

한국수출입은행 EDCF

「대외경제협력기금」

주요 수원국 구매 및 계약 관련 법령 조사

인도



2023. 12.



제 출 문

본 보고서를 한국수출입은행 「대외경제협력기금(‘EDCF’) 주요 수원국 구매 및 계약 관련 법령 조사·연구 - 인도」의 최종 보고서로 제출합니다.

2023.12.

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1. 서론

인도는 다양한 공적개발원조(ODA) 프로젝트의 수혜국이었음. 지원국 중에서도 특히 한국수출입은행(이하 “수출입은행”)은 방글라데시의 ODA 프로젝트에 중요한 역할을 수행하고 있으며, 주로 도로/교통, 수자원, 교육, 의료, 공공 분야 등 사회 인프라 개발 프로젝트에 중점을 두어 왔음.

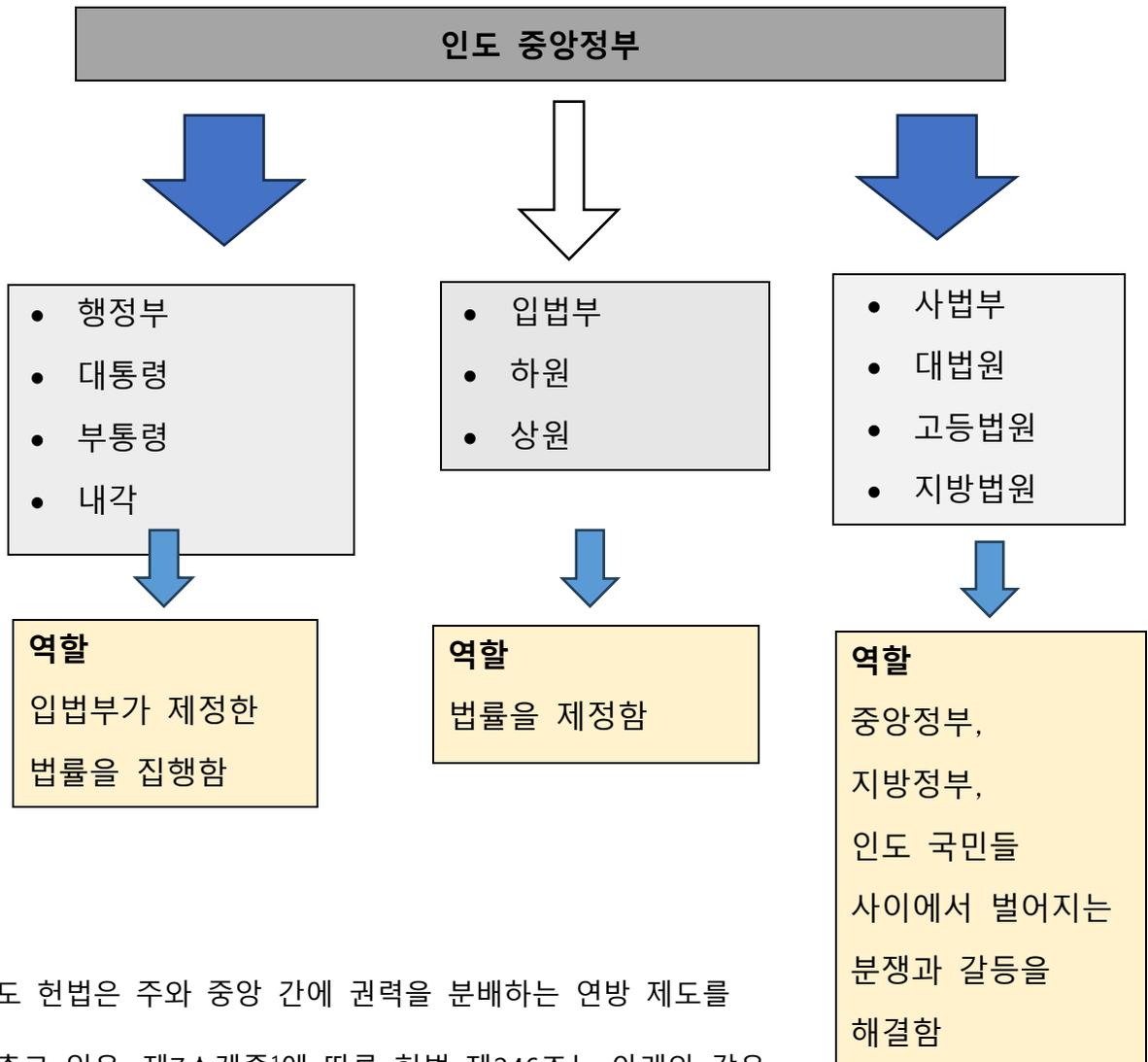
자금지원기관으로서 수출입은행은 지원 자금이 본래의 목적 달성을 위해 적절히 사용되고 있는지 여부를 감독하는 시스템을 가지고 있음. 특히 인도 ODA 프로젝트 수행에 있어서 인도 구매 및 계약 관련 법령을 사전에 조사하여 인도 ODA 프로젝트가 보다 원활히 이루어질 수 있도록 해야 함.

이를 위하여, 본 보고서는 인도의 주요 법령 체계, ODA 관련 법령, 건설 관련 법령, 구매 관련 법령, 예산 관련 법령을 조사하여, 인도가 개발프로젝트의 관점에서 보아 신뢰할만한 법적 시스템을 갖추고 있는지 여부를 살펴보고자 하였으며, 이를 통해 수출입은행의 인도 ODA 프로젝트의 이행에 있어 보다 발전된 모습을 이룩할 수 있을 것으로 생각됨.

2. 법 체계

인도 헌법은 인도의 최고법으로, 민주주의 정치 원리, 정부기관의 역할, 국민의 권리와 의무를 규율하고 있음. 인도 헌법은 세계에서 가장 오래된 성문헌법임. 인도 헌법은 인도를 주권국가로서 사회주의, 세속주의, 민주주의에 기반을 둔 공화국으로 선언하고, 인도 국민들에게 정의, 평등, 자유를 보장하며, 형제애의 정신을 널리 퍼뜨리고자 함. 인도는 의원내각제 국가로서, 행정, 입법, 사법의 3권이 분리되어 있음. 헌법상 인도의 국가원수는 대통령임. 헌법 제79조에 따라 인도의 의회(Parliament of the Union)는 대통령, 상원(Council of States; Rajya Sabha), 하원(House of the People; Lok Sabha)로 구성됨.

헌법 제74조 제1항에 따라 총리(Prime Minister)를 수반으로 하는 내각(Council of Ministers)이 구성되고, 총리는 대통령의 권한행사를 보좌함. 그러나 실제 집행권한은 총리를 수반으로 하는 내각에 부여되어 있음. 개략적인 구조는 다음 도표와 같음.



인도 헌법은 주와 중앙 간에 권력을 분배하는 연방 제도를 갖추고 있음. 제7스케줄¹에 따른 헌법 제246조는 아래와 같은 3개의 헌법상 개념인 리스트로 나누어 관할권을 구분하고 있음:

연방 리스트: 국방, 외교, 군사 및 중앙 정부가 내린 기타 결정에 관한 주제를 다룸.

주 리스트: 교통, 공중 보건, 공공 질서 및 주정부의 기타 사안들에 관한 주제를 다룸.

¹ 스케줄은 인도헌법이 지닌 특징으로서 인도 헌법이 지향하는 목적과 계획의 성격이 짙은 부분으로서 카스트가 낮은 저소득층에 대한 특례조항과, 인도 동부에 위치한 개발이 덜된 지역에 사는, 인종적으로 아시아계통의 민족들과 그들이 사는 주들에 대한 특례조항을 주로 다룸(권영호, “인도의 헌법과 정당에 관한 연구” 외국법제정보(2004), 한국법제연구원, 2면).

공동 리스트: 노동 분쟁, 노동 조합, 교육 등에 관한 주제로, 주와 중앙 정부 모두가 결정 권한을 갖는 사안들을 다룸.

인도 헌법은 위와 같이 언급된 세 가지 리스트에 기반하여 법률을 분류함. 중앙정부와 각 주 간의 관계에서는 연방 정부(즉, 중앙 정부)가 우위를 점함.

3. 개발 원조

인도정부의 사업배정규칙(Government of India (Allocation of Business) Rules, 1961)에 따라, 인도 재무부(Ministry of Finance)의 경제국(Department of Economic Affairs)가 다음 사항을 관장하는 주무기관이 됨.

- (i) 해외 국가, 특수기관, 비정부재단, 자원봉사기관으로부터의 대출, 신용 및 보조금;
- (ii) 다자기구로부터의 대출, 신용 및 보조금;
- (iii) 다음과 같은 기술적, 경제적 지원:
 - a) UN 기술지원 프로그램(The United Nations Technical Assistance Administration Programmes);
 - b) 해외 국가, 특수기관, 비정부단체들로부터의 임시적 기술지원;
 - c) UN 프로젝트 서비스 기관(United Nations office of Project services).
- (iv) 외국 정부, 국제기구 또는 조직의 기술지원.

재무부가 발행한 쌍무적 개발 원조에 관한 시스템 및 절차에 따르면 외부 개발 원조는 인도의 금융, 외환 및 식량 안보 뿐만 아니라, 사회, 인프라 및 기술 분야에서도 지원을 제공하는 것을 목표로 하여야 함. 대출, 기술 협력 및 보조금 등으로 구성된 외부 개발 원조는 양자 또는 다자간 기구로부터 제공될 수 있음. 현재 주로 G-8 국가 및 유럽 연합으로부터 양자간 원조가 제공되고 있고, 그 외의 국가들도 연간 최소 개발 패키지가 2,500만 달러 이상인 경우 양자 원조를 제공할 수 있음.

외부 개발 원조는 외부 자금이 인도의 통합 자금(Consolidated Fund of India)을 통해 제공되는 정부 프로젝트(중앙정부 및 주 정부의 프로젝트)에 적용될 수 있음. 이 경우 인도 정부가 자금 수요처에 대해 채권자의 입장이 됨. 해외 기관에 대한 대출 상환 및 이자 지급 등 의무는 경제정책담당부서가 산하의 원조, 회계 및 감사 담당실(Aid, Accounts & Audit Division)을 통해 수행함.

인도 정부는 다음과 같은 프로젝트를 위하여 양자간 또는 다자간 개발원조를 받고 있음:

- (i) 중앙 프로젝트: 중앙 부처, 금융 기관 및 항만 공사처와 같은 중앙 자치 기관에 의해 실행되는 프로젝트, 중앙 정부가 지원하는 프로그램 아래에서 실행되는 프로젝트;
- (ii) 주 프로젝트: 주 정부기관, 주 공기업, 주 금융기관 및 주 자치 기관에서 실행하는 프로젝트;

양자 개발 원조는 다음과 같은 카테고리로 분류될 수 있음:

- (i) 프로젝트 파이낸스: 도로, 발전소, 수도시설의 건설 또는 유지보수와 같은 특정 목적의 프로젝트를 위한 자금 지원. 양자 개발 원조는 시설, 장비 및 서비스의 구매에도 사용될 수 있음.
- (ii) 섹터 프로그램 파이낸스: 특정 섹터를 대상으로 개발 및 기존 기관의 혁신을 위해 이루어짐;

(iii) 금융중개대출(Financial Intermediary Loans; Lines of Credit): SIDBI, NABARD

등의 금융 기관에 소규모 및 중소기업 지원을 위해 제공됨;

(iv) 기술협력: 외부 기관이 개인, 그룹, 기관 및 조직에게 기술개발, 조직강화 등을

위해 교육을 제공하는 프로그램임.

4. 건설산업에 관한 인도 법령

인도의 건설 산업을 규율하는 단일 규제 기관은 존재하지 않으며, 건설 산업에 특정한 법률 또한 존재하지 않음. 인도의 건설 산업은 여러 규제 기관이 정한 법률을 준수해야 하며, 하나의 문제에 복수의 관련 법령이 적용될 수 있음. 예를 들어, 고용과 관련된 사안은 고용노동부(Ministry of Labour and Employment)관할로 노동관계법령이 적용될 뿐 아니라 공장법(Factories Act, 1993)의 적용도 받음. 건설 프로젝트는 환경 관련 법령과 위험 폐기물 관리 법령을 준수하여야 함. 인도의 건설 프로젝트를 규제하는 법률은 수도 없이 다양한 바, 다음은 인도의 건설 프로젝트를 규제하는 법률 중 본건 EDCF에 관련될 수도 있는 법률을 최대한 조사하여 보고드림:

1) 계약법(The Indian Contract Act, 1872)²

정부 소유 회사나 기업, 비거주자 또는 거주자에 의해 소유 또는 통제되는 민간 회사를 포함하여 모든 기관이 체결한 건설 관련 계약은 주로 영국의 민법에 해당하는 보통법(Common Law)에 근거한 계약법에 따라 규율됨. 계약법 제10조에 따른 당사자 간 계약의 필수 사항은 다음과 같음:

- (i) 합법적인 대가가 있어야 함;
- (ii) 청약과 그에 따른 수락이 있어야 함;

² https://www.indiacode.nic.in/handle/123456789/2187?view_type=browse&sam_handle=123456789/1362

- (iii) 각 당사자는 정상적인 정신 상태에 있어야 함;
- (iv) 계약의 목적이 위법하여서는 안 됨;
- (v) 당사자들은 자유의사에 따라 계약에 동의하여야 함.

계약법 제39조에 따르면 계약 당사자 중 한 쪽이 계약상 의무 또는 약속을 이행하지 않을 경우 다른 쪽 당사자는 이행을 거부할 수 있음. 그러나 계약상 의무를 이행하지 않는 쪽이 상대방의 동의를 얻고 신뢰를 부여하면 상대방은 결정된 조건에 따라 의무를 이행할 수 있음. 그러나 이는 상대방의 손해배상청구권에 영향을 주지 않음. 즉, 상대방은 여전히 기일 내에 의무불이행으로 발생한 손해에 상응하는 배상을 청구할 수 있음.

계약법은 특정한 계약이 무효로 간주되도록 규정하고 있음:

- (i) 제27조 - 경업금지 계약(Agreement in restraint of trade),
- (ii) 제28조 - 소 제기를 제한하는 계약(Agreement in restraint of any legal proceeding),
- (iii) 제29조 - 의미를 명확히 하지 않거나 명확히 할 수 없는 계약,
- (iv) 제30조 - 도박에 관한 계약.

인도의 건설 계약은 계약법의 규정을 준수하여야 함. 대부분의 건설 계약에는 법률 변경 가능성에 관련된 적절한 조항들이 포함되어 있음. 일반적으로 고용주는 법률의 변경으로 인해 발생하는 위험에 대한 전적인 책임을 짐.

일방 당사자가 계약을 위반하는 경우 상대방 당사자는 계약법 제39조에 따라 계약을 해지할 수 있음. 또한, 계약법 제73조와 제74조에 따라 계약 위반 시 불이행 당사자가

손해배상의무를 짐. 가령, 공사의 지연은 계약 위반이 되어 상대방은 계약해지 및 손해배상을 청구할 수 있을 것임. 단 실무상 실제 해지에 이르지 않는 것이고 추가기간을 허여하는 경우가 많음.

2) 계약 수정에 관한 분쟁의 주요 해결절차

계약법이 당사자들 간에 체결된 계약을 규율함. 계약법에 따라 계약을 수정하거나 변경하기 위해서는 (i) 모든 당사자들의 동의가 있어야 하고, (ii) 당사자들의 서명이 있는 변경계약서에 의하여야 함. 기존 계약조건의 수정이나 변경은 기존 계약에 대한 변경계약을 체결하는 방법으로 이루어짐. 변경계약은 기존 계약의 일부로 간주되므로, 원래 계약서에서 언급된 법령 및 관할은 특별한 사정이 없는 한 변경계약에도 그대로 적용 됨. 계약서의 내용에 따라 변경계약은 당사자의 합의만으로도 체결될 수 있지만, 관련법령에 따라 관계당국의 허가가 필요한 경우 변경계약 체결 전에 당국의 사전 허가를 얻어야 함.

계약 당사자들 사이에 발생하는 일체의 분쟁은 상호 협의를 통해 21일 이내에 해결할 수 있고, 21일 이내에 해결되지 않는 분쟁은 중재(arbitration)에 회부할 수 있음. 계약 조항에 (i) 분쟁을 중재로 해결할 수 있다는 취지 및 (ii) 중재절차를 개시할 수 있는 상황이 구체적으로 규정된 경우, 그러한 분쟁은 인도의 중재법(Arbitration and Conciliation Act, 1996)에 따른 중재절차를 통해 해결될 수 있음. 해외 당사자가 관련된 분쟁은 국제연합 국제상거래법위원회(United Nations Commission on International Trade Law; UNCITRAL)의 중재규칙에 따른 중재를 통해 해결될 수 있음.

'Shristi Infrastructure Development Corporation Ltd vs. Ircon International'

Limited 사건에 관한 델리 고등법원의 판례에 따라, 당사자간 이미 중재 합의가 있는 경우 법원은 분쟁을 가급적 중재로 처리하도록 노력하여야 함. 반면 중재 합의가 없는 경우 분쟁은 관할법원에 제소함으로써 해결될 수 있음. 예를 들어, 담보대출약정 관련 채무자의 지급불능을 둘러싼 분쟁이 발생한 경우 파산법(*Insolvency and Bankruptcy Code of India, 2016; IBC*)에 따라 상사법원(*National Company Law Tribunal*)에 제소할 수 있음.

한편, 계약에서 발생하는 일반적인 분쟁은 관할지역의 하급법원에 제기될 수 있음. 관할지역의 고등법원은 하급법원으로부터 제기된 항소사건을 처리하는 항소법원 역할을 함. 또한, 고등법원은 인도 헌법의 제226조와 제227조에 의해 자체적인 관할권을 갖고 있어, 소가 2,000,000(2백만) 루피 이상의 사건을 직접 심사할 수 있음.

대법원(*Supreme Court of India; SC*)은 인도의 최고법원으로, 고등법원으로부터의 항소사건 및 인도 대통령에 대한 자문을 행함. 대법원은 그 권한에 따라 인도 정부와 다양한 주 사이의 분쟁을 처리함.

5. 해외투자

1) 해외투자 관련법령

인도의 해외투자에 관련된 법률은 다음과 같음:

- (i) **외환관리법(Foreign Exchange Management Act, 1999; FEMA)³**: 인도에 거주하지 않는 투자자가 자본금 또는 대출로 인도에 투자하는 경우 주로 외환관리법에 의해 규율되며 인도 준비은행(Reserve Bank of India; RBI)의 직접 감독을 받음. 인도준비은행은 재무부로부터 부여받은 권한에 따라 인도에서의 외국 투자를 관리하기 위해 여러 규칙, 규정, 공고, 통보 및 지시를 제정하였음. 그 중 대표적인 것으로는 “Master Direction – External Commercial Borrowings, Trade Credits and Structured Obligation”이 있음. 이는 대외상업차관(External Commercial Borrowings; ECBs), 즉 해외 인정 대출 기관으로부터의 대출을 규율함. 인도 기업은 위 지침에서 규정된 목적과 기간에 따라 외국의 인정 대출 기관으로부터 대외상업차관을 조달할 수 있음.

