the right to object to their (i.e. invention) possess, use, benefits and rights of action.
2. **Concentrating on** The timing of the so-called patent, referring to patent a certain time limit, which is the period of protection under the law. National patent laws for the effective patent protection period has its own requirements, and start calculating the time duration of protection varies. China's "Patent Law" Article 42 provides: "invention patent term of 20 years, utility model and design patents for a period of 10 years, counted from the date of filing."
3. **Regional or Territorial** The so-called regional, that is, the space constraints of the patent. It refers to a country or a region and the protection of patents granted in the country or region only within a framework of other countries and regions do not take legal effect, the patent is not recognized and protected. If the patent in other countries

who want to enjoy patent rights, then, must be in accordance with laws of other countries a patent application. Unless the accession to international treaties and bilateral agreements otherwise provided, any other country or countries do not recognize international patents granted by intellectual property institutions.

4. **Technical Aspects** Patents are generally concerned with functional and technical aspects of products and processes and must fulfill specific conditions to be granted.
5. **Useful Requirement** The patent law specifies that the subject matter must be "useful." The term "useful" in this connection refers to the condition that the subject matter has a useful purpose and also includes operativeness; that is; a machine which will not operate to perform the intended purpose would not be called useful, and therefore would not be granted a patent. In most cases, the usefulness requirement is easily met in computer and electronic technologies.
6. **Novelty (Newness) Requirement** In order for an invention to be patentable, it must be new as defined in the patent law. This novelty requirement states that an invention cannot be patented if certain public disclosures of the invention have been made. The statute which explains when a public disclosure has been made is complicated and often requires a detailed analysis of the facts and the law.

23.4 Importance of patents

Why one should go for a patent?

One should go for a patent to enjoy the exclusive rights over the invention. If the inventor does not get the patent rights over his invention and introduce his product/process based on his invention in the market, anybody can copy his invention and exploits it commercially. To debar others from using, selling or working out his invention, the inventor must go for getting a patent.

1. A patent is a form of intellectual rights protection that enables inventors to prevent other people from making use of their ideas. Patents can be very important, both for the individual inventor whose rights are protected and for the economy. Patent laws can ensure that no one is able to take **unfair advantage** of the work and ideas of other inventors. Patents can help to ensure that businesses and individuals work to create new ideas, which can help to provide an important boost for the economy by helping to encourage innovation.

2. By **protecting a new idea** for a process or product, patents make it possible for individuals and businesses to protect their work and investments. Without this kind of protection, it would not be worthwhile for people to invest large amounts of money in new inventions since they would not be able to prevent their competitors from immediately making use of their invention, without having had to put in the same time, money and hard work.

3. Patents can be particularly important for individual inventors and **small businesses**, since they can prevent larger companies from taking advantage of their creations. A patented invention can form the basis for a new business or even enable an inventor to make their fortune. Without patent protection, a small business would not be able to compete with larger companies that could take their idea and produce it more efficiently and on a larger scale. Large companies can also use patents to protect their inventions.

4. The patent system can also be incredibly important because it **stimulates invention and innovation**. It encourages people to come up with new ideas by ensuring that their rights will be protected, which help move the economy forwards. Since patents have limited terms and they require that the patented idea is made public, they can also help to encourage development by ensuring that ideas for processes and products will be available for use at the end of the patent term.

5. The importance of patents can also become clear when a company or an inventor finds themselves on the wrong side of patent law. Patents **prevent anyone** other than the patent holder from making use of an idea, even if they have come up with a new idea that based upon an old, patented product or process. It is, therefore, important that businesses understand how the patent system works in order to ensure that they avoid falling foul of it. If they should infringe upon the patent of another person or business, then it could result in expensive legal problems.

6. Patents can be important for **individual inventors** and for the **business community** and the economy at large. Patents encourage investment and the development of new ideas, they make new inventions available to the public so that they can be made use of at the end of the term of the patent, and they can also provide protection for the inventors of new products and processes. The fedcirc.us website is full of more information on patents and patent law,

which can help you to learn more about how this important form of intellectual property rights works.

23.3 Types of Patents

There are three types of Patents granted:

1. **Utility Patent:** This is the most important type of Patent it is granted on the functional aspect of the invention. This type of Patent is most sought after and requires a lot of skill in drafting of the application and prosecuting it before a Patent Office. The functional utility of the invention is protected.