- (ii) **외환관리규정(Foreign Exchange Management (Borrowing and Lending in Foreign Exchange) Regulation, 2000)⁴**: 인도 거주자가 해외 은행으로부터 돈을 빌리는 경우 외환관리규정의 규율을 받음.

³ <https://enforcementdirector.gov.in/fema?page=0>

⁴ <https://enforcementdirector.gov.in/fema?page=1>

(iii) **인도준비은행법(The Reserve Bank of India Act 1934)**⁵: 인도의 은행 구조를 규제하고 관리함.

(iv) **외환관리규칙(The Foreign Exchange Management (Non-Debt Instruments) Rules of 2019)**⁶: 포트폴리오 투자자, 비거주자 투자자 및 해외 벤처캐피털 투자자를 통한 투자를 규율함.

이에 더하여, 인도의 해외직접투자자는 통합외국직접투자정책(Consolidated Foreign Direct Investment Policy, 2020) 및 인도준비은행이 발간한 “Master Direction No.11/2017-18 for Foreign Direct Investment in India”의 규율을 받음.

2) EDCF 사업의 성격

EDCF 사업은 대한민국의 기획재정부와 한국수출입은행이 주관하는 사업으로, 개발도상국의 경제개발을 지원하기 위해 ODA의 형태로 양허성 차관을 제공하는 프로젝트임. OECD는 EDCF를 한국의 대표적인 원조 기금으로 소개하고 있음. 대한민국 정부와 인도 정부는 EDCF가 ODA 자금의 형태로 도입되어야 한다고 합의한 바 있음⁷.

인도 정부조직법(Government of India (Allocation of Business) Rules, 1961)에 따르면, 재무부(Ministry of Finance) 산하 경제국(Department of Economic Affairs; DEA)이 외국

⁵ <https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/RBIA1934170510.PDF>

⁶ <https://enforcementdirectorates.gov.in/fema?page=0>

⁷ 대한민국 정부와 인도공화국 정부 간의 대외경제협력기금 차관에 관한 협정 (2017.6.14 일 서명, 협정 내용은 외교부 홈페이지에서 조회 가능)

정부 및 비정부단체로부터의 차관 관련 사무를 전담함. 경제국은 양자간 경제 협력에 관한 지침서 Handbook on Systems and Processes on Bilateral Official Development Assistance 를 발간하였음. 이에 따르면 ODA 로 분류되기 위해서는 제공되는 금액 중 25% 이상이 양허성 차관이여야 함.⁸

한편, 중요 인프라 건설 프로젝트를 위한 국외원조를 규율하는 인도정부의 지침에 따르면, 인도정부는 일반재정규칙(General Financial Rules, 2017) 제 277 조 (vii)를 완화하여, 재정적으로 건전한 주 정부 산하기관이 주 정부 및 인도 정부의 보증 하에 ODA 파트너 국가로부터 직접 차입하는 것을 허용하였음. 그 구체적인 조건은 다음과 같음.

개별 프로젝트를 위한 조건⁹

- i. 500 억 루피 이상의 대형 인프라 프로젝트일 것
- ii. 프로젝트의 수익이 원리금을 상환하기에 충분할 것
- iii. 프로젝트의 수익은 원리금의 지급 범위 내에서 수시로 에스크로 계좌에 예치되어야 함

⁸ Bilateral Development Assistance, a Handbook on Systems and Processes, issued by Department of Economic Affairs, Ministry of Finance, Government of India, 제 1 면 및 제 5 면.

⁹ Office Memorandum dated May 16, 2017, on Policy Guidelines for permitting the availing of external assistance by State Government entities from bilateral agencies for implementation of vital infrastructure projects issued by Ministry of Finance, Department of Economic Affairs 제 1-2 면.

Conditions for Individual Projects:

- (i) Only major infrastructure projects having total estimated cost of Rs.5,000 crore or more each, will be eligible;
- (ii) The project should have regular revenue stream i.e. the revenues to be generated from the project should be enough for repayment of principal amount and interest; and
- (iii) Revenues from the project should be escrowed to the extent of payment of principal and interest from time to time.

주 정부 프로젝트를 위한 조건¹⁰

- i. 당해 프로젝트를 수행하는 주체가 재정적으로 건전하며, 프로젝트 제안 전 3년간 평균 100억 루피 이상의 수입을 거두고 있을 것.
- ii. 당해 프로젝트를 수행하는 주체가 프로젝트 제안 전 3년간 평균 50억 루피 이상의 순이익을 내고 있으며, 순자산가치가 0보다 클 것
- iii. 위 조건을 충족하지 못할 경우 특별심사를 거쳐야 함. 단, 새로 설립된 기관이나 SPV는 당해 조건을 충족시키지 아니하여도 무방함.

주 정부가 보증을 연장하기 위한 조건¹¹

- i. 프로젝트 제안 직전년도 주 총생산액 대비 부채비율이 25% 이하일 것
- ii. 프로젝트 제안 직전년도 및 프로젝트 제안 당해년도의 재정적자가 주 총생산액의 3% 미만일 것
- iii. 주 재정법에 따른 보증 범위 내에 있을 것

¹⁰ Office Memorandum dated May 16, 2017, on Policy Guidelines for permitting the availing of external assistance by State Government entities from bilateral agencies for implementation of vital infrastructure projects issued by Ministry of Finance, Department of Economic Affairs 제 2 면.
Conditions for State Government Entities:

- (i) The Authority, Public Sector Undertaking or Organization of the State Government should be financially sound, having an average annual Revenue of not less than Rs.1,000 crore for the previous three years;
- (ii) The Authority, Public Sector Undertaking or Organization of the State Government should have consistent track record of positive net worth for the last three years with an average annual profit or surplus of not less than Rs.500 crore in last three years; and
- (iii) Any deviation from these criteria shall require special justification. These criteria would not apply for new entities / SPVs.

¹¹ Office Memorandum dated May 16, 2017, on Policy Guidelines for permitting the availing of external assistance by State Government entities from bilateral agencies for implementation of vital infrastructure projects issued by Ministry of Finance, Department of Economic Affairs 제 3 면.

Conditions for States to extend guarantee:

- (i) Debt-GSDP ratio of the State is less than or equal to 25 per cent in the preceding year;
- (ii) Fiscal Deficit of the State is less than 3 per of GSDP in the preceding year and also as per the BE of the current year i.e. the year when the proposal is made; and
- (iii) Availability of guarantee space as per the fiscal responsibility legislation of the State.”

또한, 주 정부 스스로도 위 지침을 충족시키는 한 직접 차관을 조달할 수 있음. 따라서, (i) 만약 EDCF 가 인도 정부 또는 인도 주 정부 내지 그 산하기관에게 양허성차관을 제공하는 것이라면, 이는 대외상업차관(External Commercial Borrowings)이 아니라 해외 원조(External Assistance)에 해당함. 반면, (ii) EDCF 가 양허성 차관을 제공하지 아니하고 프로젝트 회사에 직접 자금을 제공한다면, 이는 대외상업차관(External Commercial Borrowings)에 해당할 것임.

6. 노동관계법령

건설 산업은 인도 전역 또는 해당 주/도시에서 현행 노동 관련 법령을 준수하여야 함. 근로자들은 산업 분쟁법(Industrial Disputes Act, 1947)에 따라 사용자로부터 공정한 대우 및 법적인 보호를 받을 수 있음. 또한, 20명 이상의 계약직 근로자를 고용하는 모든 사용자는 계약직 근로자법(Contract Labour(Regulation and Abolition) Act, 1970)을 준수하여야 함. 이 사용자가 사업장을 등록할 것 및 관할기관¹²으로부터 라이선스를 얻을 것을 규정하고 있음.

5명 이상의 이주 근로자를 고용하는 모든 사용자는 '주간 이주 근로자(고용과 서비스 조건에 관한 규제)법(Inter-State Migrant Workmen(Regulation of Employment and Conditions of Service) Act, 1979)'에 따른 등록을 하여야 함. 이 법은 다른 주에서 온 이주 근로자들의 근로 조건을 규제하는 것으로, 이주 근로자의 평등한 임금, 이동 수당, 본국 출발 수당, 의료 시설 등을 보호하거나 제공하기 위한 것임.

근로자가 산업재해를 입은 경우 근로자 보상법(The Workmen's Compensation Act, 1923)에 따라 최소한의 보상을 지급해야 함. 최저임금법(Minimum Wages Act, 1948)에 따르면 사용자는 정부에서 결정한 최저임금률을 지급하여야 함. 더 나아가, 2017년 개정된 임금 지급법(Payment of Wages Act, 1936, Amendment Act, 2017)은 근로자가 정해진 일자에 약정된 임금을 차감 없이 받을 수 있도록 보장함.

¹² 계약직 근로자법에 따른 관할기관은 각 주나 연방직할지의 노동관계부서를 의미함. 인허가 담당 공무원은 통상 당해 노동관계부서 소속 공무원이며, 구체적으로 누가 담당자인지는 개별 지역에 따라 상이함.

임금법(Code on Wages, 2019)은 (i) 임금 지급법, (ii) 최저임금법, (iii) 상여금 지급법(Payment of Bonus Act, 1965), (iv) 동일임금법(Equal Remuneration Act, 1976)을 통합하고 대체하는 것을 목표로 함. 이는 특별한 사정이 없는 한 모든 사업장, 근로자 및 고용주에 적용됨. 임금법은 중앙정부가 최소 생활수준을 고려하여 결정하는 국가적인 최저임금률을 설정함. 최저임금은 최대 5년 간격으로 재검토되어야 함.

또한 인도 의회는 (i) 임금법, (ii) 사회보장법(Code on Social Security, 2020), (iii) 직장안전, 보건 및 근로조건법(Code on Occupational Safety, Health and Working Conditions, 2020), (iv) 산업관계법(Industrial Relations Code, 2020)을 통과시켰음. 다양한 기존 노동관계법령들이 위 새로운 법령에 통합되거나 수정되었음.

사용자나 하도급업체가 개별적으로, 또는 공동으로 선택하는 표준보험은 Contractor's All Risk Policy("CAR Policy")임. 모든 주요 건설계약 프로젝트는 건설단계 중 이에 의무적으로 가입하여야 함을 명시함. 또한 근로자 국가보험법(Employees' State Insurance Act, 1948)은 10명 이상의 근로자를 고용하는 모든 기업, 건설 프로젝트를 대상으로 등록을 강제하고 있음.

현재 근로자 국가보험법은 모든 사용자가 자신의 근로자들을 위해 보험을 제공하도록 규정하고 있음. 이 법은 직접 고용된 근로자뿐 아니라 하도급업체를 통해 고용된 근로자들도 보험가입의 대상으로 하고 있음. 보험은 출산휴가, 질병, 일시적 또는 영구적인 신체 장애, 산업재해로 인한 사망 등과 같은 사태로부터 근로자의 수입상실을 보호함.

사회보장법은 기존의 노동관계법령을 통합, 단순화하기 위하여 입법되었음. 사회보장법

제4장은 사용자가 직접 고용하는 근로자뿐만 아니라 하도급업체를 통해 고용하는 근로자에 대하여도 부담금을 납부하도록 요구함. 이 법은 10명 이상의 근로자가 고용되는 모든 사업장에 적용됨. 질병, 임산부 수당, 산업재해수당, 의료 보상, 장례비용 또는 장애수당 등의 혜택이 이 법에 따라 제공됨. 사회보장법을 통해 처음으로 사회보장 혜택이 계약직 근로자에까지 확대되었음. 또한 사회보장법은 모든 사용자가 (보험회사를 막론하고) 임금보험에 의무적으로 가입하도록 규정하였음.

건설산업에서 근로자를 고용하는 모든 사용자에게는 (i) 근로자 보상법, (ii) 근로자 국가보험법, (iii) 출산휴가법(Maternity Benefit Act, 1961), (iv) 퇴직금법(Payment of Gratuity Act, 1972), (v) 근로자 공제기금 등에 관한 법률(Employees' Provident Fund and Miscellaneous Provisions Act, 1952), (vi) 직장내성희롱 금지, 예방 및 해결에 관한 법률(Sexual Harassment at Workplace (Prohibition, Prevention and Redressal) Act, 2013)이 의무적으로 적용됨. 사회보장법은 위 6개의 법률을 통합하고 대체하기 위하여 제정되었음.

나아가 직장안전, 보건 및 근로조건법은 직장 안전, 보건 기준이나 이 법에 따라 제정된 세부 규칙을 준수하도록 강제함.

건설 및 기타 건축 근로자(고용 및 근무 조건 규제)법(Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996; BOCW Act) 제7조에 따르면 건설 또는 기타 건축 작업에서 건설 근로자를 고용하는 모든 사업장은 지정된 당국에 등록하여야 함. 위 법의 규정에 따라 건설 또는 기타 건축 작업을 위해 건설 근로자를 고용한 사업장의 소유자는 사용자로 간주됨. 또한 제7조에 따라 해당

사업장의 모든 사용자는 위 법의 적용 범위에 포함되며, 건설 근로자를 고용하고자 하는 경우 관계 당국¹³에게 지정된 방식으로 사업장을 등록하여야 함. 위 법은 공장법에 해당하는 "공장"에는 적용되지 않음. 사업장 소유자 및 건설 또는 건축 활동을 수행하기 위해 고용한 계약업자는 건설 및 기타 건축근로자 복지 세법(Building and Other Construction Workers' Welfare Cess Act, 1996; Cess Act)의 규율을 받으며, 이에 따라 사용자는 건설비용의 1%를 조세로 납부하여야 함.

공장법(Factories Act 1999)에 따라 인도의 공장은 근로자에게 무료 음용수를 제공하고 적절한 조명, 난방, 환기 및 청결을 보장해야 함. 또한 사용자는 근로자들에게 안전한 휴식 장소와 옷을 갈아입을 수 있는 장소를 제공해야 함.

유해물질법(Hazardous Substances Act, 1986)에 따라 인도에서 유해 물질을 생산하거나 사용하는 사용자는 정부로부터 라이선스를 얻어야 함.

¹³ 관계당국은 위 등록사무의 처리를 위해 정부당국으로부터 지정받은 자를 의미하며, 구체적으로 누구인지는 각 주마다 상이함. 통상 당해 구역을 관할하는 assistant labour commissioner 및 labour officer 가 등록사무를 처리함.

7. 건설계약

1) 건설 계약의 표준 형식

인도에서는 건설 계약의 표준 형식이 존재하지 않음. 그러나 국제 컨설팅 엔지니어 연맹(International Federation of Consulting Engineers; FIDIC), 영국 토목학회(Institution of Civil Engineers) 및 AUTM 표준 기관 간 협정(AUTM Model Inter-institutional Agreement) 등이 가장 자주 사용되는 계약 형식임. 또는 일부 정부 기관은 자체 형식을 사용하기도 하는데, 이는 특히 민관합작 프로젝트(Public-Private Partnership, PPP)에 대한 요구 사항을 규정하는데 사용되며, 도로, 공항, 항만 등의 대규모 복합 프로젝트의 개발에서 흔히 찾아볼 수 있음.

2) 건설계약 관련 중재 및 분쟁해결

인도 중재법(Arbitration Act)는 인도의 중재를 규율하는 기본 법률로, 본질적으로 1985년 UNCITRAL(United Nations Commission on International Trade Law) 모범법 및 1976년 UNCITRAL 모범중재규칙에 기초하고 있음. 본 법은 크게 두 부분으로 구성되는데, 제1부는 인도 내에서 이루어지는 모든 중재(국제중재 및 국내중재)를 규율하며, 제2부는 외국 중재의 집행에 관한 사항을 다룸.

중재법에 따라 뉴욕협약(New York Convention) 및 제네바 협약(Geneva Convention)이 인도 내에서도 효력을 가짐. 따라서 인도 법원은 (i) 다른 국가가 뉴욕 협약의 체약국이며, (ii) 당해 국가의 영토에서 중재판결이 이루어진 경우 그러한 중재판결을

승인하고 집행할 수 있음. 단, 인도 내에서 뉴욕협약은 당사자 간 '상업적'인 분야에서 발생한 분쟁에만 적용됨. 상업적인 분쟁인 한 계약에 기인한 것인지 여부는 불문함.

중재법 제48조는 외국 중재판결을 인도해서 집행하기 위해 필요한 조건을 규정하고 있음. 이에 따르면 (i) 중재판결이 인도 중재법률에 따라 중재의 대상이 될 수 없는 사안에 관한 것이거나, (ii) 중재판결의 집행이 인도의 공공정책에 반하는 경우 인도 법원은 그 집행을 거부할 수 있음. 단, 위 '인도의 공공정책에 반하는 경우'는 사기, 부패, 인도의 근본 정책에 위배되는 경우 등으로 좁게 규정되어 있음. 외국 중재판결의 집행기한은 12년임.

3) 매뉴얼에 따른 건설계약 관련 중재 절차

Manual for Procurement of Works 제 6 장 제 6.8 조에 따르면, 입찰 문서는 분쟁 해결 방법을 명시해야 하며, 이에는 분쟁 해결 위원회(Dispute Resolution Board)를 통한 분쟁해결방법이 반드시 포함되어야 함. 제 6.8.3.조에 따르면 공사위원회(Works Committee) 및 재무부 지출국(Department of Expenditure)이 분쟁 해결 위원회를 구성할 수 있음. 분쟁 해결 위원회에는 행정 및 재정 관련 공무원 외에 공사 시행 경험이 있는 숙련된 인원을 포함하여야 함.

제 6.8.2.항에 따르면, 계약 또는 공사 실행과 관련하여 발생하는 계약 당사자 간의 모든 분쟁(공사 실행 중 및 계약해지 전/후를 불문하며, 당사자 중 누구가 이의를 제기하였는지도 불문함)은 분쟁 해결 위원회에 회부되어야 함.

각 당사자들은 공공 조달 계약의 이행 과정에서 발생하는 분쟁을 일반 회계 규칙 제 227 조에 따라 해결하여야 함. 이에 따르면, 분쟁이 발생할 경우 당사자들은 계약서에 명시된 조정/중재 절차에 따라 계약을 해결하여야 하나, 계약서에 분쟁 해결에 관한 조항이 없다면 바로 소송을 제기할 수 있음.