2. **Design Patent:** This type of Patent is granted to the ornamental or external appearance of the invention. If a design is of functional necessity then it cannot be registered for Design Patent. For e.g. the aerodynamic shape of a plane cannot be registered as design patent, as the shape is very important for the smooth functioning of the invention itself.

3. **Plant Patent:** This type of Patent is granted for Plant variety made through asexual reproduction of plant varieties.

23.4 Patentable and Non Patentable Inventions in India

In unit 21 we already discussed about the patentable and non patentable inventions. A brief view is also given in this unit.

23.4.1 Patentable Inventions in India

What is patentable?

Only inventions are patentable. An invention must be new, useful and must involve inventive steps compared to closest prior art. A new and unobvious product, process, apparatus or composition of matter will generally be patentable.

23.4.2 Inventions not Patentable in India

An invention may satisfy the condition of novelty, inventiveness and usefulness but it may not qualify for a patent under the following situations:

i. An invention which is frivolous or which claims anything obviously contrary to well established natural laws.

ii. An invention the primary or intended use or commercial exploitation of which could be contrary to public order or morality or which causes serious prejudice to human , animal or plant life or health or to the environment.

iii. The mere discovery of scientific principle or the formulation of an abstract theory or discovery of any living thing or non-living substance occurring in nature.

iv. The mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant.

v. A substance obtained by mere admixture resulting only in the aggregation of the properties of the components thereof or a process for producing such substance.

vi. The mere arrangement or re-arrangement or duplication of known devices each functioning independently of one another in a known way.

vii. A method of agriculture or horticulture.

viii. Any process for medicinal, surgical, curative, prophylactic, diagnostic, therapeutic or other treatment of human beings or any process for a similar treatment of animals to render them free of disease or to increase their economic value or that of their products.

ix. Plants and animals in whole or any part thereof other than microorganisms but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals.

x. Mathematical or business method or a computer program per se algorithms.

xi. A literary, dramatic, musical or artistic work or any other aesthetic creation whatsoever including cinematographic works and television productions.

xii. A mere scheme or rule or method of performing mental act or method of playing game.

xiii. A presentation of information.

xiv. Topography of integrated circuits.

xv. An invention which, in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components.

xvi. Inventions relating to atomic energy.

23.5 Commercialization and Disclosing of Inventions

Many inventors feel that filing a patent application is the most important and first thing they must do once they have an idea. This is rarely the case. Patenting an invention is not the only consideration and rushing to file an application may actually be the wrong thing to do first.

Patents are of no value unless the commercial worth of the product or technology can be demonstrated and exploited. Many patentable inventions have failed not because they didn't work, or because they had been invented before, but because the inventor was unable to exploit them commercially. Inventing is increasingly being seen as a business. You must invest in the business if you wish to make a return, and management and marketing skills are every bit as important as technical skills. If the inventor does not have all the skills required, it may be necessary to put together a team or partnership to exploit the project or to license the invention to an existing company who already has related products. If one does successfully commercialize an invention however the rewards can be substantial.

A number of successful companies' world over own patents, which protect them against, copied products home or imported. This is an important factor in present day international trade. Most other traditionally used barriers to trade are being removed in the interests of fair competition. Patents are one of the few mechanisms that companies can legally use to protect their market share. Having foreign patents also allows Irish companies to protect their products in export markets.

Where a product is unsuitable for export because of distance, cost or other factors, a licensing strategy can be used. The Indian company can use the patents to license the manufacturing/marketing rights for their invention to a foreign manufacturer. In return they receive a royalty, which increases their profits. Licensing for both the home and export markets to Indian and/or foreign companies are also the appropriate strategy for inventions made by non-manufacturing companies or by universities and colleges.

To succeed, an inventor does not have to have a great deal of business or technical expertise. He/she must however adopt a businesslike approach to the project. The first thing is to realize that there are several stages in the inventive process. It is vital to realize what stage one is at and what one needs to do next.

The stages of development of a successful invention are:

- Identification of a problem that needs to be solved.
- Inventing a solution to the problem, which works?
- Developing a prototype or being able to demonstrate the invention to prove how it works.
- Filing a patent application to protect the invention so that it can be disclosed to other people.
- Arranging the manufacturing and marketing of the invention either through one's own company or through licensing.
- Each stage requires its own particular expertise and resources. It is essential that the early stages are satisfactorily completed before moving on. Experience shows that taking short cuts does not pay. For example, it is hard to get investors or potential licensees to appreciate the benefits of a particular invention if the prototype is very crude and does not work properly.