4) 개별 협정에 명시된 분쟁 해결 절차와 법령 간의 우선순위

세계은행 및 국제 자금 기관의 자금으로 행하는 프로젝트의 경우, 개별 기관과 체결한 협정이 법령에 앞서 적용되게 됨(일반회계규칙 제 264 조). 따라서 차관 협정에 포함된 분쟁해결조항이 법령에 우선하게 되고, 이러한 경우 각 당사자는 계약상 분쟁 해결 방법에 구속됨. 통상 분쟁 해결 조항에는 제소, 조정, 중재 등을 포함하고 있으나, 구체적인 사항은 개별 계약서에 따라 다를 것으로 보임.

5) 국가건축코드

국가건축코드(National Building Code of India, 2016)은 건설에 대한 지침을 제공하는 법률로, 건축 관련 모든 기관이 채택할 수 있는 표준 규정으로 기능함. 건축물이 국가건축코드 상 요건에 따라 건축되었는지 여부는 주로 주 정부가 심사함. 일부 주는 당해 주 건축법의 내용에 국가건축코드의 규정을 반영하기도 하였음. 국가건축코드의 집행 실무는 각 주마다 상이할 수 있음.

국가건축코드는 행정 규정과 함께 건물에 대한 일반 요구사항, 화재 안전 요구사항, 소재, 구조 설계 및 건물 건설의 안전 요건을 포함함. 이 규정은 다음과 같은 사항들과 관련된 규정들로 구성됨:

- (i) 화재와 생명안전에 관한 규정;
- (ii) 전문가에 의한 건물의 구조적 안전 인증 및 건물 설계 검토 체계;
- (iii) 건축 및 배관설비에 관한 규정;
- (iv) 최신 구조적 하중, 설계 및 건설 규정, 특히 풍하중에 관한 규정;
- (v) 건설 관리 가이드라인;
- (vi) 적합한 품질의 건물을 안전하고 적시에 완성하기 위한 가이드라인.

내무부(Ministry of home Affairs) 산하 소방, 민방위, 지역방위대국(Directorate General of Fire Services, Civil Defence and Home Guards)가 2017. 4. 18. 발행한 지침에 따르면, 모든 주 정부는 국가건축코드 제4장 Fire & Life Safety in their building bye-laws에 입각하여 건축행정을 집행하도록 권고됨.

국가건축코드에 관한 주요 판례로는 다음이 있음.

Dinesh Mani C.M. v. State of Kerala

케랄라주 고등법원은, "국가건축코드는 강제력 없는 가이드라인에 불과하며, 국가건축코드의 어떤 규정이 주 건축법에 포함될지는 각 주 정부가 결정해야 한다. 즉, 주 정부가 국가건축코드의 규정을 주 건축법에 반영하지 않았다면 당해 규정은 법적 효력을 갖지 아니할 수 있다¹⁴"고 판시하였음.

Avinash Mehrotra v Union of India

대법원은 화재안전규정을 준수하는 것의 중요성을 강조하며, 주 정부 및 연방직할지는

¹⁴ "The National Building Code is only a set of guidelines which is non-statutory in nature and it is for the State Government to decide as to whether any provisions therein are to be incorporated into the Building Rules applicable to the State. In other words, if the State Government does not incorporate the provisions of the National Building Code into the Building Rules applicable, the same may not have the force of law".

학교가 국가건축코드에 따른 안전기준을 충족하는지 여부를 감독하여야 한다고 판시하였음. 대법원은 중앙정부에 비정부기구인 United Human Rights Federation이 공익소송을 제기하였다는 점을 통지하며, 국가건축코드는 강제력 없는 참고적 의미를 지님에 그치지만, 각 주정부는 국가건축코드상 안전규정에 부합하게 주 건축법을 개정하는 것이 바람직하다고 권고하였음.

Rajive Raturi Vs. Union of India (UOI) and Ors

시각장애인의 안전한 도로 및 교통시설 접근권을 다룬 대법원 판결임. 당해 사건에서 소송 당사자로 된 인도 정부는, 국가건축코드는 인도 표준청(Bureau of Indian Standrads)이 2017. 3. 15. 제정한 규칙으로, 각 주정부가 국가건축코드상 기준을 채택함으로써 강제력을 갖게 된다고 진술하였음.

결론적으로, 국가건축코드의 어떤 규정이건 주 정부가 이를 주 건축법에 채택하지 않으면 강제성을 띄지 아니함. 그럼에도 불구하고 거의 대부분의 주 정부는 국가건축코드의 내용을 주 건축법에 반영하고 있는 바, 국가건축코드는 인도의 건설행정에 중요한 가이드라인으로 기능하고 있음.

한편, 국가건축코드 위반에 관한 제재를 살펴봄. 국가건축코드에는 위반에 대한 중대한 벌칙은 규정되어 있지 아니함. 단, 국가건축코드는 건물, 건설 및 보수에 관한 12 개의 장으로 구성되어 있는데, 각 장이 요구하는 안전기준을 준수하지 아니하거나, 기타 관련규정을 위반할 시 건물 소유자에게 비용이 발생하거나, 사용승인 등 주 정부기관의 허가/승인이 거부될 수 있음.

국가건축코드 제 2 부 제 9 조에 따르면 국가건축코드 규정을 위반하거나, 그 의무를 이행하지 못하거나, 국가건축코드를 집행하는 자를 방해하는 행위는 범죄에 해당함. 이 경우 정부는 금전적인 제재를 과하거나 기타 국가건축코드에 따른 제재조치를 취할 수 있음.

국가건축코드 제 2 부 제 7.5 조에 따르면, 이미 승인된 건축계획이 국가건축코드를 위반하는 것으로 사후적으로 밝혀진 경우, 관계 당국은 건물소유자에게 이를 통보하여 정정절차가 취하도록 함. 정정이 완료될 때까지 추가적인 건축을 하여서는 안 됨.

국가건축코드 제 15.1 조에 따르면 안전하지 않은 것으로 확인된 건물은 공공안전에 위협을 가하는 것으로 간주되며, 수리, 철거 또는 그 밖의 관계당국의 조치에 따라야 함. 관계당국은 모든 건물을 검사할 권한이 있고, 결함이 발견된 경우 관계당국은 결함에 관한 서면기록을 작성하고 이를 건물의 소유자(또는 점유자)에게 통지함.

통지서에는 소유자 또는 점유자로 하여금 지정된 기간 내에 수리나 철거등의 조치를 취할 것을 명하는 내용이 포함되어 있음. 건물의 소유자나 점유자가 기간 내 적절한 조치를 취하지 아니할 경우 금전적 제재에 처해질 수 있음.

국가건축코드 제 7 부 제 9.4 조에 따르면, 건설장비 검사 중 안전규정 위반이나 위법성이 발견된 경우 관계 당국은 장비 소유자에게 이를 통지하고, 장비 소유자는 통지를 받은 때로부터 24 시간 이내에 이를 해결하여야 함. 관계당국은 이 과정에서 완전한 재량권을 지니며, 이 때 발생하는 비용은 모두 장비 소유자가 부담하여야 함.

관계당국이란 국가건축코드를 감독하는 공무원, 기관 또는 위원회로서, 구체적으로는 각 주에 따라 지방정부 또는 개발 관련 관청 등 다양할 수 있음.

8. 프로젝트 단계에서의 주요 인허가 절차

1) 건설 프로젝트 시행에 필요한 인허가 절차

건설 프로젝트를 위해서는 다음과 같은 인허가를 취득하여야 함:

- (i) 토지소유권: 건설 프로젝트를 위해서는 해당 프로젝트가 진행될 토지에 대한 명확한 소유권을 가져야 함. 명확한 소유권은 부동산이 적법한 등기명의인에 의해 순차적으로 등기되어 현재의 소유권이전등기에 이르렀으며, 시장에서 거래 가능하고, 해당 부동산에 대한 현재 상태와 관련하여 부동산 거래법(Transfer of Property Act, 1882)상의 어떠한 문제나 장애도 가지고 있지 아니함을 의미함. 토지의 소유권 또는 부담 등의 상태를 확인하기 위해 해당 지역의 지역 하위 등기소로부터 증명서를 획득해야 함. 농지를 비농업용지로 변환하는 경우에는 해당 지역의 지방 당국 및 그 주의 도시 개발부로부터 허가를 획득해야 함
- (ii) 지역 승인(Zonal Clearance): 토지 소유권 확인 이후에는 지역 당국으로부터 지역 승인을 얻어야 함. 지역 당국으로부터 전력 공급처, 통신 공사, 수도 및 하수 공급처, 공항 관리청, 주립 오염 통제청, 환경 허가, 소방서로부터 필요한 다양한 승인을 획득해야 함.
- (iii) 건축허가: 건축 계획은 건축허가를 받아야 하며, 건축허가를 받기 이전에 다양한 관계 당국으로부터 인허가를 받아야 할 수 있음. 예를들어, 뭄바이의 경우 국도/고속도로 관리부서의 허가를 받아야 함.

- (iv) 환경허가: 모든 인프라 프로젝트에 대하여 환경영향평가공고(Environmental Impact Assessment Notification, 2006)의 스케줄 I에 따른 환경허가를 획득하여야 함.

2) 설계 변경 시 주요 인허가 절차:

기존 계약을 변경하기 위해서는 계약에 따라 모든 당사자의 서면 동의를 얻어 기존 계약을 수정하기 위한 수정 계약을 체결해야 함. 지역 또는 주정부 단계의 권한 승인이 필요한 주요 변경 사항¹⁵의 경우 해당 변경에 대해 관할 정부 기관에 문의해야 하며, 이에 대한 승인 여부는 해당 정부 또는 지역 당국의 재량에 따름.

국가건축코드 제12.1조에 따르면, 건물에 대한 변경 사항이 발생할 경우 국가건축코드에 정해진 양식을 갖추어 따라 관계 당국에 보고되어야 하며, 이 때 건축계획의 사본, site plan, structural sufficiency certificate, 국가건축코드가 요구하는 certificate of supervision 등의 서류를 첨부하여야 함. 국가건축코드 Part II. 제 12.7조에 따르면, 건설 과정 중 승인된 건설 계획으로부터 벗어나는 경우 (화이트워싱, 페인팅, 리타일링, 미장공사 등의 경미한 변경은 제외), 사전에 관계당국의 승인을 받아야 함. 관계당국에 변경 사항을 명시한 수정된 계획을 제출하여야 하며, 원래 계획에 대한 규정된 절차도 준수하여야 함. 변경은 3주 이내에 이루어져야 함.

이 때 관계당국이란 국가건축코드를 감독하는 공무원, 기관 또는 위원회로서, 구체적으로는 각 주에 따라 지방정부 또는 개발 관련 관청 등 다양할 수 있음.

¹⁵ 주요 변경이란 승인된 건물 계획이나 일반 건물 요건, 구조 안정성 요건, 규정에 따른 소방 및 안전 요건에 영향을 미치는 변경 사항을 의미함. 주요 변경 사항은 주 정부의 승인 또는 허가를 요함.

한편, 국가건축코드 제12.4.1조에 따르면, 일반 건축 요건, 구조 안정성 및 화재 및 보건 안전 요건에 관한 규정을 위반하지 않는 변경 사항에 대해서는 통지 및 허가가 필요하지 않음.

9. 조달법

1) 개관

공공조달에 관한 주요 법령은 다음과 같음.¹⁶

- (i) 일반회계규칙(The General Financial Rules, 2017; GFR);
- (ii) 상품 및 서비스 조달을 위한 정책 및 절차에 관한 매뉴얼(The Manual on Policies and Procedures for Purchase of Goods and Services);
- (iii) The Director General of Supplies and Disposals Manual¹⁷

더욱이 통신법(Telecom Regulatory Authority Act, 1997)과 전기법(Electricity Act, 2003)과 같은 특정 산업을 위한 법률들도 있으며, 이러한 법률들은 다른 산업에 대한 요구 사항을 포함하고 있음. 정부에 의한 구매는 구매위원회의 권고나 등록된 공급업체와의 계약에 기반함.

인도에는 공공 조달을 전속적으로 규율하는 중앙 법률이 없으며, 그 대신 중첩되는 행정 규칙과 규정, 산업별 매뉴얼, 그리고 공공 구매 체계에 대한 주별 법률들이 있음. 일부 주인 타밀나두(Tamil Nadu), 카르나타카(Karnataka), 안드라 프라데시(Andhra Pradesh), 아삼(Assam), 라자스탄(Rajasthan) 등은 각각 자신들의 주별 법률을 제정하여 해당 주에서의 구매 절차를 규제함.

¹⁶ 공공조달의 투명성과 객관성을 높이기 위해 감사원(Central Vigilance Commission)이 발행한 매뉴얼은 상기 매뉴얼들에 통합되어 폐지되었음.

¹⁷ 물품이나 서비스의 조달에 관한 매뉴얼로, 국방부 등 개별 부처가 발행한 매뉴얼과 함께 적용됨.

2) 일반회계규칙

일반회계규칙은 재무부에서 발행된 종합규정으로, 공공 조달 절차 및 외부원조 시 따라야 할 절차를 규정하는 포괄적인 규칙임. 일반회계규칙은 규정에 달리 명시되어 있다는 등의 특별한 사정을 제외하면 인도 정부의 모든 부서가 따라야 하는 행정지침임. 일반회계규칙은 (i) 인도 중앙정부와 모든 부속기관, (ii) 자치단체(단, 자치단체의 조례에 중앙정부가 승인한 별도의 재정규칙이 명시된 경우를 제외함)에 적용됨.

일반회계규칙에 따른 물품 및 서비스의 조달절차

일반회계규칙 제6장(물품 및 서비스의 조달)은 공공서비스에 사용하기 위해 필요한 물품의 조달에 관해 인도의 모든 부서에 적용되는 일반 규칙을 규정하고 있음. 이에 관한 상세한 지침은 일반회계규칙 제6장에 따라 조달기관이 세부적으로 정할 수 있음. 이하 일반회계규칙의 주요 내용을 소개함.

일반회계규칙 제144조에 따른 공공 조달 요건은 다음과 같음:

- i. 조달 기관의 요구 사항을 고려하여 조달할 물품의 품질, 수량에 관한 사항을 상세하게 정하여야 함.
- ii. 국가 기술 규정 또는 인정된 국가 표준 또는 건축 코드가 있는 경우 기술 사양은 이러한 표준을 기반으로 작성해야 하고, 이러한 표준이 없는 경우 관련 국제 표준을 기반으로 작성하여야 함.
- iii. 재고 보유 비용을 피하기 위해 필요 이상의 수량을 구매하여서는 안 됨.
- iv. 입찰 제안은 공정하고 투명하며 합리적인 절차를 따라야 함.

- v. 조달 기관은 선정된 제안이 모든 면에서 요구 사항을 충분히 충족시킨다는 사실을 확인해야 함.
- vi. 조달 기관은 선정된 제안의 가격이 합리적이고 요구되는 품질과 일치한다는 사실을 확인해야 함.
- vii. 조달 과정의 각 단계에서 관련 조달 기관은 조달 결정을 내리는 동안 고려한 사항을 기록에 남겨야 함.
- viii. 입찰 발행 시 입찰 발행일부터 계약 발행일까지 완전한 조달 스케줄을 공개해야 함.
- ix. 모든 부처/부서는 매년 초까지 연간 조달 계획을 작성해야 하며, 이를 웹사이트에 게시해야 함.

일반회계규칙 제144조 제9항은 인도와 인접한 국가 출신의 입찰자는

산업무역진흥부(Department for Promotion of Industry and International Trade; DPIIT)가
구성한 위원회에 등록된 이후에 비로소 상품, 서비스(컨설팅 서비스 및 비컨설팅 서비스
포함), 혹은 공사에 입찰할 수 있음을 규정함.

일반회계규칙 제153조 제3항에 따라 중앙 정부는 어떤 카테고리의 입찰자로부터든지 상품
또는 서비스의 의무 조달을 제공할 수 있으며, 다양한 산업 분야에서는 해당 분야의 공공
구매를 보완하기 위한 규칙과 지침들이 제공됨.

제154조는 견적서 없이 상품을 구매하는 절차를 규정함. 각 기회마다 최대 25,000루피에
해당하는 가치의 상품 구매는 신뢰할 수 있는 공급업체로부터 필요한 품질과 사양의
상품을 구매했음을 증명하는 인증서를 근거로 입찰절차 없이 이루어질 수 있음.

제160조에 따라 관련부처는 의무적으로 전자조달포털을 통해 입찰을 받아야 함.

제161조에 따라, 추정 가치가 250만 루피 이상인 물품의 조달에는 광고를 통한 입찰 초청을 사용하여야 함.

제170조에 따라 물품 조달 시, 250만 루피 이상의 추정 가치를 가진 물품의 경우 입찰 유효기간 동안 입찰자의 입찰 철회를 방지하기 위해 입찰보증금을 제출하도록 요구하여야 함. 입찰보증금은 통상 조달될 물품의 추정가치의 2%~5%의 범위로 정해짐. 조달 관련부서는 입찰 보증금의 금액을 적절히 산정하여 입찰 문서에 명시하여야 함. 이에 더해, 제171조에 따라 계약체결 시 낙찰자로부터 성능 보증금을 징수하여야 함. 성능보증금은 통상 계약금액의 5%~10%로 정해지며, 정확한 산정비율은 입찰문서에 명시되어야 함.

제 173 조에 따라 모든 정부 구매는 공정하고 투명한 방식으로 이루어져야 하며, 잠재적인 입찰자들이 경쟁 입찰을 준비하고 제출할 수 있도록 해야함.

일반회계규칙에 따른 외부 원조 프로젝트의 시행

일반회계규칙 제 264 조에 따라, 다자간 또는 양자 기금 기관으로부터 외부 지원을 받아 프로젝트를 실행하는 경우 해당 프로젝트는 매년 의회에서 승인하는 예산안에 반영되어야 함. 재무부 경제국이 외부 원조 프로젝트의 주무기관으로, 외부 기금 기관과 대출 또는 보조금에 대한 법적 계약을 체결함.

재무부 경제국 원조계정감사실(Office of the Controller of Aid Accounts and Audit; CAAA)는 인도정부와 외부 자금 기관 간 체결된 차관 계약을 집행하는 책임을 짐. 따라서 모든 차관계약의 사본은 재무부 원조계정감사실에 송부되어야 함. 한편, 외부 지원금은 (외화로 지급되건 인도 루피로 지급되건) 뭄바이의 인도준비은행으로 송금됨. 뭄바이의 인도준비은행은 동액 상당액을 뉴 델리의 인도준비은행 산하 경제국(Department of Economic Affairs)의 원조계정감사실(Controller, Aid Accounts and Audit)로 송금함.

제268조에 따라 각 주 정부는 프로젝트 실행 기관이 재정년도 동안 프로젝트에 사용할 예정인 지출을 예산에 포함시켜야 함.

일반회계규칙에 따른 정부보증의 제공

인도 정부 보증을 부여하는 권한은 경제국 예산실(Budget Division)에 있음. 인도 정부 보증은 사회적, 경제적 파급효과가 큰 중앙 정부 프로젝트의 실행가능성을 높이기 위해서, 또는 양자간/다자간 기구가 제공하는 양허성 차관의 조건으로 정부 보증이 필요한 경우 행하여 짐. 그러나 인도 정부 보증은 인도 헌법 제292조, 재정책임 및 예산관리법(Fiscal Responsibility and Budget management Act) 및 그 시행령에 의해 제한되고 있음. 재정책임 및 예산관리법 제4조 (1) (c)항은 중앙정부의 보증 한도를 회계연도 당 국내총생산액의 0.5%로 제안하고 있음. 같은 법 제7조 (3) (b)항에 따르면 예기치 못한 사항으로 인해 위 한도를 초과하여 보증을 제공하는 경우, 재무부 장관은 인도 의회(상원과 하원 모두)에서 한도를 초과하게 된 경위, 예산에 미치는 실질적/잠재적 영향 및 중앙정부의 시정조치를 설명하여야 함.

일반회계규칙 제277조는 인도 정부의 보증에 관해 다음과 같은 조건을 정하고 있음:

- i. 공익을 위할 것
- ii. 통상적인 대출의 경우와 마찬가지로 검토절차를 거칠 것
- iii. 새로운 보증계약을 체결하기 위해서는 관련 부처, 재무부 경제국, 또는 이들이 추천한 독립 기관이 보증에 수반하는 위험을 철저히 평가하여야 함
- iv. 검토절차를 마친 뒤 보증 제안은 재무부 경제국으로 송부되어야 함.
- v. 보증의 범위는 원리금의 상환에 국한되며, 나머지 위험은 보증의 범위에 포함되지 아니함.
- vi. 정부 보증은 오직 공공부문을 위해서만 연장될 수 있음.
- vii. 정부 보증은 민간영역을 위해서는 제공될 수 없음.
- viii. 정부 보증은 외부 상업 차용을 위해서는 연장될 수 없음.
- ix. 정부 보증은 연성 차관(soft loan)을 위해서는 제공될 수 있으나, 상업 대출(commercial loan)을 위해서는 제공될 수 없음.

위 조건을 충족하는 경우, 정부는 대출 기관이 부과하는 조건에 따라 프로젝트 금액의 최대 80%를 보증할 수 있음. 이는 대출 기관으로 하여금 프로젝트 및 차용인의 신용 등급을 적절히 분석하고 리스크 관리 전략을 수립하도록 유도하기 위함임. 단, 대출을 받는 기관이 인도 정부를 대신하여 일부 기능을 수행하는 등 특별한 사정이 있다면 인도 정부는 프로젝트 금액 100%를 보증할 수 있음.

일반회계규칙 제280조에 따르면, 정부 보증 발급하기 위해서는 다음의 조건을 준수하여야 함:

- i. 대출 및 보증의 이행, 대출 및 보증계약 조건의 감독, 프로젝트 모니터링 등은 대여기관과 인도 연방 정부가 체결한 계약에 의해 규율되어야 함.

- ii. 보증 계약서는 일반회계규칙 제 11 장(Chapter)에 배치되어서는 안 됨.
- iii. 예산실이 승인한 보증 제안은 제안된 회계연도 내에 이행되어야 하며, 보증계약이 동일한 회계연도에 체결되지 아니할 경우 새로이 보증제안을 제출하여야 함.
- iv. 보증은 예산실과 합의한 특정 목적을 위해서만 제공되어야 함.
- v. 인도 정부가 제공하는 보증은 타인에게 양도될 수 없음. 보증이 양도된 경우 예산실이 양도를 승인하지 아니하면 당해 보증은 무효로 됨.

일반회계규칙 제283조에 따른 보증의 이행

프로젝트 관련 부처는 예상되는 이행 사실을 예산실에 미리 통지하여야 함. 보증이 이행될 경우를 대비하여 인도 공공 계정에 보증상환기금이 설치됨. 또는, 재무부 예산실의 승인을 얻어 대출 기관에 보증액과 동일한 금액¹⁸을 지급함으로써 보증의무를 면할 수도 있음.

3) 상품 및 서비스 조달을 위한 정책 및 절차에 관한 매뉴얼

인도의 조달정책에 관하여는 재무부 지출국(Department of Expenditure)가 발행한 다음과 같은 매뉴얼들이 존재함.

물품의 조달에 관한 매뉴얼(Manual for procurement of goods)

본 매뉴얼은 상품의 조달과정에 적용되며, 조달 기관이 조달절차를 외부 기관에 위탁하거나, 조달 절차가 다른 계약과 결합하여 처리되는 경우에도 적용됨. 단, 본

¹⁸ 이 금액 또한 보증상환기금의 한도 내에서 이루어져야 함.

매뉴얼은 조달 기관이 자체 수요를 충족시키기 위해 자회사(지배적인 지분을 보유한 조인트 벤처 포함)로부터 물품을 구매하는 경우에는 적용되지 않음.

본 매뉴얼에 따른 물품에는 일체의 물품, 자재, 상품, 가축, 의약품, 가구, 설비, 원료, 소모품, 예비부품, 기계, 산업 플랜트, 자동차, 항공기, 선박, 기차, 공장의 생산설비 등 유형물은 물론, 소프트웨어, 기술 이전, 라이선스, 특허권 등의 무형물도 포함되나, 도서관을 위한 도서, 출판물, 정기간행물 등은 포함되지 않음. 또한, 물품의 조달에는 운송, 보험, 설치, 시운전, 교육, 유지 및 보수와 같이, 물품 공급에 수반하는 소규모 서비스도 포함될 수 있음.

공사 조달 절차 매뉴얼(Manual for policies and procedures for procurement of works)

본 매뉴얼은 공사의 조달에 적용됨. 본 매뉴얼이 규정하는 공사는 그 자체로 경제적 또는 기술적인 기능을 충족하는 활동으로, 하나 이상의 공학, 건축, 재료, 기술, 노동, 기계 및 장비 이상을 사용하여 이루어지는 건설, 제조, 수리, 개장, 장식, 설치, 발굴, 준설 등을 의미함. 공사의 성격에 따라서는 물품의 조달 또한 공사의 범위에 포함될 수 있음.

공사에는 도로, 철도, 공항, 항구, 다리, 건물, 관개 시스템, 상하수도, 댐, 터널 등 토목공사와, 기계 및 전기 설비의 설치 및 유지보수 작업이 포함됨.

본 매뉴얼은 특히 공사를 자체적으로 시행할 역량이 없어 제3자에게 공사를 위탁하는 조달기관을 대상으로 하고 있음.

컨설팅 및 기타 서비스 조달 매뉴얼

(Manual for procurement of consultancy and other services)

본 매뉴얼은 컨설팅 서비스를 포함한 일체의 서비스 조달에 적용됨. 본 매뉴얼에 따른 서비스란 유지보수 서비스, 전문적 서비스, 교육 및 훈련, 컨설팅 및 자문 또는 그 밖에 조달기관이 지정한 일체의 서비스를 의미하며, 그러한 서비스에 수반되는 물품 또는 공사도 이에 해당될 수 있음. 단, 법령이나 행정명령에 따라 특정 개인과 체결하는 계약은 이에 해당하지 아니함.

4) The Director General of Supplies and Disposals Manual ("DGS&D Manual")

Directorate General of Supplies & Disposals ("DGS&D")는 인도의 중앙 조달 부서로, 구매, 품질 보증, 통관, 운송, 등록, 교육훈련 및 컨설팅을 담당하는 하위 부서로 구성되어 있음.

본 조직의 핵심 기능은 구매 부서가 수행하며, 중앙정부 또는 주 정부를 대신하여 조달 행정을 집행함. 품질 보증 부서는 조달 규격 설정, 업체 평가 및 등록, 물품 품질 보증 등을 통해 조달 행정을 지원함.

DGS&D 매뉴얼은 (i) 인도 헌법 제299조에 따라 중앙정부 또는 주 정부를 대신하여 체결하는 계약, (iii) 중앙정부 및 주 정부 이외의 당사자를 대신하여 체결하는 계약, (iii) 기타 조달절차를 규율하는 규정을 다루고 있음.

본 매뉴얼의 주요 내용은 다음과 같음:

- i. 중앙정부 및 연방 직할지를 위한 물품의 구매 및 검사
- ii. 주 정부, 공기업, 공공기관 등을 위한 물품 구매 및 검사
- iii. DGS&D, 중앙 정부, 주 정부, 공공기관 등이 발주한 물품의 수입 통관
- iv. 공급자 등록 및 해외 공급자의 인도 대리점 등록¹⁹
- v. 구매 및 품질관리 분야에서 정부기관 및 산업체를 위한 교육훈련

5) 매뉴얼과 차관 협정의 우선순위

상기 언급된 매뉴얼들은 명시적으로 세계은행이나 기타 국제 자금기관이 시행하는 프로젝트에는 적용되지 아니한다고 정하고 있음. 일반회계규칙 제 264 조에 따르면 그러한 해외 원조에는 개별 협정이 우선 적용되기 때문임. 즉, 차관 협정의 내용이 조달 관련 법령에 우선하여 적용됨.

EDCF 사업 역시 협정 내용이 조달 관련 법령에 앞서 적용될 것으로 보이나, 보다 상세한 내역은 협정 내용 자체를 분석해보아야 확인할 수 있음.

¹⁹ 인도 재무부는 외국 공급업체의 인도 대리점을 의무적으로 등록하도록 정하고 있음.

10. 입찰절차

정부 기관이 관여하는 프로젝트에 대해서는 규제 기관이 입찰 절차를 통해 프로젝트 시공자를 선정함. 낙찰자는 다음을 이행하여 프로젝트를 진행함:

- (i) 토지구매계약²⁰
- (ii) 건설
- (iii) 계약기간동안 프로젝트 운영

인도의 공공조달은 일반적으로 입찰절차를 통해 이루어짐. 인도 대법원은 입찰공고가

²⁰ 공사 조달 절차 매뉴얼 제 1.10 항에 따르면, 조달기관은 낙찰자와 계약을 체결하기 전에 토지취득절차를 완료하여야 함. 계약 체결 전에 조달기관이 필요 토지의 전부를 취득하여야 하며, 만약 일부 토지를 취득하지 못한 경우 프로젝트를 지연함이 없이 계약을 체결하고 가능한 토지에서 먼저 공사를 개시하여야 함. 그러나, 그러한 경우에도 계약에 필수적인 토지는 계약 체결 전에 어떠한 부담도 없는 상태로 확보되어 있어야 함. 이 때 조달기관은 당해 프로젝트의 조달에 관한 권한이 위임된 정부 부처나 그 소속 기관을 의미함.

또한, 동 매뉴얼 제 6.1.3 조에 따르면, 조달기관은 계약 체결 이전에 토지취득절차 마치는 외에, 도시계획, 환경, 전기, 소방 등과 관련하여 필요되는 모든 인허가를 취득하여야 하며, 낙찰자는 공사의 시공에 필요한 일체의 추가 승인 및 허가를 자신의 비용으로 취득하여야 함.

인도 헌법상 토지는 주 정부의 관할이며, 각 주마다 다른 규정이 적용됨. 정부 소유 토지는 정부의 사전 승인 없이는 매각될 수 없음. 토지의 수용, 재개발 및 정착에 대한 공정한 보상 및 투명성 제고법(The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation, and Resettlement Act, 2013; “LARR”)이 인도의 토지 취득 절차를 규율하는데, 이 법은 연방정부 또는 주 정부가 산업단지의 개발, 기반시설의 구축 등을 위해 사유지를 취득하는 절차를 규율하고 있음. 민간합작투자 프로젝트를 위한 토지 수용도 위 법의 적용을 받으나, 고속도로를 위해 토지를 취득하는 경우에는 위 법이 적용되지 아니함. LARR 이 적용되지 않는 토지 취득은 재산이전법(Transfer of Property Act, 1882; “TPA”)의 규율을 받음.

일간뉴스에 광고되고, 중앙조달포털에 업로드되어야 한다고 판결하였음.

이하는 입찰절차의 유형임:

- (i) 개방형 경쟁 입찰(Open Competitive Bidding): 입찰자들에 의해 제출된 입찰서가 공개되고 낙찰자가 누구인지 알 수 있어 투명한 입찰이 가능함.²¹
- (ii) 제한 경쟁 입찰(Restrictive Bidding): 사전 선별절차를 통과한 제한된 수의 입찰자에게만 입찰공고를 보내는 입찰방식임.²²
- (iii) 이단계 입찰(Two-stage Bidding): 일반적으로 높은 전문적 능력이 요구되는 경우에 채택되는 방식으로, 입찰자로부터 2개의 별도의 입찰서(각 기술적, 재정적 측면에 관함)를 제출받음.²³
- (iv) 직접구매(Single Source Procurement/Spot Purchase): 비상사태, 비용 제한, 이전 작업이 지속 등 특수한 경우에 관계당국의 승인을 얻은 특별한 경우에 한하여 사용될 수 있는 비경쟁적인 방식임.²⁴

²¹ General Financial Rules, 2017 Rule 161

Open competitive bidding: In this type of bidding, the bids submitted by the parties are opened to the public. This type of bidding creates a transparent bidding process, wherein the interested parties are made aware of the selection of the bidder.

²² General Financial Rules, 2017 Rule 162

Restrictive bidding: In this procedure, the invitation to bid is only sent to a limited number of bidders that have been prequalified through a screening process.

²³ General Financial Rules, 2017 Rule 163, 164

Two-stage bidding: Two-stage bidding process is usually taken up where a heightened sense of professional proficiency is required. In such cases, two separate bids (technical and financial) are invited from the procurers.

²⁴ General Financial Rules, 2017 Rule 166

Single source procurement/ Spot purchase: As opposed to the other procedures covered above, this method is non-competitive and is used in exceptional circumstances after obtaining the approval of a competent authority. The special/exceptional circumstances could be an emergency, limitation of cost or continuance of previous work.

인도 정부는 위에 언급된 조달 방법/절차 외에도 다른 조달방법을 공고할 수 있음. 단, 인도에 자회사가 없는 해외 입찰자는 인도에서 특수목적회사(Special Purpose Vehicle) 또는 자회사를 설립해야 하며, 계약 기간 동안 일정한 소유권 수준을 유지해야 함. 해외 입찰자에게 제공되는 보호조치는 인도 내 입찰자에게 제공되는 것과 동일함. 인도 헌법은 법 앞의 평등을 명령하며 차별을 금지하므로, EU 회원국을 포함한 어떤 국가의 입찰자에게도 특혜는 없음. 모든 입찰자는 동등하게 취급되며, 조달 절차와 관련된 어떠한 분쟁이 있을 경우에도 동일한 보호조치에 접근할 수 있음.

11. 각 지역별 관련규정

인도에는 공공 조달에 관한 포괄적인 규정이 없음. 위에서 언급한 중앙 법률 외에도, 인도는 각 주정부가 수행하는 조달에서 투명성을 유지하기 위해 입찰절차를 규율하는 법령이 존재함.

1) 안드라 프라데시 (Andhra Pradesh)

안드라 프라데시 주정부 의회에서 제정된 "The Andhra Pradesh Infrastructure (Transparency Through Judicial Preview) Act, 2019" (이하 "법률")은, 법률에 첨부된 일정애 나열된 부문에서 시행되는 모든 인프라 프로젝트에 적용됨. 이 법률은 안드라 프라데시 주정부가 모든 인프라 프로젝트(10억 루피 이상의 민관합작 프로젝트 포함)에 대한 입찰을 개시하기 전에, 전/현직 고등 법원 판사로부터 사전 법적 판단을 받도록 하여, 법정 절차, 규칙 및 지침을 준수하도록 함.

안드라 프라데시 주정부는 입찰 절차를 체계화하기 위한 여러 정부 명령을 발행하고 시행했하였음(이하 "정부 명령"). 이러한 명령은 안드라 프라데시 주정부의 다양한 부서장에 의해 발행되며, 프로젝트의 금전적 상한선을 설정하는 한편, 해당 부서에 의해 발행된 명령의 발효일부터는 모든 공사 및 물자 조달이 전자 조달 시장을 통해서만 이루어져야 한다고 규정하고 있음.

정부 명령이 규정하는 서비스 요금, 입찰비용 및 거래비용은 각 작업의 예상 비용에 합산되어야 하고, 유관 부처가 발행한 별도의 정부 명령에서 달리 지시하였다는 등의 특별한 사정이 없는 한, 낙찰자 또는 조달 주문을 받은 서비스 공급자에 의해 지불되어야 함. 정부 명령에 따라 전자조달이 이루어져야 하는 작업에 관하여, 안드라 프라데시 정부는 전통적인 방법²⁵에 의한 입찰을 받아들이지 아니함.

2) 타밀 나두 (Tamil Nadu)

타밀 나두 입법부는 주 정부 조달을 규율하기 위하여 다음과 같은 법률 및 규칙들을 제정하였음. 이는 입찰 초청 기관의 선정, 입찰 개시, 평가 및 낙찰 절차를 규정함.

Tamil Nadu Transparency in Tenders Act, 1998

Tamil Nadu Transparency in Tenders Act, 1998(이하 "법")은 입찰 절차를 규율하고 공공조달의 투명성을 제고하기 위하여 타밀 나두 입법부에 의해 제정되었음.

법 제8조, 제9조는 입찰 개시 절차 및 입찰 초청 기관(Tender Inviting Authority)의 기능을 규정하고 있음. 입찰 초청 기관은 타밀 나두 정부가 임명한 공직자들에게 공고하는 방법으로 입찰자를 초청하고, 이를 신문에 게재하는 방법으로 공표함. 입찰 수용 기관(Tender Accepting Authority) 또는 이로부터 권한을 위임받은 다른 공무원은 입찰자들의 면전에서 입찰을 개봉하여야 함.

제10조에 따르면, 둘 이상의 입찰자가 동일한 가격을 제시한 경우, 입찰 수용 기관은

²⁵ 전자입찰을 사용하지 아니한 서면 입찰을 의미함.

입찰자의 경험과 신뢰도를 고려하여, 조달 계약을 분할하여 복수의 입찰자와 계약을 체결할 수 있음. 그러한 분할이 불가능하거나 평등하게 분할되지 않는 경우, 입찰 수용 기관은 그 이유를 기록하여야 함.