- **Disclosing an Invention**

Details of an invention should not be disclosed to outsiders until such time as a patent application has been filed. However, many people make the mistake of filing patent applications too early. Because they are afraid that somebody else may invent the same thing, they file an application as quickly as possible without having any clear plan as to what they are going to do next. They then find that many months pass before they are in a position to commercially exploit the invention, and they have not left enough time to obtain the necessary finance to cover international patent filings. In general, it is better to complete the development of the invention and file the patent application when it becomes necessary to make disclosures as part of a planned programme of commercial exploitation. If it is necessary to talk to technical specialists or others in order to obtain assistance during the development of the invention, this should be done on the basis of confidentiality. People should be informed that the information is strictly confidential and asked to sign a simple document undertaking not to disclose the information until given permission to do so.

Adopting a proper commercialization strategy involves considering all aspects at the same time, technical, commercial and legal. At the initial stages proper attention should be given to the technical aspects, but once the patent application is filed, the commercialization should proceed as quickly as possible within the limited time scale provided by the patent system. Once an application has been filed in Ireland, applications in other countries must be made within twelve months if the best protection is to be obtained. As is explained below, an

international patent programme can be a very expensive business. Funding for it from either private or public sources is unlikely to be obtained unless there are definite commercial plans for the invention which are well advanced. Setting up one's own manufacturing company or identifying potential licensees and reaching agreement with them can take time.

A period of longer than twelve months is usually required to complete either of these activities. Thus if one has filed ones patent application too early one will inevitably run into financial difficulties in trying to keep it going. Another reason why it can be a mistake to file too early is that development of the invention may not be completed. Designs may change during development or other inventive features may be introduced. If the patent specification has been drafted too early it may not be possible to amend it to reflect the changes made. One can end up with a patent, which does not really cover the final commercial product.

23.6 Registration of a Patent in India

Patent Registration in India is useful in preventing your competitors from exploiting your invention. You can force your competitors to design around your invention (if that is possible) which can cost them time and money. It may put you in a stronger position with other companies who have Patents in which you are interested. Customers are often impressed by 'Patented Technology' so patenting can have a positive role to play in your marketing strategy. Patents are often a good 'keep off the grass' warning to other businesses.

Many competitors are now more aware of Patents and the consequences of being found to be infringing a Patent. **Patent Registration in India** gives the patentee the exclusive right to make or use the patented article or use the patented process. He can prevent all others from making or using the patented process. A patentee has also the right to assign the patent, grant licenses under, or otherwise deal with it for any consideration. The following steps are included in registration process

1. Filing Application

Any person, even if he or she is a minor, may apply for a patent either alone or jointly with any other person. Such persons include the inventor, or his assignee or legal representative in the case of an ordinary application or, in the case of a priority application, the applicant in the convention country or his assignee or his legal representative. A corporate body cannot be named as an inventor. Foreigners and nationals not living in India need an address for service in India for this purpose. They may appoint a registered agent or representative whose address for service can be the address for service in India.

- **Place of filing**

An application for patent must be filed at the Patent Office branch within whose territorial jurisdiction the applicant resides or has his principal place of business or domicile. A foreign applicant must file in the Patent Office branch having jurisdiction over the place where his address for service is located.

- **Priority**

Priority can be claimed from the earliest corresponding application in a convention country, provided that the Indian application is filed within twelve months of the priority date. Multiple and partial priorities are allowed.

- **Specification**

A priority application must be filed with a complete specification in the first instance but a non-priority application may be filed with either a provisional specification or a complete specification. Where a provisional specification is filed in the first instance, a complete specification must be filed within twelve months. Where two or more provisional specifications have been filed, the specifications may be cognated and all the subject matter may be incorporated into a single complete specification to be lodged within twelve months of the date of the earliest filed provisional specification.

- **Naming of inventor(s)**

As regards non-priority applications, the inventor(s) must be named in the application form. As regards priority applications, a declaration as to inventor ship must be filed with the application or within a maximum period of six months.