예외: 제16조는 본 법이 적용되지 않는 예외를 규정하고 있음. 예외는 다음과 같음:

- i. 정부에 의하여 자연재해 또는 비상사태가 선언된 경우;
- ii. 특정 공급자나 계약자가 재화나 서비스와 관련하여 배타적인 권리를 가지고 있고, 다른 합리적인 대체재가 존재하지 않는 경우, 또는 조달기관으로부터 조달된 재화, 장비, 기술을 보유하고 있는 조달기관이 기존 재화, 장비, 기술과의 호환성을 위해 동일한 공급자로부터 조달이 이루어져야한다고 결정한 경우;
- iii. 정부 프로그램이 아니라, 통상적인 영업활동(상품의 매매 등)을 하는 조달기관을 위한 조달의 경우;
- iv. 사전 정부 승인을 얻어, Tamil Nadu Water Investment Company Limited, Tamil Nadu Infrastructure Fund Management Corporation Limited, Tamil Nadu Urban Infrastructure Financial Services Limited 등 금융기관과 협의한 경우.
- v. State Road Transport Undertakings와 체결하는 Rate Contracts의 경우

Tamil Nadu Transparency in Tenders Rules, 2000

본 규정은 민관합작프로젝트를 제외한 일체의 조달에 적용됨.

4-A조는, 조달기관이 의무적으로 웹 포털을 통한 입찰을 이용하여 조달하여야 하며, 4월 1일 이후로 온라인 포털 이외에서 이루어지는 입찰은 절차 위반이라고 규정함. 전산망을 통하여 제출된 입찰은 입찰 초청 기관 또는 입찰 평가 위원회(tender

Scrutiny Committee)에 의해 개봉될 수 있음. 입찰은 정해진 입찰종료시간이 정해진 후 즉시 개봉하여야 하여야 함이 원칙임. 단, 입찰 개봉에 참석하기를 희망한 입찰자가 있는 장소로 이동하여 입찰을 개봉하는 경우, 이를 위하여 1시간을 초과하지 않는 합리적인 범위 내에서 개봉을 연기될 수 있음. 입찰은 입회를 희망한 입찰자들 면전에서, 또는 입찰자들 대표 1인의 면전에서 개봉되어야 함. 계약금(Earnest money Deposit; EMD)은 입찰자의 선택에 따라 은행의 보증서나 온라인 송금으로 지불될 수 있음.

자격 요건: 제31조는 입찰자가 자연인, 사기업, 또는 민관합작기구인 경우에 적용되는 자격요건을 규정하고 있음. 입찰희망자를 위한 자격요건은 Request for Qualification(RFQ)에 규정된 사항에 한정되지 아니하고, 입찰자는 하나의 프로젝트에 둘 이상의 입찰서를 제출할 수 없으며, 단독으로, 또는 합작업체의 일원으로 입찰하는 입찰희망자는 단독이건 다른 합작업체의 일원이건 별도의 입찰서를 제출할 수 없음.

7억 5천만 루피를 초과하는 입찰공고는 의무적으로, Indian Trade Journal 뿐만 아니라 타밀 나두의 모든 영문 신문 및 지역 언어 신문에 공고되어야 하며, 위 공고에는 마지막 입찰서 제출 기간을 표시하여야 함. 조달 기관은 입찰자의 필요를 고려하여야 하며, 입찰자에게는 입찰을 준비하고 제출할 합리적인 기간이 부여되어야 함.

제14조 제7항에 따라, 입찰 서류는 입찰자가 가격을 제시해야 하는 조건을 명확하게 나타내야 하며, 이 가격은 운송, 관련 세금 및 과세, 보험, 기타 부가 서비스 등 최종 목적지까지의 모든 비용을 포함해야 하며 그 내역을 구체적으로 포함하여야 함.

Tamil Nadu Transparency in Tenders (Public Private Partnership Procurement),

2012

이 규정은 2,500만 루피를 초과하는 모든 민관합작 프로젝트에 적용됨.

제3조에 따라, 1억 루피 미만의 민관합작 프로젝트에 대해서는 단계적 입찰 방식이 채택될 수 있으며, 자격 정보와 기술 제안이 하나의 봉투에 봉합되고, 최종 제안은 별도의 봉투에 봉합됨. 모든 입찰 공고 및 민관합작 프로젝트의 입찰결정은 State Tender Bulletin에 공표됨. 입찰 초청 기관은 프로젝트 가치가 5억 루피를 초과하는 모든 경우에 Indian Trade Journal에 입찰 초청 공고를 게재하여야 함.

제23조에 따라, 입찰이 개봉된 이후에는 입찰을 변경하거나 수정할 수 없음. 단, 입찰 수용 기관은 낙찰자와 가격을 삭감하기 위한 협의를 할 수 있음.

3) 델리 (Delhi)

2022년 6월에 개정된, 인도 정부 재무부(Government of India Ministry of Finance) Department of Expenditure 발간, 재화 조달 매뉴얼(GOI Manual)은 조달에 관한 일반적인 지침을 제공할 목적으로 발행되었음. 이는 그 성질 상 포괄적인 지침으로, 각 부서는 위 지침의 틀 안에서, 지역적 및 전문적인 요구에 따라 각자의 세부적인 매뉴얼, 규칙, 명령 및 특별명령 등(표준 형식 및 표준 입찰 계약서 등을 포함하여)을 통하여 구체화하도록 권장됨. 이와 같이 구체화된 지침은 각 조달 담당자를 위한 세부 지침으로 기능함.

조달 방식: 매뉴얼 제4.1조는 조달 방식을 설명하고 있음. 공공 조달에서 잠재적인 입찰자로부터의 제안은 가장 넓은 경쟁이 필요한 경우와 절차의 복잡성 사이의 균형을 달성하는 방향으로 이루어져야 함. 다양한 조달 방식과 입찰 시스템은 다양한 조달

상황에서 그러한 균형을 유지하기 위하여 사용될 수 있음.

그러나 국제 기구²⁶로부터 제공되는 대출 또는 보조금으로 재정이 충당되는 조달의 경우, 대출계약서에 재무부의 승인을 거쳐 조달 절차를 규정하여야 함.

공공조달에서 사용될 수 있는 조달 방식으로는 (i) Open Tender Enquiry와 (ii) Global Tender Enquiry가 있음.

- i. Open Tender Enquiry는, 입찰 공고를 지정된 웹사이트에 동시에 게시하여 가능한 한 넓은 경쟁을 유도하는 조달방법임.
- ii. Global Tender Enquiry는, 적절한 광고와 외국 통화로의 지불을 위한 신용장 발급을 통하여, 조달 절차에 해외 기업을 유치하는 것을 목표로 함.

매뉴얼 4.3.3조에 따르면 20억 루피 미만의 금액으로는 Global Tender Enquiry를 진행하지 않음. 위 금액 한도는 Department of Expenditure가 수시로 지정할 수 있음. 그러나, 해당 한도 미만의 입찰 초청을 위해 특별한 사정이 있는 경우에는 해당 부처가 상세한 사유를 설명하고 사전 승인을 요청할 수 있음.

한편, 매뉴얼 제4.15조에 따라, 모든 부처는 의무적으로 전자 포털을 통하여 조달절차를 진행하여야 함.

입찰의 평가: 매뉴얼 제7.4조에 따라 해외 입찰자는 입찰 서류에 선적지 조건인 Free

²⁶ 세계은행이나 아시아개발은행과 같이, 차용국이 준수하여야 하는 고유의 절차를 보유한 국제기구를 말함.

Alongside Ship("FAS"), Free on Board("FOB"), Cost and Freight("CFR") 또는 Cost Insurance and Freight("CIF") 기준으로 견적을 작성하여야 하며, 운임이나 보험 등의 가격을 명시하여야 함. 구매자는 위 조건 중 하나를 택하여 주문할 권리를 가짐.

입찰서에는 인도에 적용되는 관세 번호와 관세율도 표시되어야 함. FAS 또는 FOB 견적의 경우 운임 및 보험료가(견적에 표시되지 않았다면 확인 후) 더해져 CIF 비용으로 계산됨. Free on Rail("FOR") 조건의 경우, 비용을 계산하기 위해서는, 입찰 개봉일 기준 CIF 비용에 하역 수수료, 관세, 상계관세(countervailing duty), 할증금을 포함한 가격 위에 1%를 더해야 함. 그 외에도 clearing agency charge, 내륙 운송료, Octroi(또는 입장세) 등을 산정하여 FOR 또는 Free On Truck ("FOT") 조건에 추가할 수 있음. 신용장 지불이 있는 입찰의 경우, (조달 기관의 거래은행이 확인한) 신용장 수수료 예상액 또한 더해져야 함.

인도 내국입찰자와 해외 입찰자가 모두 입찰한 경우, 견적 비교는 구매기관의 지출 총액 원칙에 따라 모든 적용 가능한 세금 및 관세를 포함한 FOR 또는 FOT 대상을 기준으로 수행됨. 델리 조달법과 차관 협정의 내용이 배치되는 경우 차관 협정의 내용이 우선함.

4) 마하라슈트라 (Maharashtra)

마하라슈트라 주에서는 공공 조달을 규제하는 주별 법령이 없으며, 대신 주 정부가 발행한, 주 정부 기관의 조달 절차에 관한 사무 절차 매뉴얼(Manual of office procedure for Procurement by the Government departments)이 있음. 이 매뉴얼은 불공정한 조달 수단을 배제하고 투명한 방식으로 조달을 규제하고자 함.

마하라슈트라주의 조달 관련 부처는 조달위원회를 구성하고 본 매뉴얼에 따라 조달행정을 집행하여야 함. 본 매뉴얼은 2016. 12. 1. 이후 추진되는 조달프로그램에 적용됨.

또한, 본 매뉴얼은 지속가능한 조달정책을 강조하며, 제품을 구매할 때 전통적인 경제적 측면 외에도 사회 및 환경적 측면을 고려하도록 정하고 있음. 상품의 복잡성, 성격 및 가치에 따라 (i) Open Competitive Tender, (ii) Direct Purchase 또는 Spot Purchase, (iii) Purchase through Quotation, (iv) Limited Tender, (v) Procurement from empaneled/rate contract supplier, (vi) Single Source Procurement (vii) Purchase by Swiss challenge method, (viii) Purchase by expression of interest 등의 방법을 사용할 수 있으며, 입찰 광고는 마하라슈트라주 정보 홈페이지에 게시되어야 함.

12. 조달관계법령 위반에 대한 벌칙

1) 개관

일반회계규칙 및 인도 정부 매뉴얼은 조달관계법령 위반에 관한 벌칙규정을 두고 있음.

2) Code of Integrity for Public Procurement(“Code of Integrity”)

공공조달에는 부패가 개입하기 쉬우므로, 공공조달과정의 청렴도를 제고하기 위해 일반회계규칙 제175조에 따라 Code of Integrity가 도입되었음. 공공조달에 참여하는 입찰참가자, 공급자, 낙찰자, 컨설턴트 및 서비스 공급자는 Code of Integrity를 준수하여야 함.

Code of Integrity의 주요 내용은 다음과 같음

- i. 다음 행위의 금지:
 - a) 직접적 또는 간접적으로 조달 절차에서 부당한 이익을 얻거나 조달절차에 영향을 미치기 위하여 뇌물 기타 물질적 이익을 제공, 요청, 수수하는 행위
 - b) 재정적 이익 또는 그 밖의 이익을 취하거나 의무를 회피하기 위하여 정보를 누락하거나 허위로 진술하는 행위
 - c) 조달절차의 투명성, 공정성을 저해할 수 있는 담합, 입찰 조작, 그 밖의 반경쟁적 행위
 - d) 조달절차에서 부당한 이득을 얻거나 개인적인 이득을 취하기 위해 조달 기관이 입찰자에게 제공한 기밀정보를 사용하는 행위

- e) 입찰이나 조달 계약 체결에 관하여 입찰참가자와 조달공무원간의 사적 거래 행위
 - f) 조달 과정에 영향을 미치기 위해 직접적 또는 간접적으로 어떤 당사자를 협박하거나 위협하는 행위
 - g) 조달 절차에서의 감사과정을 방해하는 행위
 - h) 입찰 절차에 참여하거나 최종 계약자로 선정되기 위해 허위 진술 또는 허위 정보를 제공하는 행위
- ii. 이해충돌사항을 공개할 것
 - iii. 입찰자는 최근 3년 동안 (i) 국가와 대상기관을 막론하고 위 i의 내용에 위배되는 위법행위를 저질렀는지 여부 및 (ii) 다른 조달기관으로부터 입찰참가제한 처분 등을 받은 적이 있는지 여부를 공개하여야 함.

3) 제재조치

일반회계규칙 제175 (2)조에 따라, 조달 기관은 입찰자에게 공정한 기회를 제공하고 입찰자의 의견을 들은 후, 입찰자 (또는 잠재적 입찰자)가 Code of Integrity 위반에 대해 적절한 조치(입찰참가자격 제한 포함)를 취할 수 있음. 구체적으로, 일반회계규칙 제151조에 따른 입찰참가자격 제한 처분의 주요 내용은 다음과 같음:

- i. 공공 조달 계약의 이행 과정에서 인명이나 재산의 손실을 초래한 행위에 대해 부패방지법(Prevention of Corruption Act, 1988), 인도 형법(Indian Penal Code), 그 밖의 법률에 따라 입찰자가 유죄 판결을 받은 경우
- ii. 입찰참가자격 제한 처분을 받은 회사 또는 그러한 회사의 승계인은 제한 처분을 받은 날로부터 최대 3년간 입찰 과정에 참여할 수 없음.
- iii. 입찰자가 Code of Integrity를 위반한 경우, 2년간 입찰참가자격이 제한될 수 있음.

Manual for Procurement of Consultancy and other Services 제2.2.6조에 따르면,
입찰자가 Code of Integrity를 위반한 경우 조달기관은 조달 계약서 또는 입찰 문서에
명시된 제재조치 외에도 다음과 같은 조치를 취할 수 있음

(i) 조달절차가 진행중인 경우:

- a) 입찰보증금의 몰수;
- b) 계약 전 사전협상(pre-contract negotiations)의 철회;
- c) 당해 조달절차에서 위반행위를 한 입찰자의 배제

(ii) 이미 계약이 체결된 경우:

- a) 계약의 취소 및 손해배상청구;
- b) 당해 조달에 관한 보증금의 몰수;
- c) 조달기관이 지불한 금액 및 그 이자 청구.

(iii) 등록된 공급자 목록에서 제거 및 최소 1년 이상의 입찰제한처분;

(iv) 경쟁제한적 행위의 경우 인도 공정거래위원회(Competition Commission of India)에
통보 및 자료제공

(v) 입찰자의 임직원이 위 위반행위에 책임이 있는 경우, 당해 개인에 대한 형사 조치

13. 환경관계법령

건설산업에서 준수해야 할 주요 환경관계법령은 다음과 같음:

(i) 환경보호법(The Environment Protection Act, 1986)

이 법은 자연환경에 배출할 수 있는 물질과 배출하여서는 안되는 물질을 구분하는 기준을 확립하고, 위험 물질에 대한 기준을 제정함. 위험 물질 관련 기준을 위반한 경우 벌금형에 처해질 수 있음. 또한 건설 기업들은 건설 중 또는 건설 후 발생하는 사고를 보고하여야 함.

(ii) 삼림보호법(The Forest Conservation Act, 1980)

이 법은 삼림자원을 보호하기 위해 벌목과 광업과 같은 활동들을 규제하는 한편, 재활용품 사용 등 지속가능한 발전을 위한 정책을 채택하는 기업들에게 인센티브를 제공함.

(iii) 위험폐기물 관리규정(The Hazardous Waste Management Rules, 1993)

이 규정은 위험폐기물의 처리 및 처분 방법을 명시함. 또한 위험물질을 저장하는 데 사용되는 용기에 대한 기준을 설정하고, 지정된 구역에 유독성 물질을 투기하는 것을 금지하며, 위험폐기물을 처리하는 직원들에 대해 훈련을 요구함.

(iv) 환경영향평가 가이드라인(The Environmental Assessment Notification and Assessment Procedure (EANAP) Guidelines)

이 지침은 프로젝트가 시작되기 전에 환경영향평가가 어떻게 수행되어야 하는지 및 이를 위해 프로젝트 회사가 어떤 정보를 제공하여야 하는지를 규율함.

14. 결론

인도의 정부조달은 계약법, 일반 회계 규칙을 비롯한 법률과 각 주별 조달관련 법령 및 각종 정부 가이드라인에 의해 규율되고 있음. 그러나 일반회계규칙 제264조에 따르면 해외원조 프로젝트에는 개별 기관과 체결한 협정이 법령에 앞서 적용되므로, 이 범위 내에서 인도 법령 및 정부 발간 가이드라인의 역할은 제한적이라 생각 됨. 뿐만 아니라 계약을 둘러싼 분쟁 또한 개별 계약에 명시된 분쟁해결 조항에 따라 처리되고 있는 것으로 보임. 따라서, ODA 사업에 인도 법령 및 정부 가이드라인의 관여는 제한적인 것으로 사료되는 바, 이를 감독하기 위해서는 인도 법령에 의지하기는 어렵고, 개별 ODA 협정을 체결하는 단계에서 참가 기업을 규제할 수 있는 시스템을 확보하는 것이 중요해 보이고, 따라서 해당 사업별로 법률 검토를 받는 것은 필수적인 조치라고 할 것임.

국제투명성기구(Transparency International)는 2022년 인도의 부패 인식 지수(Corruption Perceptions Index)를 40점으로 평가하였는데, 이는 평가대상국 180개국 중 85등의 저조한 수치임. 앞서 언급한 바와 같이 인도의 법령은 ODA 사업에 제한적으로 관여하게 되므로, 당사자간의 계약 및 이를 감독할 수 있는 시스템이 중요함. 그러나 인도의 높은 부패도를 고려하면 과연 인도의 정부 시스템이 ODA 사업 관련 상대방의 계약 위반에 얼마나 실효적인 조치를 제공할 수 있을 지 의문스러운 바, 인도의 행정력만으로 EDCF 사업을 모니터링 하기는 어려우리라 생각됨.

결국, 개별 EDCF사업의 원활한 추진을 위해서는 인도 관련 법령에 의존하기는 어렵고, 개별 프로젝트 마다 협정의 세부적인 내용을 재검토 할 필요성이 있는 것으로 사료됨.

15. 별첨자료

1. 계약법 (The Indian Contract Act, 1872)
2. 양자간 경제 협력에 관한 지침서 (Handbook on Systems and Processes on Bilateral Official Development Assistance)
3. 상품 및 서비스 조달을 위한 정책 및 절차에 관한 매뉴얼 (The Manual on Policies and Procedures for Purchase of Goods and Services)
4. 일반재정규칙 2017(General Financial Rules, 2017)



별첨1

계약법

(The Indian Contract Act, 1872)

INDIAN CONTRACT ACT, 1872

Preamble - THE INDIAN CONTRACT ACT, 1872

THE INDIAN CONTRACT ACT, 1872

[Act, No. 09 of 1872]¹

[25th April, 1872]

PREAMBLE

Whereas it is expedient to define and amend certain parts of the law relating to contracts;

It is hereby enacted as follows:--

1. The Chapters and sections of the [Transfer of Property Act, 1882](#) (4 of 1882), which relate to contracts are, in places in which that Act, is in force, to be taken as part of this Act-See [Act 4 of 1882, section 4](#).

This Act has been extended to and brought into force in Dadra and Nagar Haveli by Regulation 6 of 1963, section 2 and Schedule I (w.e.f. 1-7-1965), to Goa, Daman and Diu by Regulation 11 of 1963, section 3 and Schedule, to the whole of the Union Territory of Lakshadweep by Regulation 8 of 1965, section 3 and Schedule, to the Union Territory of Pondicherry by [Act 26 of 1968, section 3](#) and Schedule.

The Act has been extended to and brought into force in the State of Sikkim (w.e.f. 1-9-1984) vide S.O. 641 (E), published in the Gazette of India, Extra., Pt. II, Section 3(ii), dated 24th August, 1984.

Section 1 - Short title, extent and Commencement

1. Short title

This Act may be called the Indian Contract Act, 1872.

Extent, Commencement--

It extends to the whole of India ³[***] ; and it shall come into force on the first day of September, 1872.

Saving--

²[* * *] Nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act

1. Substituted by [Act 3 of 1951, section 3](#) and Schedule, for "except part B States".
2. The Words "The enactments mentioned in the Schedule here to are repealed to the extent specified in the third column thereof, but" rep. by [Act 10 of 1914, section 3](#) and Schedule II.
3. Omitted by [Jammu And Kashmir Reorganisation Act, 2019](#), w.e.f. 31.10.2019 the previous text was:-

"except the State of Jammu and Kashmir"

Section 2 - Interpretation clause

Commentary

In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:—

- (a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal;
- (b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;
- (c) The person making the proposal is called the "promisor", and the person accepting the proposal is called the "promisee";
- (d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;
- (e) Every promise and every set of promises, forming the consideration for each other, is an agreement;
- (f) Promises which form the consideration or part of the consideration for each other are called reciprocal promises;
- (g) An agreement not enforceable by law is said to be void;
- (h) An agreement enforceable by law is a contract;
- (i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract;
- (j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

Section 3 - Communication, acceptance and revocation of proposals

The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking, by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

Section 4 - Communication when complete

The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete,—

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete,—

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;

Illustrations

(a) A proposes, by letter, to sell a house to B at a certain price.

The communication of the proposal is complete when B receives the letter.

(b) B accepts A's proposal by a letter sent by post.

The communication of the acceptance is complete,

as against A when the letter is posted;

as against B, when the letter is received by A.

(c) A revokes his proposal by telegram.

The revocation is complete as against A when the telegram is dispatched.

It is complete as against B when B receives it.

B revokes his acceptance by telegram. B's revocation is complete as against B when the telegram is dispatched, and as against A when it reaches him.

Section 5 - Revocation of proposals and acceptance

◀Commentary

(1) A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

(2) An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Illustrations

(a) A proposes, by a letter sent by post, to sell his house to B.

(b) B accepts the proposal by a letter sent by post.

(c) A may revoke his proposal at any time before or at the moment when B posts his letter of acceptance, but not afterwards.

(d) B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches A, but not afterwards.

Section 6 - Revocation how made

◀Commentary

A proposal is revoked—

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

Section 7 - Acceptance must be absolute

◀Commentary

In order to convert a proposal into a promise, the acceptance must—

- (1) be absolute and unqualified;
- (2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance.

Section 8 - Acceptance by performing conditions, or receiving consideration

◀Commentary

Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

Section 9 - Promises, express and implied

◀Commentary

In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

Section 10 - What agreements are contracts

◀Commentary

All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in ¹[India] and not hereby expressly repealed, by which any contract is required to be made in writing² or in the presence of witnesses, or any law relating to registration of documents.

1. Substituted by [Act 3 of 1951, section 3](#) and Schedule, for "Part A States and Part C States" which had been Substituted by the A.O. 1950, for "the Provinces".

2. See e.g., section 25, the [Copyright Act, 1957](#) (14 of 1957), [section 19](#), the [Carriers Act, 1865](#) (3 of 1865) [sections 6](#) and [7](#); the [Companies Act, 1956](#) (1 of 1956) [section 12](#), [30](#), [46](#) and [109](#).

Section 11 - Who are competent to contract

◀Commentary

Every person is competent to contract who is of the age of majority according to the law to which he is subject¹, and who is of sound mind and is not disqualified from contracting by any law to which he is subject.

1. See the [Indian Majority Act, 1875](#) (9 of 1875).

Section 12 - What is a sound mind for the purposes of contracting

◀Commentary

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

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

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

Illustrations

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

A sane man, who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

Section 13 - 'Consent' defined

◀Commentary

Two or more persons are said to consent when they agree upon the same thing in the same sense.

Section 14 - 'Free consent' defined

←Commentary

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

- (1) coercion, as defined in section 15, or
- (2) undue influence, as defined in section 16, or
- (3) fraud, as defined in section 17, or
- (4) misrepresentation, as defined in section 18, or
- (5) mistake, subject to the provisions of sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

Section 15 - 'Coercion' defined

←Commentary

"Coercion" is the committing, or threatening to commit, any act forbidden by the Indian Penal Code (45 of 1860), or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation.—It is immaterial whether the Indian Penal Code (45 of 1860) is or is not in force in the place where the coercion is employed.

Illustration

A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal code (45 of 1860).

A afterwards sues B for breach of contract at Calcutta.

A has employed coercion, although his act is not an offence by the law of England, and although [section 506](#) of the Indian Penal Code (45 of 1860) was not in force at the time when or place where the act was done.

Section 16 - 'Undue influence' defined

1[16. 'Undue influence' defined

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

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

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

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

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

(4) Nothing in this sub-section shall affect the provisions of [section 111](#) of the Indian Evidence Act, 1872 (1 of 1872).

Illustrations

(a) A having advanced money to his son, B, during his minority, upon B's coming of age obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence.

(b) A, a man enfeebled by disease or age, is induced, by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services, B employs undue influence.

(c) A, being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.

(d) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.]

1. Substituted by Act 6 of 1899, section 2, for the original section 16.

Section 17 - 'Fraud' defined

←Commentary

"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent¹, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :

- (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
- (2) the active concealment of a fact by one having knowledge or belief of the fact;
- (3) a promise made without any intention of performing it;
- (4) any other act fitted to deceive;
- (5) any such act or omission as the law specially declares to be fraudulent.

Explanation.-Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak², or unless his silence is, in itself, equivalent to speech.

Illustrations

- (a) A sells, by auction, to B, a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A.
- (b) B is A's daughter and has just come of age. Here, the relation between the parties would make it A's duty to tell B if the horse is unsound.
- (c) B says to A-"If you do not deny it, I shall assume that the horse is sound." A says nothing. Here, A's silence is equivalent to speech.
- (d) A and B, being traders, enter upon a contract. A has private information of a change in prices which would affect B's willingness to proceed with the contract. A is not bound to inform B.

1. Cf. section 238, infra.

2. See section 143, infra.

Section 18 - 'Misrepresentation' defined

- (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
- (2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him; by misleading another to his prejudice, or to the prejudice of any one claiming under him;
- (3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

Section 19 - Voidability of agreement without free consent

◀Commentary

When consent to an agreement is caused by coercion, ¹[***] fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

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

Explanation.-A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practiced, or to whom such misrepresentation was made, does not render a contract voidable.

Illustrations

(a) A, intending to deceive B, falsely represents that five hundred maunds of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B.

(b) A, by a misrepresentation, leads B erroneously to believe that five hundred maunds of indigo are made annually at A's factory. B examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.

(c) A fraudulently informs B that A's estate is free from encumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out and the mortgage debt redeemed.

(d) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an undervalue. The contract is voidable at the option of A.

(e) A is entitled to succeed to an estate at the death of B, B dies; C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

1. The words "undue influence" rep. by Act 6 of 1899, section 3.

Section 19A - Power to set aside contract induced by undue influence

1[Power to set aside contract induced by undue influence

When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the by party whose consent was so caused.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

Illustrations

(a) A's son has forged B's name to a promissory note. B, under threat of prosecuting A's son, obtains a bond from A for the amount of the forged note. If B sues on this bond, the Court may set the bond aside.

(b) A, a money-lender, advances Rs.100 to B, an agriculturist, and, by undue influence, induces B to execute a bond for Rs. 200 with interest at 6 percent per month. The Court may set the bond aside, ordering B to repay the Rs.100 with such interest as may seem just.]

1. Inserted by Act 6 of 1899, section 3.

Section 20 - Agreement void where both parties are under mistake as to matter of fact

Where both the parties to an agreement are under a mistake as to a matter of fact^{Commentary} essential to the agreement, the agreement is void.

Explanation.-An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

Illustrations

(a) A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of the facts. The agreement is void.

(b) A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

(c) A, being entitled to an estate for the life of B, agrees to sell it to C, B was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

Section 21 - Effect of mistakes as to law

[←Commentary](#)

A contract is not voidable because it was caused by a mistake as to any law in force in¹[India]; but a mistake as to a law not in force in¹[India] has the same effect as a mistake of fact.

²[* * *]

Illustration

A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation; the contract is not voidable.

³[* * *]

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1. The original words "British India" have successively been amended by the A.O. 1948 and the A.O. 1950 to read as above.
 2. Paragraph 2, inserted by the A.O. 1937, omitted by the A.O. 1950.
 3. The second Illustration to section 21 repealed by Act 24 of 1917, section 3 and Schedule II.

Section 22 - Contract caused by mistake of one party as to matter of fact

[←Commentary](#)

A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

Section 23 - What considerations and objects are lawful and what not

[←Commentary](#)

The consideration or object of an agreement is lawful, unless-

It is forbidden by law;¹ or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Illustrations

(a) A agrees to sell his house to B for 10,000 rupees. Here, B's promise to pay the sum of 10,000 rupees is the consideration for A's promise to sell the house, and A's promise to sell the house is the consideration for B's promise to pay the 10,000 rupees. These are lawful considerations.

(b) A promises to pay B 1,000 rupees at the end of six months, if C, who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here the promise of each party is the consideration for the promise of the other party and they are lawful considerations.

(c) A promises, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here, A's promise is the consideration for B's payment, and B's payment is the consideration for A's promise and these are lawful considerations.

(d) A promises to maintain B's child and B promises to pay A 1,000 rupees yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e) A, B and C enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(f) A promises to obtain for B an employment in the public service, and B promises to pay 1,000 rupees to A. The agreement is void, as the consideration for it is unlawful.

(g) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment, by A, on his principal.

(h) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

(i) A's estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

(j) A, who is B's mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1,000 rupees to A. The agreement is void, because it is immoral.

(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code (45 of 1860).

1. See section 26, 27, 28 and 30, infra.

Section 24 - Agreements void, if considerations and objects unlawful in part

If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void. Commentary

Illustration

A promises to superintend, on behalf of B, a legal manufacture of indigo, and an illegal traffic in other articles. B promises to pay to A a salary of 10,000 rupees a year. The agreement is void, the object of A's promise, and the consideration for B's promise, being in part unlawful.

Section 25 - Agreement without consideration, void, unless it is in writing and registered, or is a promise to compensate for something done, or is a promise to pay a debt barred by limitation law

An agreement made without consideration is void, unless-

Commentary

(1) it is expressed in writing and registered under the law for the time being in force for the registration of ¹ [documents], and is made on account of natural love and affection between parties standing in a near relation to each other; or unless

(2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless

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

In any of these cases, such an agreement is a contract.

Explanation 1.-Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2.-An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

Illustrations

- (a) A promises, for no consideration, to give to B Rs. 1,000. This is a void agreement.
- (b) A, for natural love and affection, promises to give his son, B, Rs. 1,000. A puts his promise to B into writing and registers it. This is a contract.
- (c) A finds B's purse and gives it to him. B promises to give A Rs. 50. This is a contract.
- (d) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract.
- (e) A owes B Rs. 1,000, but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs. 500 on account of the debt. This is a contract.
- (f) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.

(g) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A denies that his consent to the agreement was freely given.

The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not A's consent was freely given.

1. Substituted by [Act 12 of 1891](#), section 2 and Schedule II Pt. I, for "assurances".

Section 26 - Agreement in restraint of marriage void

◀Commentary

Every agreement in restraint of the marriage of any person, other than a minor, is void.

Section 27 - Agreement in restraint of trade void

◀Commentary

(1) Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Exception 1.-Saving of agreement not to carry on business of which good-will is sold.--

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

¹[* * *]

1. Exceptions 2 and 3 rep. by [Act 9 of 1932](#), [section 73](#) and Schedule II.

Section 28 - Agreements in restraint of legal proceedings void

◀Commentary

¹[Every agreement,-

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to the extent.]

⁵[Exception 1.- Saving of contract to refer to arbitration or mediation dispute that may arise.-

This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to resolution through arbitration or mediation.

Exception 2.- Saving of contract to refer questions that have already arisen.-

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

⁴[Exception 3.--This section shall not render illegal a contract in writing by which any bank or financial institution stipulate a term in a guarantee or any agreement making a provision for guarantee for extinguishment of the rights or discharge of any party thereto from any liability under or in respect of such guarantee or agreement on the expiry of a specified period which is not less than one year from the date of occurring or non-occurring of a specified event for extinguishment or discharge of such party from the said liability.

Explanation.--

(i) In Exception 3, the expression "bank" means--

(a) a "banking company" as defined in clause (c) of [section 5](#) of the Banking Regulation Act, 1949(10 of 1949);

(b) "a corresponding new bank" as defined in clause (da) of [section 5](#) of the Banking Regulation Act, 1949(10 of 1949);

(c) "State Bank of India" constituted under [section 3](#) of the State Bank of India Act, 1955(23 of 1955);

(d) "a subsidiary bank" as defined in clause (k) of [section 2](#) of the State Bank of India (Subsidiary Banks) Act, 1959(38 of 1959);

(e) "a Regional Rural Bank" established under [section 3](#) of the Regional Rural Banks Act, 1976(21 of 1976);

(f) "a Co-operative Bank" as defined in clause (cci) of [section 5](#) of the Banking Regulation Act, 1949(10 of 1949);

(g) "a multi-State co-operative bank" as defined in clause (cciiia) of [section 5](#) of the Banking Regulation Act, 1949(10 of 1949); and

(ii) In Exception 3, the expression "a financial institution" means any public financial institution within the meaning of [section 4A](#) of the Companies Act, 1956(1 of 1956).]

1. Section 28 as substituted by the [Indian Contract \(Amendment\) Act, 1996](#), subsequently repealed by [Repealing and Amending Act, 2001](#), previously read as under:

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

[* * *]

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

2. The second clause of Exception 1 to section 28 rep. by Act 1 of 1877, section 2 and Schedule
3. Cf. the [Arbitration Act, 1940](#) (10 of 1940) and the [Companies Act, 1956](#) (1 of 1956), [section 389](#).
4. Inserted by the [Banking Laws \(Amendment\) Act, 2012](#).
5. Substituted by [Mediation Act, 2023](#), for the following:-

"Exception 1.- Saving of contract to refer to arbitration dispute that may arise.-

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

²[* * *]

Exception 2.- Saving of contract to refer questions that have already arisen.-

Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.³"

Section 29 - Agreements void for uncertainty

Agreements, the meaning of which is not certain, or capable of being made certain, are Commentary void.

Illustrations

(a) A agrees to sell to B "a hundred tons of oil". There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

(b) A agrees to sell to B one hundred tons of oil of a specified description, known as an article of commerce. There is no uncertainty here to make the agreement void.

(c) A, who is a dealer in coconut—oil only, agrees to sell to B "one hundred tons of oil". The nature of A's trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of coconut—oil.

(d) A agrees to sell to B "all the grain in my granary at Ramnagar". There is no uncertainty here to make the agreement void.

(e) A agrees to sell to B "one thousand mounds of rice at a price to be fixed by C". As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

(f) A agrees to sell to B "my white horse for rupees five hundred or rupees one thousand". There is nothing to show which of the two prices was to be given. The agreement is void.

Section 30 - Agreements by way of wager, void

Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

Exception in favour of certain prizes for horse-racing.—

This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race.

[Section 294-A](#) of the Indian Penal Code not affected.—

Nothing in this section shall be deemed to legalize any transaction connected with horse-racing, to which the provisions of [section 294-A](#) of the Indian Penal Code (45 of 1860) apply.

Section 31 - Contingent contract defined

◀◀Commentary

A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

Illustration

A contracts to pay B Rs.10,000 if B's house is burnt. This is a contingent contract.

Section 32 - Enforcement of contracts contingent on an event happening

◀◀Commentary

Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void.

Illustrations

(a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.

(b) A makes a contract with B to sell a horse to B at a specified price, if C, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse.

(c) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

Section 33 - Enforcement of contracts contingent on an event not happening

Contingent contracts to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not before.

Illustration

A agrees to pay B a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

Section 34 - When event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person

If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.

Illustrations

A agrees to pay B a sum of money if B marries C, C marries D. The marriage of B to C must now be considered impossible, although it is possible that D may die and that C may afterwards marry B.

Section 35 - When contracts become void which are contingent on happening of specified event within fixed time

Contingent contracts to do or not to do anything if a specified uncertain event happens Commentary within a fixed time become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

When contracts may be enforced which are contingent on specified event not happening within fixed time.—

Contingent contracts to do or not to do anything if a specified uncertain event does not happen within a fixed time, may be enforced by law when the time fixed has expired and such event has not happened or, before the time fixed has expired, if it becomes certain that such event will not happen.

Illustrations

(a) A promises to pay B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.

(b) A promises to pay B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

Section 36 - Agreement contingent on impossible event void

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

Illustrations

(a) A agrees to pay B 1,000 rupees if two straight lines should enclose a space. The agreement is void.

(b) A agrees to pay B 1,000 rupees if B will marry A's daughter. C.C. was dead at the time of the agreement. The agreement is void.

Section 37 - Obligations of parties to contracts

◀Commentary

The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

Illustrations

(a) A promises to deliver goods to B on a certain day on payment of Rs. 1,000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay the Rs. 1,000 to A's representatives.

(b) A promises to paint a picture for B by a certain day, at a certain price. A dies before the day. The contract cannot be enforced either by A's representatives or by B.

Section 38 - Effect of refusal to accept offer of performance

◀Commentary

Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Every such offer must fulfill the following conditions:—

- (1) it must be unconditional;
- (2) it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do;
- (3) if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.
- (4) An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

Illustration

A contracts to deliver to B at his warehouse, on the 1st March, 1873, 100 bales of cotton of a particular quality. In order to make an offer of a performance with the effect stated in this section, A must bring the cotton to B's warehouse, on the appointed day, under such circumstances that B may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

Section 39 - Effect of refusal of party to perform promise wholly

When a party to a contract has refused to perform, or disabled himself from ◀Commentary performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Illustration

(a) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night A willfully absents herself from the theatre. B is at liberty to put an end to the contract.