- **Information of corresponding applications in other countries**

It is necessary at the time of filing a patent application in India, to inform the Controller of the details of all corresponding applications in other countries and to undertake to keep the Controller so informed up to the grant of the Indian application. Failure to do so could result in the refusal of the application in case it is opposed, or even revocation of a patent in proceedings before the High Court.

2. Patent Examination

- **Examination of application**

Both formal and substantive examinations are made by the Indian Patent Office. Examination is by request.

- **Procedure**

An applicant is required to meet all the objections and requirements of the Patent Office within a period of twelve months from the date of the first examination report (FER) issued by the Controller. No extension of time is permitted. If a patent application is not put in order in twelve months from the date of the FER it lapses.

- **Amendment of application**

An applicant may, of his own accord, apply to the Controller for amendment of his application or any document filed in respect thereof but such amendments must be filed by way of correction, explanation, or disclaimer. An applicant may also amend his application or specification at the instance of the examiner and file a separate divisional application(s) for the other invention(s) which will be accorded the date of filing of the complete specification of the original application or such later date as the Controller may fix. The divisional application must be filed prior to the grant of the parent application.

3. **Patent Publication**

Publication takes place 18 months from the date of the application. Urgent publication is possible on request on payment of fees. On and from the date of publication of application for patent and until the date of grant of a patent in respect of such application, the applicant will have the like privileges and rights as if a patent for the invention had been granted on the date of publication of the application.

- **Pre-Grant opposition of patent application**

After publication but before the date of grant by way of representation, anyone may file opposition to the grant of a patent.

- **Publication of subject matter**

The grant of an application is published in the official journal and is notified therein for post grant opposition. A patent can be revoked within one year after grant by post grant opposition proceedings before the Controller of Patents.

- **Revocation of a patent**

It is possible on the grounds of prior publication anywhere in the world, public use or knowledge in India, lack of novelty with regard to the subject matter, obviousness, lack of inventiveness, ambiguity, insufficiency of description of the invention, fraud, false suggestion or representation that the person named as the inventor is not the true inventor, lack of utility, non-patentability of subject matter (e.g. food, drug or medicine per se, atomic energy, mere admixture, mere arrangement of known devices, process of testing, method of agriculture or

horticulture, process of medicinal treatment), failure to furnish or falsity in material particulars of information regarding corresponding applications in other countries supplied to the Controller or that the invention is contrary to law or morality.

- **Annuities**

Except in the case of a patent of addition, for which no annuities are payable, annual renewal fees must be paid during the life of an Indian patent, the first of such fees falling due at the end of the second year of the life of a patents granted. Renewal fees falling due during the pendency of the application are payable within a non-extendible period of three months from the date the patent is taken on record in the Register of Patents. Two or more year's renewal fees may be paid in advance if the patentee so desires. A maximum extension of six months may be obtained on payment of the prescribed penalty fees. If the renewal fee in question is not paid within the extended period available, the patent will lapse.

- **Restoration**

A lapsed patent may be restored if an application for restoration is made within one year of the date of lapsing of the patent, provided it can be shown that the lapsing of the patent was unintentional and that there was no undue delay in making the application for restoration.

- **Working of patents**

Every patentee and every licensee is required to furnish within three months from the end of the calendar year in which the patent is granted, a statement as to the extent to which the invention has been worked in India on a commercial scale in the preceding year. Non filing of this statement is a criminal offence.

- **Compulsory licenses**

After three years from the date of sealing of a patent, an interested party may apply to the Controller for the grant of a compulsory license alleging that the reasonable requirements of the public with respect to the invention have not been satisfied or that the invention is not available at reasonable price. If the Controller is satisfied that a prima facie case for an applicant for compulsory license has been made out, he shall serve notice on the patentees who, if they so desire, may oppose the application for compulsory license.

- **Marking**

It is not compulsory but advisable as otherwise damages may be difficult to recover in cases of infringement. The invention may be marked with the word “Patented” or “Patent” accompanied by the number and year of the patent.

- **Infringement**

An infringement suit may be instituted by a patentee or his exclusive licensee. Every ground for revocation is available as a defense and revocation can be counter claimed in infringement proceedings. The Court may grant relief in respect of a valid claim or claims even though one or more other claims in the suit may be held to be invalid. Relief may include damages and costs as awarded by the court. A suit for injunction may be instituted and damages recovered in cases where there have been groundless threats. Any person may institute a suit for declaration as to non-infringement of a patent. Onus of proof of non-infringement lies with the defendant.