(b) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her at the rate of 100 rupees for each night. On the sixth night A willfully absents herself. With the assent of B, A sings on the seventh night. B has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through A's failure to sing on the sixth night.

Section 40 - Person by whom promise is to be performed

Commentary

If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it.

Illustrations

(a) A promises to pay B a sum of money. A may perform this promise, either by personally paying the money to B or by causing it to be paid to B by another; and, if A dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

(b) A promises to paint a picture for B. A must perform this promise personally.

Section 41 - Effect of accepting performance from third person

Commentary

When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

Section 42 - Devolution of joint liabilities

Commentary

When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons, during their joint lives, and, after the death of any of them, his representative jointly with the survivor or survivors, and, after the death of the last survivor, the representatives of all jointly, must fulfill the promise.

Section 43 - Any one of joint promisors may be compelled to perform

Commentary

When two or more persons make a joint promise, the promise may, in the absence of express agreement to the contrary, compel any¹[one or more] of such joint promisors to perform the whole of the promise.

Each promisor may compel contribution.-Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

Sharing of loss by default in contribution.-If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Explanation.-Nothing in this section shall prevent a surety from recovering from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

Illustrations

(a) A, B and C jointly promise to pay D 3,000 rupees. D may compel either A or B or C to pay him 3,000 rupees.

(b) A, B and C jointly promise to pay D the sum of 3,000 rupees. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts. C is entitled to receive 500 rupees from A's estate, and 1,250 rupees from B.

(c) A, B and C are under a joint promise to pay D 3,000 rupees. C is unable to pay anything, and A is compelled to pay the whole. A is entitled to receive 1,500 rupees from B.

(d) A, B and C are under a joint promise to pay D 3,000 rupees, A and B being only sureties for C. C fails to pay. A and B are compelled to pay the whole sum. They are entitled to recover it from C.

1. Substituted by [Act 12 of 1891, section 2](#) and Schedule II Pt. I for "one".

Section 44 - Effect of release of one joint promisor

Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisors so released from responsibility to the other joint promisor or joint promisors.¹ ◀Commentary

1 . See section 138. infra.

Section 45 - Devolution of joint rights

When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.¹ ◀Commentary

Illustration

A, in consideration of 5,000 rupees, lent to him by B and C, promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's

representative jointly with C during C's life, and after the death of C with the representatives of B and C jointly.

1 . For an exception to section 45 in case of Government securities, see the [Public Debt Act, 1944](#) (18 of 1944), [section 8](#).

Section 46 - Time for performance of promise, where no application is to be made and no time is specified

Where, by the contract, a promisor is to perform his promise without application by the [Commentary](#) promise, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation.—The question "what is a reasonable time" is, in each particular case, a question of fact.

Section 47 - Time and place for performance of promise, where time is specified and no application to be made

When promise is to be performed on a certain day, and the promisor has undertaken [Commentary](#) to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.

Illustration

A promises to deliver goods at B's warehouse on the first January. On that day A brings the goods to B's warehouse, but after the usual hour for closing it, and they are not received. A has not performed his promise.

Section 48 - Application for performance on certain day to be at proper time and place

When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

Explanation. —The question "what is a proper time and place" is, in each particular case, a question of fact.

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INDIAN CONTRACT ACT, 1872

Section 49 - Place for the performance of promise, where no application to be made and no place fixed for performance

When a promise is to be performed without application by the promisee, and no place [Commentary](#) is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.

Illustration

A undertakes to deliver a thousand maunds of jute to B on a fixed day. A must apply to B to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

Section 50 - Performance in manner or at time prescribed or sanctioned by promisee

The performance of any promise may be made in any manner, or at any time which the [Commentary](#) promisee prescribes or sanctions.

Illustrations

(a) B owes A 2,000 rupees. A desires B to pay the amount to A's account with C, a banker. B, who also banks with C, orders the amount to be transferred from his account to A's credit, and this is done by C. Afterwards, and before A knows of the transfer, C fails. There has been a good payment by B.

(b) A and B are mutually indebted. A and B settle an account by setting off one item against another, and B pays A the balance found to be due from him upon such settlement. This amounts to a payment by A and B, respectively, of the sums which they owed to each other.

(c) A owes B 2,000 rupees. B accepts some of A's goods in reduction of the debt. The delivery of goods operates as a part payment.

(d) A desires B, who owes him Rs. 100, to send him a note for Rs. 100 by post. The debt is discharged as soon as B puts into the post a letter containing the note duly addressed to A.

Section 51 - Promisor not bound to perform, unless reciprocal promisee ready and willing to perform

[Commentary](#)

When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Illustrations

(a) A and B contract that A shall deliver goods to B to be paid for by B on delivery. A need not deliver the goods, unless B is ready and willing to pay for the goods on delivery.

B need not pay for the goods, unless A is ready and willing to deliver them on payment.

(b) A and B contract that A shall deliver goods to B at a price to be paid by installments, the first installment to be paid on delivery.

A need not deliver, unless B is ready and willing to pay the first installment on delivery.

B need not that pay the first installment, unless A is ready and willing to deliver the goods on payment of the first installment.

Section 52 - Order of performance of reciprocal promises

◀Commentary

Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Illustrations

(a) A and B contract that A shall build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it.

(b) A and B contract that A shall make over his stock-in-trade to B at a fixed price, and B promises to give security for the payment of the money. A's promise need not be performed until the security is given, for the nature of the transaction requires that A should have security before he delivers up his stock.

Section 53 - Liability of party preventing event on which the contract is to take effect

◀Commentary

When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented: and he is entitled to compensation¹ from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

Illustration

A and B contract that B shall execute certain work for A for a thousand rupees. B is ready and willing to execute the work accordingly, but A prevents him from doing so. The contract is voidable at the option of B; and, if he elects to rescind it, he is entitled to recover from A compensation for any loss which he has incurred by its non-performance.

1. See section 73, infra.

Section 54 - Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises

Commentary

When a contract consists of reciprocal promises, such that one them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

Illustrations

(a) A hires B's ship to take in and convey, from Calcutta to the Mauritius, a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of B's promise, and must make compensation to B for the loss which B sustains by the non-performance of the contract.

(b) A contracts with B to execute certain builder's work for a fixed price, B supplying the scaffolding and timber necessary for the work. B refuses to furnish any scaffolding or timber, and the work cannot be executed. A need not execute the work, and B is bound to make compensation to A for any loss caused to him by the non-performance of the contract.

(c) A contracts with B to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B engages to pay for the merchandise within a week from the date of the contract. B does not pay within the week. A's promise to deliver need not be performed, and B must make compensation.

(d) A promises B to sell him one hundred bales of merchandise, to be delivered next day, and B promises A to pay for them within a month. A does not deliver according to his promise. B's promise to pay need not be performed, and A must make compensation.

Section 55 - Effect of failure to perform at a fixed time, in contract in which time is essential

Commentary

When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than that agreed upon. -

If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance he gives notice to the promisor of his intention to do so.¹

1. Cf. section 62 and 63, infra.

Section 56 - Agreement to do impossible act

Commentary

An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful.-

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

Compensation for loss through non-performance of act known to be impossible or unlawful.-

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

Illustrations

- (a) A agrees with B to discover treasure by magic. The agreement is void.
- (b) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.
- (c) A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practice polygamy, A must make compensation to B for the loss caused to her by the non-performance of his promise.
- (d) A contracts to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.
- (e) A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void.

1 . See section 65, infra.

Section 57 - Reciprocal promise to do things legal, and also other things illegal

[←Commentary](#)

Where persons reciprocally promise, firstly, to do certain things which are legal, and, secondly, under specified circumstances to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.

Illustration

A and B agree that A shall sell B a house for 10,000 rupees, but that, if B uses it as a gambling house, he shall pay A 50,000 rupees for it.

The first, set of reciprocal promises, namely, to sell the house and to pay 10,000 rupees for it, is a contract.

The second set is for an unlawful object, namely, that B may use the house as a gambling house, and is a void agreement.

Section 58 - Alternative promise, one branch being illegal

In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

Illustration

A and B agree that A shall pay B 1,000 rupees for which B shall afterwards deliver to A either rice or smuggled opium.

This is a valid contract to deliver rice, and a void agreement as to the opium.

Section 59 - Application of payment where debt to be discharged is indicated

Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

Illustrations

(a) A owes B, among other debts, 1,000 rupees upon a promissory note which falls due on the first June. He owes B no other debt of that amount. On the first June A pays to B 1,000 rupees. The payment is to be applied to the discharge of the promissory note.

(b) A owes to B, among other debts, the sum of 567 rupees. B writes to A and demands payment of this sum. A sends to B 567 rupees. This payment is to be applied to the discharge of the debt of which B had demanded payment.

Section 60 - Application of payment where debt to be discharged is not indicated

Commentary

Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

Section 61 - Application of payment where neither party appropriates

Commentary

Where neither party makes any appropriation the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionally.

Section 62 - Effect of novation, rescission, and alteration of contract

Commentary

If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Illustrations

(a) A owes money to B under a contract. It is agreed between A, B and C that B shall thenceforth accept C as his debtor, instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted.

(b) A owes B 10,000 rupees. A enters into an arrangement with B, and gives B a mortgage of his (A's) estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.

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

Section 63 - Promise may dispense with or remit performance of promise

Commentary

Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, ¹ or may accept instead of it any satisfaction which he thinks fit.

Illustrations

(a) A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.

(b) A owes B 5,000 rupees. A pays to B, and B accepts, in satisfaction of the whole debt, 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.

(c) A owes B 5,000 rupees. C pays to B 1,000 rupees, and B accepts them, in satisfaction of his claim on A. This payment is a discharge of the whole claim.²

(d) A owes B, under a contract, a sum of money, the amount of which has not been ascertained. A, without ascertaining the amount, gives to B, and B, in satisfaction thereof, accepts, the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.

(e) A owes B 2,000 rupees, and is also indebted to other creditors. A makes an arrangement with his creditors, including B, to pay them a ³ [composition] of eight annas in the rupee upon their respective demands. Payment to B of 1,000 rupees is a discharge of B's demand.

1. But See section 135, infra.

2. See section 41, supra.

3. Substituted by [Act 12 of 1891](#), [section 2](#) and Schedule II, Pt. I, for "compensation".

Section 64 - Consequences of rescission of voidable contract

◀Commentary

When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.¹

1 . See section 75, infra.

Section 65 - Obligation of person who has received advantage under void agreement, or contract that becomes void

◀Commentary

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it.

Illustrations

(a) A pays B 1,000 rupees in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise. The agreement is void, but B must repay A the 1,000 rupees.

(b) A contracts with B to deliver to him 250 maunds of rice before the first of May. A delivers 130 maunds only before that day, and none after. B retains the 130 maunds after the first of May. He is bound to pay A for them.

(c) A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her a hundred rupees for each

night's performance. On the sixth night, A willfully absents herself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung.

(d) A contracts to sing for B at a concert for 1,000 rupees, which are paid in advance. A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B the 1,000 rupees paid in advance

Section 66 - Mode of communicating or revoking rescission of voidable contract

The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.¹

1. See section 3 and 5, supra.

Section 67 - Effect of neglect of promisee to afford promisor reasonable facilities for performance

If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

Illustration

A contracts with B to repair B's house.

B neglects or refuses to point out to A the places in which his house requires repair.

A is excused for the non-performance of the contract if it is caused by such neglect or refusal.

Section 68 - Claim for necessaries supplied to person incapable of contracting, or on his account

Commentary

If a person, incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.¹

Illustrations

(a) A supplies B, a lunatic, with necessaries suitable to his condition in life. A is entitled to be reimbursed from B's property.

(b) A supplies the wife and children of B, a lunatic, with necessaries suitable to their condition in life. A is entitled to be reimbursed from B's property.

1. The property of a Government ward in the Madhya Pradesh is not liable under this section, see the [C.P. Court of Wards Act, 1899](#) (C.P. Act 24 of 1899), [section 31\(I\)](#).

Section 69 - Reimbursement of person paying money due by another, in payment of which he is interested

◀Commentary

A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

Illustration

B holds land in Bengal, on a lease granted by A, the zamindar. The revenue payable by A to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of B's lease. B, to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from A. A is bound to make good to B the amount so paid.

Section 70 - Obligation of person enjoying benefit of non-gratuitous act

◀Commentary

Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.¹

Illustrations

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

(b) A saves B's property from fire. A is not entitled to compensation from B, if the circumstances show that he intended to act gratuitously.

¹ . As to suits by minors under section 70 in Presidency Small Cause Courts see the [Presidency Small Cause Courts Act, 1882](#) (15 of 1882), [section 32](#).

Section 71 - Responsibility of finder of goods

◀Commentary

A person who finds goods belonging to another, and takes them into his custody, is subject to the same responsibility as a bailee.¹

¹ . See section 151 and 152, infra.

Section 72 - Liability of person to whom money is paid or thing delivered by mistake or under coercion

[Commentary](#)

A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

Illustrations

(a) A and B jointly owe 100 rupees to C, A alone Pays the amount to C, and B, not knowing this fact, pays 100 rupees over again to C. C is bound to repay the amount to B.

(b) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

Section 73 - Compensation for loss or damage caused by breach of contract

[Commentary](#)

When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract

When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation.-In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

Illustrations

(a) A contracts to sell and deliver 50 maunds of saltpeter to B, at a certain price to be paid on delivery. A breaks his promise. B is entitled to receive from A, by way of compensation, the sum, if any, by which the contract price falls short of the price for which B might have obtained 50 maunds of saltpeter of like quality at the time when the saltpeter ought to have been delivered.

(b) A hires B's ship to go to Bombay, and there take on board, on the first of January, a cargo which A is to provide and to bring it to Calcutta, the freight to be paid when earned. B's ship does not go to Bombay, but A has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. A avails himself of those opportunities, but is put to trouble and expense in doing so. A is entitled to receive compensation from B in respect of such trouble and expense.

(c) A contracts to buy of B, at a stated price, 50 maunds of rice, no time being fixed for delivery. A afterwards informs B that he will not accept the rice if tendered to him. B is entitled to receive

from A, by way of compensation, the amount, if any, by which the contract price exceeds that which B can obtain for the rice at the time when A informs B that he will not accept it.

(d) A contracts to buy B's ship for 60,000 rupees, but breaks his promise. A must pay to B, by way of compensation, the excess, if any, of the contract price over the price which B can obtain for the ship at the time of the breach of promise.

(e) A, the owner of a boat, contracts with B to take a cargo of jute to Mirzapur, for sale at that place, starting on a specified day. The boat, owing to some avoidable cause, does not start at the time appointed, whereby the arrival of the cargo at Mirzapur is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute falls. The measure of the compensation payable to B by A is the difference between the price which B could have obtained for the cargo at Mirzapur at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived.

(f) A contracts to repair B's house in a certain manner, and receives payment in advance. A repairs the house, but not according to contract. B is entitled to recover from A the cost of making the repairs conform to the contract.

(g) A contracts to let his ship to B for a year, from the first of January, for a certain price. Freight rises, and, on the first of January, the hire obtainable for the ship is higher than the contract price. A breaks his promise. He must pay to B, by way of compensation, a sum equal to the difference between the contract price and the price for which B could hire a similar ship for a year on and from the first of January.

(h) A contracts to supply B with a certain quantity of iron at a fixed price, being a higher price than that for which A could procure and deliver the iron. B wrongfully refuses to receive the iron. B must pay to A, by way of compensation, the difference between the contract price of the iron and the sum for which A could have obtained and delivered it.

(i) A delivers to B, a common carrier, a machine, to be conveyed, without delay, to A's mill, informing B that his mill is stopped for want of the machine. B unreasonably delays the delivery of the machine, and A, in consequence, loses a profitable contract with the Government. A is entitled to receive from B, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

(j) A, having contracted with B to supply B with 1,000 tons of iron at 100 rupees a ton, to be delivered at a stated time, contracts with C for the purchase of 1,000 tons of iron at 80 rupees a ton, telling C that he does so for the purpose of performing his contract with B. C fails to perform his contract with A, who cannot procure other iron, and B, in consequence, rescinds the contract. C must pay to A 20,000 rupees, being the profit which A would have made by the performance of his contract with B.

(k) A contracts with B to make and deliver to B, by a fixed day, for a specified price, a certain piece of machinery. A does not deliver the piece of machinery at the time specified, and in consequence of this, B is obliged to procure another at a higher price than that which he was to have paid to A, and is prevented from performing a contract which B had made with a third person at the time of his contract with A (but which had not been then communicated to A), and is compelled to make compensation for breach of that contract. A must pay to B, by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by B for another, but not the sum paid by B to the third person by way of compensation.

(l) A, a builder, contracts to erect and finish a house by the first of January, in order that B may give possession of it at that time to C, to whom B has contracted to let it. A is informed of the contract between B and C. A builds the house so badly that, before the first of January, it falls down and has to be re-built by B, who, in consequence, loses the rent which he was to have received from C, and is obliged to make compensation to C for the breach of his contract. A must make compensation to B for the cost of rebuilding the house for the rent lost, and for the compensation made to C.

(m) A sells certain merchandise to B, warranting it to be of a particular quality, and B, in reliance upon this warranty, sells it to C with a similar warranty. The goods prove to be not according to

the warranty, and B becomes liable to pay C a sum of money by way of compensation. B is entitled to be reimbursed this sum by A.

(n) A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day. B, in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the day of payment.

(o) A contracts to deliver 50 maunds of saltpeter to B on the first of January, at a certain price. B afterwards, before the first of January, contracts to sell the saltpeter to C at a price higher than the market price of the first of January. A breaks his promise. In estimating the compensation payable by A to B, the market price of the first of January, and not the profit which would have arisen to B from the sale to C, is to be taken into account.

(p) A contracts to sell and deliver 500 bales of cotton to B on a fixed day. A knows nothing of B's mode of conducting his business. A breaks his promise, and B, having no cotton, is obliged to close his mill. A is not responsible to B for the loss caused to B by the closing of the mill.

(q) A contracts to sell and deliver to B, on the first of January, certain cloth which B intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making caps. B is entitled to receive from A, by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

(r) A, a ship-owner, contracts with B to convey him from Calcutta to Sydney in A's ship, sailing on the first of January, and B pays to A, by way of deposit, one-half of his passage-money. The ship does not sail on the first of January, and B, after being in consequence detained in Calcutta for some time and thereby put to some expense, proceeds to Sydney in another vessel, and, in consequence, arriving too late in Sydney, loses a sum of money. A is liable to repay to B his deposit, with interest, and the expense to which he is put by his detention in Calcutta, and the excess, if any, of the passage-money paid for the second ship over that agreed upon for the first, but not the sum of money which B lost by arriving in Sydney too late.

Section 74 - Compensation for breach of contract where penalty stipulated for

◀Commentary

¹[When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.-A stipulation for increased interest from the date of default may be a stipulation by way of penalty.]