4. Patents and Computer Software

It is possible to patent programs for computers which, when run on a computer produce a "technical effect or includes hardware". However, if a program does not produce a technical effect when run on a computer it is unlikely to be patentable. A technical effect is generally an improvement in technology and needs to be in an area of technology, which is patentable. For instance, an improved program for translating between Japanese and English is not patentable because linguistics is a mental process, not a technical field. On the other hand, a program, which speeds up image enhancement, may be patentable because it produces a technical improvement in a technical area.

Some countries, such as the USA, which may be a large potential market for your software, have a more liberal approach to software patenting and often grant patents for software, which would be excluded in India and other countries.

Deciding whether or not a particular computer program is patentable is a complex issue and advice from a Patent Agent may help to determine which the most effective form of protection available is.

Requirements (to be sent to patent agent) for filing patent application in India

- Authorization of agent.
- Specifications in English.
- Sets of drawings.
- Priority document if priority is to be claimed (i.e. certified copy of the specification as originally filed). In case the priority document is not in English, it must be accompanied by an attested or certified English translation thereof.
- Full name, address, occupation and nationality of both the inventor and the applicant (if an assignee) and full name, address, occupation and nationality of the applicant in the convention country, should be given.
- Details of all corresponding applications in other countries.

- Proof of the applicant's right to make the application within three months from the filing of the application.
- Declaration as to inventor ship signed by the applicant where priority has been claimed or where complete specification is filed after a provisional specification; can be filed within three months of filing of application or complete specification.
- Application Form 1 duly completed and signed along with

a) the full name of the inventor and / or the applicant
b) the name and designation of the person signing on behalf of the applicant
c) Addresses and nationalities of all the inventors, applicants and also of the applicants in the convention country (if different from India) and
d) Date of filing of the basic application in the convention country.

23.7 Meaning and Classification of Trademarks

A **trademark** is a distinctive sign or indicator used by an individual, business organization, or other legal entity to identify that the products or services to consumers with which the trademark appears originate from a unique source, designated for a specific market, and is used to distinguish its products or services from those of other entities.

A trademark is typically a name, word, phrase, logo, symbol, design, image, or a combination of these elements. There is also a range of non-conventional trademarks comprising marks which do not fall into these standard categories, such as those based on color, smell, or sound.

The owner of a trademark may initiate legal proceedings for trademark infringement to prevent unauthorized use of that trademark. Most countries require formal registration of a trademark in order to pursue this type of action. A few countries, including the United States and Canada, recognize common law trademark rights, which mean action can be taken for trademark that is in use but not registered. Generally common law trademarks do not offer the holder as much legal protection as registered trademarks.

The term trademark is also used informally to refer to any distinguishing attribute by which an individual is readily identified, such as the well-known characteristics of celebrities. When

a trademark is used in relation to services rather than products, it may sometimes be called a service mark, particularly in the United States.

Classification of Trademarks

The Mark can be classified into following four different categories:-

a. Marks as are inherently distinctive
b. Marks as are not inherently distinctive but have acquired distinctiveness on account of use and reputation
c. Marks as are generic, descriptive, laudatory or have direct reference to the character and quality of the goods/services
d. Marks consisting of geographical names

1**. Inherently distinctive marks** are those that are in the nature of invented word these have no assigned meaning and afford the highest protection in law. Such marks do not have any direct or indirect reference to the character or quality of the goods and do not consist of common names, surnames or words of ordinary language. The trademarks like **CALTEX** and **KODAK** fall in this category.

2. There are marks, which are **not inherently distinctive** in their nature but may be capable of distinguishing goods or services of a particular person from that of others or have the capacity to acquire distinctiveness. Such marks may not be inventive but possess the capacity or ability to distinguish. The marks which possess a capacity or ability to distinguish (though not inherently distinctive) can acquire the status of a distinctive character on account of exclusive use and reputation acquired in the course of trade on account of use and publicity. The marks consisting of personal names, surnames or words of ordinary languages are capable of acquiring distinctiveness and are capable of distinguishing the goods of one manufacture from those of others provided such names, surnames or words do not have any direct reference to the character or quality of the goods.

3. The marks having direct reference to the character or quality of goods or as are indicative of geographical indications are neither inherently distinctive nor capable of distinguishing nor acquiring distinctiveness by secondary significance so as to qualify to be described as trademarks. The words, which convey a direct reference to the character and quality of goods

or services, are known as **descriptive marks**. If the marks convey an indirect reference to the character or quality of the goods, the same may qualify to be a trademark.

4. Generally, the **geographical** names are considered to be incapable of performing the role of a trademark. The geographical names, which in their ordinary signification, are known or recognized for a particular kind or quality of goods or services are not capable of performing the role of a trademark. However, if a place in its ordinary significance is not known for a particular kind or quality of goods for which its name is used, it can still perform and is capable to perform the role of a trade mark. There are a large number of geographical names which have been considered and held to be capable of performing the role of a trademark such as **CHAMBAL, GUJARAT, BHARAT**, etc.

5. There may be marks which would not fall in either of the categories (i) to (iv) but may consist of other elements or combination thereof, for example, a word mark standing alone may not qualify to perform role of a trade mark but when used in a distinctive manner in combination with other elements, may become capable of being a good trade mark.

23.8 Salient Features of the Trademark Law in India

1. Service Marks

A mechanism is now available to protect marks used in the service industry. Thus businesses providing services like computer hardware and software assembly and maintenance, restaurant and hotel services, courier and transport, beauty and health care, advertising, publishing, educational and the like are now in a position to protect their names and marks.

2. Collective Marks

Marks being used by a group of companies can now be protected by the group collectively.

3. Well-known marks

Marks, which are deemed to be well known, are defined. Such marks will enjoy greater protection. Persons will not be able to register or use marks, which are imitations of well-known trademarks.

4. Enlarged scope of registration

Persons who get their marks registered for particular goods in a particular class and commence using their marks can sue and prevent other persons from

- Using the same or similar marks even for different goods falling in other classes;
- Using the same or similar marks even only as part of their firm name or company name;
- Using the same or similar mark only in advertising or on business papers;
- Importing or exporting goods under the said trade mark;
- Unauthorized oral use of the said trademark.

5. Stringent punishment

Punishment for violating a trademark right has been enhanced. The offence has now been made cognizable and wide powers have been given to the police to seize infringing goods. At the same time the power of the Courts to grant ex parte injunctions have been amplified.

6. Appellate Board

An appellate board (IPAB) has been constituted based in Chennai for speedy disposal of Appeals and rectification applications.

7. Expedited procedure

Mechanisms have been set in place for expediting search and registration by paying five times the normal fee.

8. Enhanced renewal period

Registered trademarks need to be renewed every ten years.

9. License agreements do not need to be compulsorily registered.

10. Marks may include the **shape** of goods.

11. Marks may include a **combination of colors.**

Violation of Provision is a Cognizable Offence

Violation of any provision of trademark law in India is a cognizable offence. A police official, not below the post of Deputy Superintendent of Police, is authorized to conduct search and seize goods and other devices without warrant. However, the official is required to

consult the Registrar of Trade Marks. An offender under the Act will be liable with a punishment of minimum imprisonment of six months and fine of Rs.50, 000 and maximum punishment of three years imprisonment and fine of Rs.2, 00,000.

23.9 Trademarks Registration in India

1. Application for registration

An application for registration may be made by any person claiming to be the proprietor of a mark but only as regards the particular goods or service in respect of which he/she is using or proposing to use the mark. At the time of filing the application, the proprietor must have the intention to use the mark himself/herself or though a registered user.

- **Foreigners and nationals not living in the country**

May be recorded as being registered proprietors of trademarks but they must provide the Registry with an address for service in India, otherwise, they must appoint a registered agent or representative.

- **Kind of marks**

The law provides for association trademarks, the registration of certification marks, defensive marks and collective marks.

- **Registrability**

To be registrable, a trademark application must contain or consist of the following essential particulars:

a) The name of a company, individual or firm represented in a special or particular manner;
b) The signature of the applicant for registration or some predecessor in his/her business;
c) One or more invented words;
d) One or more words having no direct reference to the character or quality of the goods and not being, according to its ordinary signification, a geographical name, or a surname, or a personal name, or any common abbreviation thereof, or the name of a sect, caste or tribe in India;
e) Any other distinctive mark. No trademark shall be registered in respect of analgin, aspirin, chlorpromazine, ferrous sulphate, piperazine and its salts such as adipate, citrate and phosphate or for a new single ingredient drug first introduced in India. The Indian national flag, the name or pictorial representation of Mahatma Gandhi, Jawahar Lal Nehru, Chatrapati Shivaji, or the Prime Minister of India and the names

and emblems of certain international organizations may not be registered as trademarks. In the case of portraits, the name of the person depicted must be stated.

2. Examination

Applications are examined to ensure that they comply with the requirements of the law and that they do not conflict with marks which are already registered, or which are the subjects of earlier pending applications.

- **Amendments**

An application may be amended provided the amendment does not constitute a major alteration of the mark.

- **Ground for refusal**

Registration may be refused in respect of marks which are scandalous or obscene, which are likely to deceive, cause confusion, or offend religious susceptibilities, which are contrary to the law or morality, or which would otherwise be disentitled to protection in a court, which are accepted chemical names or which are identical to other marks for the same goods or description of goods. In the case of identical marks, registration may, however, be allowed upon proof that the mark was being used concurrently and in good faith.

- **Hearing**

Hearing may be sought with regard to applications which the Registrar proposes to refuse and an appeal may be made to the High Court against any orders issued at a hearing.

3. Granting, Protection

- **Opposition**

Applications which have been accepted are advertised in the Trade Marks Journal and opposition may be filed within three months of the date of advertisement; an extension of time of one month for filing opposition may be obtained upon application. The Register was formerly divided into two parts. Part A contained the marks already registered under the Trade Marks Act 1940 and all marks which were distinctive or had acquired distinctiveness (satisfactory evidence to this effect must be produced) could be registered in Part A of the Register. Part B contained marks which could not be registered in Part A or which were not distinctive but were capable of distinguishing the goods of the applicants. Since 2003 this distinction is removed. There is now only a single register.

- **Duration of registration**

Ten years, renewable for further periods of ten years each.

- **Renewal fees**

Must be paid before but not more than six months before the date of expiry of the last registration; a mark may be restored within one year from the last date of renewal upon application to the Registrar, either completely or subject to such conditions and limitations as he/she may think fit to impose. A trademark which has been removed from the Register for non-payment of renewal fees can be cited against an application for registration during a period of one year as from the date of removal.

- **Assignment**

A registered trademark can be assigned with or without the goodwill of the business concerned. An unregistered trade mark is not assignable without the goodwill of the business concerned except if it is used in the same business as a registered trademark and assigned to the same person and along with a registered trademark covering the same goods.

- **Registered user**

The Central Government can refuse the registration of a registered user if it is against the public interest or the development of industry, trade or commerce in India. Before doing so the Central Government must disclose the facts and circumstances on the basis of which it proposes to refuse the registration of a registered user and give the applicant an opportunity of a hearing.

- **Marking of goods**

The law does not prescribe that a registered trademark, when used by its proprietor, be described as such on the goods to which it is applied nor does it require that the proprietor' identity be disclosed. Where a mark is used by a registered user, however, goods must be marked in such a way as to disclose the identity of the registered proprietor and the fact that the mark is being used by the registered user by permission of the registered proprietor. All goods imported into or manufactured or assembled in India may be required to be marked in such a way as to indicate their country of origin. Under Section 117 of the Act, the Indian Government will, from time to time, issue notifications specifying the manner in which the goods are to be marked.

- **Rectification for non-use**

The Register may be rectified (removal of a mark) in respect of a registered mark and one of the grounds for applying for rectification is the non-use of a mark for a period exceeding five

years and one month before filing of the rectification application unless there are special circumstances excusing non-use.

- **Infringement**

Suits may be filed against the infringement of registered marks and in any suit, registration may be regarded as valid in all respects even years from the date of registration. Unregistered trademarks with reputation in India or internationally well-known trademarks can be protected against misuse in a passing off action.

23.10 Summary

In this unit we studied about the patents, their registration process, trademarks, their classification and registration of trademarks in India. A patent is a form of intellectual property. It consists of a set of exclusive rights granted by a sovereign state to an inventor or their assignee for a limited period of time in exchange for the public disclosure of an invention. In modern usage, the term patent usually refers to the right granted to anyone who invents any new, useful, and non-obvious process, machine, article of manufacture, or composition of matter. Patents are of no value unless the commercial worth of the product or technology can be demonstrated and exploited. On the other hand, a trademark is a distinctive sign or indicator used by an individual, business organization, or other legal entity to identify that the products or services to consumers with which the trademark appears originate from a unique source, designated for a specific market, and is used to distinguish its products or services from those of other entities. The owner of a trademark may initiate legal proceedings for trademark infringement to prevent unauthorized use of that trademark. Most countries require formal registration of a trademark in order to pursue this type of action.

23.11 Glossary

Cognizable Offence- A criminal offences in which the police are empowered to register an FIR, investigate, and arrest an accused without a court issued warrant.

Post grant opposition- is an administrative process available under the patent and trademark law of most jurisdictions which allows third parties to dispute the validity of a granted patent or trademark.

Utility Patent- The most common type of patent. It includes inventions that operate in a new and useful manner.

Infringement- In a legal context, an infringement refers to the violation of a law or a right. This includes intellectual property infringements.

Claims- Claims in a patent define an invention and are legally enforceable. They are written in very precise language.

Invention- An invention is the conception of a new and useful article, machine, composition, or process.

Disclosure- In return for a patent, an inventor provides a complete revelation or disclosure of the invention he or she is seeking to protect with a patent.

Patent Model- A model of a proposed invention. The patent office discontinued the use of models in 1880, but many modern inventors use them to visualize their inventions even today.

Service Mark- It is the same as a trademark, except that it identifies and distinguishes the source of a service rather than a product.

23.12 Check your Progress

1. For a patent to benefit from legal protection it must have:
    a) Been approved by scientific peers
    b) Market potential
    c) A scientific basis
    d) Industrial application
    e) All of the above
2. Which of the following is not patentable under the 1988 Patent Act?
    a) New products
    b) Manufacturing processes
    c) Mathematical processes
    d) All of the above
    e) Chemical formulae
3. A patent lasts for how long?
    a) 25 years
    b) can be renewed every 5 years
    c) 20 years
    d) can be renewed every 10 years

e) 10years

4. Trademarks are closely associated with:

a) Reputation

b) Patents

c) Business image

d) All of the above

e) Goodwill

5. It is possible for a new product to be protected using:

a) Trademarks and copyright

b) Copyright and patents

c) Registered designs and patents

d) All of the above

6. Which of the following is part of a patent?

a) Patent overview

b) Patent abstract

c) Patent summary

d) All of the above

e) Patent costing

7. Discoveries are not patentable because:

a) It is not possible

b) There is no demand for it

c) It would hinder competition

d) It would hinder the pursuit of knowledge

e) All of the above

8. Which of the following principles is applicable to trademarks?

a) A trademark should be capable of distinguishing goods or services

b) A trademark should not be deceptive

c) All of the above

d) A trademark should not cause confusion with previous trademarks

e) A trademark should be distinctive

9. One of the most powerful weapons against illegal copying of music from compact discs is:

a) The law

b) None of the above

c) Public responsibility

d) The internet

e) New technology

10. The patent system has received fierce criticism in the past few years because it:

a) Hinders innovation

b) Enables firms to generate abnormally high profits

c) Favors big and powerful multi-national firms

d) Hinders competition

e) All of the above

23.13 Answers to check your progress/SAQ

1. d) 2. c) 3.c) 4. a) 5. d) 6.b) 7.d) 8. c) 9.e) 10. e)

23.14 Terminal Questions

1. What do you mean by patent? Explain the features and importance of patents.

2. Explain different types of patents. What are various steps in the process of patents registration in India?

3. Describe in detail patentable and non patentable inventions in India.

4. Explain different types of trademarks. What are the features of the new trademark law in India?

5. Describe registration process of trademarks in India.

6. Write notes on the following

a) Commercialisation of inventions
b) Disclosing of inventions
c) Granting and protection of trademarks
d) Patent publication

23.15 Suggested Readings

Gupta T. S, Intellectual property law in India, Kumar law international, 2011
Myneni S. R, Law of Intellectual Property, Asia Law House Hyderabad, 2001
http://www.indiajuris.com/pdf/ptbook.pdf
http://www.patentindia.org/patent.htm
http://www.patentindia.org/trademark.htm
Wadhera Dr B L, Law Relating to Intellectual Property, Universal Law Publishing, 4th edition
.