Exception.-When any person enters into any bail bond, recognizance or other instrument of the same nature or, under the provisions of any law, or under the orders of the ³[Central Government] or of any ⁴[State Government], gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.-A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

Illustrations

(a) A contracts with B to pay B Rs.1,000, if he fails to pay B Rs.500 on a given day. A fails to pay B Rs.500 on that day. B is entitled to recover from A such compensation, not exceeding Rs.1,000, as the Court considers reasonable.

(b) A contracts with B that, if A practices as a surgeon within Calcutta, he will pay B Rs.5,000. A practices as a surgeon in Calcutta. B is entitled to such compensation, not exceeding Rs.5,000, as the Court considers reasonable.

(c) A gives a recognizance binding him in a penalty of Rs.500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

²[(d) A gives B a bond for the repayment of Rs.1,000 with interest at 12 per cent. at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 percent. from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.

(e) A, who owes money to B, a money-lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and B is only entitled to reasonable compensation in case of breach.

(f) A undertakes to repay B a loan of Rs.1,000 by five equal monthly installments, with a stipulation that, in default, of payment of any installment the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

(g) A borrows Rs.100 from B and gives him a bond for Rs.200 payable by five yearly installments of Rs.40, with a stipulation that, in default of payment of any installment, the whole shall become due. This is a stipulation by way of penalty.]

1. Substituted by Act 6 of 1899, section 4, for the first paragraph of section 74.

2. Added by Act 6 of 1899, section 4

3. Substituted by the A.O. 1937, for "Government of India".

4. Inserted by the A.O. 1950, for "Provincial Government".

Section 75 - Party rightfully rescinding contract entitled to compensation

[←Commentary](#)

A person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfillment of the contract.

Illustration

A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night, A willfully absents herself from the theatre, and B, in consequence, rescinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfillment of the contract.

Section 76 to 123 - Repealed

Section 76-123 [Repealed by the Sale of Goods Act, 1930 (3 of 1930) [section 65](#)]

Section 124 - "Contract of indemnity" defined

[←Commentary](#)

A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity".

Illustration

A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 rupees. This is a contract of indemnity.

Section 125 - Rights of indemnity- holder when sued

◀Commentary

The promise in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor—

- (1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;
- (2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit;
- (3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promise to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.

Section 126 - 'Contract of guarantee', Surety', 'Principal debtor' and 'creditor'

◀Commentary

A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written.

Section 127 - Consideration for guarantee

◀Commentary

Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.

Illustrations

- (a) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.
- (b) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that, if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise.

(c) A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

Section 128 - Surety's liability

◀◀Commentary

The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

Illustration

A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is liable not only for the amount of the bill but also for any interest and charges which may have become due on it.

Section 129 - 'Continuing guarantee'

◀◀Commentary

A guarantee which extends to a series of transactions is called a 'continuing guarantee'.

Illustrations

(a) A, in consideration that B will employ C in collecting the rent of B's zamindari, promises B to be responsible, to the amount of 5,000 rupees, for the due collection and payment by C of those rents. This is a continuing guarantee.

(b) A guarantees payment to B, a tea-dealer, to the amount of £100, for any tea he may from time to time supply to C. B supplies C with tea to above the value of £100, and C pays B for it. Afterwards B supplies C with tea to the value of £200. C fails to pay. The guarantee given by A was a continuing guarantee, and he is accordingly liable to B to the extent of £100.

(c) A guarantees payment to B of the price of five sacks of flour to be delivered by B to C and to be paid for in a month. B delivers five sacks to C. C pays for them. Afterwards B delivers four sacks to C, which C does not pay for. The guarantee given by A was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks.

Section 130 - Revocation of continuing guarantee

◀◀Commentary

A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

Illustrations

(a) A, in consideration of B's discounting, at A's request, bills of exchange for C, guarantees to B, for twelve months, the due payment of all such bills to the extent of 5,000 rupees. B discounts bills for C to the extent of 2,000 rupees. Afterwards, at the end of three months, A revokes the guarantee. This revocation discharges A from all liability to B for any subsequent discount. But A is liable to B for the 2,000 rupees, on default of C.

(b) A guarantees to B, to the extent of 10,000 rupees, that C shall pay all the bills that B shall draw upon him. B draws upon C. C accepts the bill. A gives notice of revocation. C dishonours the bill at maturity. A is liable upon his guarantee.

Section 131 - Revocation of continuing guarantee by surety's death

Commentary

The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

Section 132 - Liability of two persons, primarily liable, not affected by arrangement between them that one shall be surety on others default

Commentary

Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

Illustration

A and B make a joint and several promissory note to C. A makes it, in fact, as surety for B, and C knows this at the time when the note is made. The fact that A, to the knowledge of C, made the note as surety for B, is no answer to a suit by C against A upon the note.

Section 133 - Discharge of surety by variance in terms of contract

Commentary

Any variance, made without the surety's consent, in the terms of the contract between the principal ¹[debtor] and the creditor, discharges the surety as to transactions subsequent to the variance.

Illustrations

(a) A becomes surety to C for B's conduct as a manager in C's bank. Afterwards B and C contract, without A's consent, that B's salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. B allows a customer to over-draw, and the bank loses a sum of money.

A is discharged from his surety ship by the variance made without his consent, and is not liable to make good this loss.

(b) A guarantees C against the misconduct of B in an office to which B is appointed by C, and of which the duties are defined by an Act of the Legislature. By a subsequent Act, the nature of the

office is materially altered. Afterwards, B misconducts himself. A is discharged by the change from future liability under his guarantee, though the misconduct of B is in respect of a duty not affected by the later Act.

(c) C agrees to appoint B as his clerk to sell goods at a yearly salary, upon A's becoming surety to C for B's duly accounting for moneys received by him as such clerk. Afterwards, without A's knowledge or consent, C and B agree that B should be paid by a commission on the goods sold by him and not by a fixed salary. A is not liable for subsequent misconduct of B.

(d) A gives to C a continuing guarantee to the extent of 3,000 rupees for any oil supplied by C to B on credit. Afterwards B becomes embarrassed, and, without the knowledge of A, B and C contract that C shall continue to supply B with oil for ready money, and that the payments shall be applied to the then existing debts between B and C. A is not liable on his guarantee for any goods supplied after this new arrangement.

(e) C contracts to lend B 5,000 rupees on the 1st March. A guarantees repayment. C pays the 5,000 rupees to B on the 1st January, A is discharged from his liability, as the contract has been varied, inasmuch as C might sue B for the money before the 1st of March.

1. Inserted by Act 24 of 1917, section 2 and Schedule I.

Section 134 - Discharge of surety by release or discharge of principal debtor

The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

Illustrations

(a) A gives a guarantee to C for goods to be supplied by C to B. C supplies goods to B, and afterwards B becomes embarrassed and contracts with his creditors (including C) to assign to them his property in consideration of their releasing him from their demands. Here B is released from his debt by the contract with C, and A is discharged from his surety ship.

(b) A contracts with B to grow a crop of indigo on A's land and to deliver it to B at a fixed rate, and C guarantees A's performance of this contract. B diverts a stream of water which is necessary for irrigation of A's land, and thereby prevents him from raising the indigo. C is no longer liable on his guarantee.

(c) A contracts with B for a fixed price to build a house for B within a stipulated time, B supplying the necessary timber. C guarantees A's performance of the contract. B omits to supply the timber. C is discharged from his surety ship.

Section 135 - Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor

◀Commentary

A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

Section 136 - Surety not discharged when agreement made with third person to give time to principal debtor

Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

Illustration

C, the holder of an overdue bill of exchange drawn by A as surety for B, and accepted by B, contracts with M to give time to B. A is not discharged.

Section 137 - Creditor's forbearance to sue does not discharge surety

◀Commentary

Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him, does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

Illustration

B owes to C a debt guaranteed by A. The debt becomes payable. C does not sue B for a year after the debt has become payable. A is not discharged from his surety ship.

Section 138 - Release of one co- surety does not discharge others

Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties.¹

1. See section 44, supra.

Section 139 - Discharge of surety by creditors act or omission impairing surety's eventual remedy

◀Commentary

If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

Illustrations

(a) B contracts to build a ship for C for a given sum, to be paid by installments as the work reaches certain stages. A becomes surety to C for B's due performance of the contract. C, without the knowledge of A, prepays to B the last two installments. A is discharged by this prepayment.

(b) C lends money to B on the security of a joint and several promissory note made in C's favour by B, and by A as surety for B, together with a bill of sale of B's furniture, which gives power to C to sell the furniture, and apply the proceeds in discharge of the note. Subsequently, C sells the furniture, but, owing to his misconduct and willful negligence, only a small price is realized. A is discharged from liability on the note.

(c) A puts M as apprentice to B, and gives a guarantee to B for M's fidelity. B promises on his part that he will at least once a month, see M make up the cash. B omits to see this done as promised, and M embezzles. A is not liable to B of his guarantee.

Section 140 - Rights of surety on payment or performance

◀Commentary

Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

Section 141 - Surety's right to benefit of creditors securities

◀Commentary

A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses, or, without the consent of the

surety, parts with such security, the surety is discharged to the extent of the value of the security.

Illustrations

(a) C, advances to B, his tenant, 2,000 rupees on the guarantee of A. C has also a further security for the 2,000 rupees by a mortgage of B's furniture. C cancels the mortgage. B becomes insolvent, and C, sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture.

(b) C, a creditor, whose advance to B's is secured by a decree, receives also a guarantee for that advance from A. C afterwards takes B's goods in execution under the decree, and then, without the knowledge of A, withdraws the execution. A is discharged.

(c) A, as surety for B, makes a bond jointly with B to C, to secure a loan from C to B. Afterwards, C obtains from B a further security for the same debt. Subsequently, C gives up the further security. A is not discharged.

Section 142 - Guarantee obtained by misrepresentation, invalid

Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

Section 143 - Guarantee obtained by concealment invalid

Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid.

Illustrations

(a) A engages B as clerk to collect money for him. B fails to account for some of his receipts, and A in consequence calls upon him to furnish security for his duly accounting. C gives his guarantee for B's duly accounting. A does not acquaint C with B's previous conduct. B afterwards makes default. The guarantee is invalid.

(b) A guarantees to C payment for iron to be supplied by him to B to the amount of 2,000 tons. B and C have privately agreed that B should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.

Section 144 - Guarantee on contract that creditor shall not act on it until co-surety joins

Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

Section 145 - Implied promise to indemnify surety

◀Commentary

In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

Illustrations

(a) B is indebted to C, and A is surety for the debt. C demands payment from A, and on his refusal sues him for the amount. A defends the suit, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from B the amount paid by him for costs, as well as the principal debt.

(b) C lends B a sum of money, and A, at the request of B, accepts a bill of exchange drawn by B upon A to secure the amount. C, the holder of the bill, demands payment of it from A, and, on A's refusal to pay, sues him upon the bill. A, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from B the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.

(c) A guarantees to C, to the extent of 2,000 rupees, payment for rice to be supplied by C to B. C supplies to B rice to a less amount than 2,000 rupees, but obtains from A payment of the sum of 2,000 rupees in respect of the rice supplied. A cannot recover from B more than the price of the rice actually supplied.

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INDIAN CONTRACT ACT, 1872

Section 146 - Co-sureties liable to contribute equally

Commentary

Where two or more persons are co- sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts; and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.¹

Illustrations

(a) A, B and C are sureties to D for the sum of 3,000 rupees lent to E. E makes default in payment. A, B and C are liable, as between themselves, to pay 1,000 rupees each.

(b) A, B and C are sureties to D for the sum of 1,000 rupees lent to E, and there is a contract between A, B and C that A is to be responsible to the extent of one-quarter, B to the extent of one-quarter, and C to the extent of one-half. E makes default in payment. As between the sureties, A is liable to pay 250 rupees, B 250 rupees, and C 500 rupees.

1. See section 43, supra.

Section 147 - Liability of co-sureties bound in different sums

Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

Illustrations

(a) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000

rupees, conditioned for D's duly accounting to E. D makes default to the extent of 30,000 rupees. A, B and C are liable to pay 10,000 rupees.

(b) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 40,000 rupees. A is liable to pay 10,000 rupees, and B and C 15,000 rupees each.

(c) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 70,000 rupees. A, B and C have to pay each the full penalty of his bond.

Section 148 - 'Bailment', 'bailor' and 'bailee' defined

◀Commentary

A 'bailment' is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the 'bailor'. The person to whom they are delivered is called the 'bailee'.

Explanation.—If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor of such goods, although they may not have been delivered by way of bailment.

Section 149 - Delivery to bailee how made

◀Commentary

The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorized to hold them on his behalf.

Section 150 - Bailors duty to disclose faults in goods bailed

◀Commentary

The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

If such goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

Illustrations

(a) A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damage sustained.

(b) A hires a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury.

Section 151 - Care to be taken by bailee

Commentary

151. Care to be taken by bailee

In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.²

1. The responsibility of the Trustees of the Port of Madras constituted under the Madras Port Trust Act, 1905 (Madras Act 2 of 1905), in regard to goods has been declared to be that of a bailee under these sections, without the qualifying words "in the absence of any special contract" in section 152, see section 40(1) of the Act.

2. As to railway contracts see the [Indian Railways Act, 1890](#) (9 of 1890), [section 72](#). [Ed. The [Indian Railways Act, 1890](#) (9 of 1890) has been repealed by the [Railways Act, 1989](#) (24 of 1989), [section 200](#).] As to the liability of common carriers, see the [Carriers Act, 1865](#) (3 of 1865), [section 8](#).

Section 152 - Bailee when not liable for loss, etc. , of thing bailed

Commentary

152. Bailee when not liable for loss, etc. , of thing bailed

The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151.

1. The responsibility of the Trustees of the Port of Madras constituted under the Madras Port Trust Act, 1905 (Madras Act 2 of 1905), in regard to goods has been declared to be that of a bailee under these sections, without the qualifying words "in the absence of any special contract" in section 152, see section 40(1) of the Act.

Section 153 - Termination of bailment by bailee's act inconsistent with conditions

A contract of bailment is avoidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

Illustrations

A lets to B, for hire, a horse for his own riding. B drives the horse in his carriage. This is, at the option of A, a termination of the bailment.

Section 154 - Liability of bailee making unauthorized use of goods bailed

If the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.

Illustrations

(a) A lends a horse to B for his own riding only. B allows C, a member of his family, to ride the horse. C rides with care, but the horse accidentally falls and is injured. B is liable to make compensation to A for the injury done to the horse.

(b) A hires a horse in Calcutta from B expressly to march to Banaras. A rides with due care, but marches to Cuttack instead. The horse accidentally falls and is injured. A is liable to make compensation to B for the injury to the horse.

Section 155 - Effect of mixture, with bailor's consent, of his goods with bailees

If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.

Section 156 - Effect of mixture without bailors consent, when the goods can be separated

If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.

Illustrations

A bails 100 bales of cotton marked with a particular mark to B. B, without A's consent, mixes the 100 bales with other bales of his own, bearing a different mark; A is entitled to have his 100 bales returned, and B is bound to bear all the expense incurred in the separation of the bales, and any other incidental damage.

Section 157 - Effect of mixture, without bailor's consent, when the goods cannot be separated

If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

Illustrations

A bails a barrel of Cape flour worth Rs. 45 to B. B, without A's consent, mixes the flour with country flour of his own, worth only Rs. 25 a barrel. B must compensate A for the loss of his flour.

Section 158 - Repayment, by bailor, of necessary expenses

◀Commentary

Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

Section 159 - Restoration of goods lent gratuitously

The lender of a thing for use may at any time require its return, if the loan was gratuitous, even though he lent it for a specified time or purpose. But, if, on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.

Section 160 - Return of goods bailed, on expiration of time or accomplishment of purpose

Commentary

It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.

Section 161 - Bailee's responsibility when goods are not duly returned

Commentary

1161. Bailee's responsibility when goods are not duly returned

If by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.²

1. Section 161 has been declared to apply to the responsibility of the Trustees of the Port of Madras as to goods in their possession, see the Madras Port Trust Act, 1905 (Madras Act 2 of 1905).

2. As to Railway contracts, see the [Indian Railways Act, 1890](#) (9 of 1890), [section 72](#) [Ed. The [Indian Railways Act, 1890](#) (9 of 1980) has been repealed by the [Railways Act, 1989](#) (24 of 1989), [sec. 200](#).]

Section 162 - Termination of gratuitous bailment by death

A gratuitous bailment is terminated by the death either of the bailor or of the bailee.

Section 163 - Bailor entitled to increase or profit from goods bailed

In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

Illustrations

A leaves a cow in the custody of B to be taken care of. The cow has a calf. B is bound to deliver the calf as well as the cow to A.

Section 164 - Bailor's responsibility to bailee

The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods or to give directions, respecting them.

Section 165 - Bailment by several joint owners

If several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary.

Section 166 - Bailee not responsible on redelivery to bailor without title

◀Commentary

If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery.¹

1 . See the [Indian Evidence Act, 1872](#) (1 of 1872), [section 117](#).

Section 167 - Right of third person claiming goods bailed

If a person, other than the bailor, claims goods bailed, he may apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods.

Section 168 - Right of finder of goods, may sue for specific reward offered

The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation; and, where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it.

Section 169 - When finder of thing commonly on sale may sell it

When a thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it—

(1) when the thing is in danger of perishing or of losing the greater part of its value, or

(2) when the lawful charges of the finder, in respect of the thing found, amount to two-thirds of its value.

Section 170 - Bailee's particular lien

◀Commentary

Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.

Illustrations

(a) A delivers a rough diamond to B, a jeweler, to be cut and polished, which is accordingly done. B is entitled to retain the stone till he is paid for the services he has rendered.

(b) A gives cloth to B, a tailor, to make into a coat. B promises A to deliver the coat as soon as it is finished, and to give a three months credit for the price. B is not entitled to retain the coat until he is paid.

Section 171 - General lien of bankers, factors, wharfingers, attorneys and policy-brokers

◀Commentary

Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.¹

1. As to lien of an agent, see section 221 infra. As to lien of a Railway Administration, see the [Indian Railways Act 1890](#) (9 of 1890), [section 55](#). [Ed. The [Indian Railways Act, 1890](#) (9 of 1890) has been repealed by the [Railways Act, 1989](#) (24 of 1989) [Section 200](#). Now see the [Railways Act 1989](#) (24 of 1989, [section 83](#).)]

Section 172 - 'Pledge', 'pawnor' and 'pawnee' defined

◀Commentary

The bailment of goods as security for payment of a debt or performance of a promise is called 'pledge'. The bailor is in this case called the 'pawnor'. The bailee is called the 'pawnee'.

Section 173 - Pawnees right of retainer

◀Commentary

The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

Section 174 - Pawnee not to retain for debt or promise other than that for which goods pledged. Presumption in case of subsequent advances

The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged; but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

Section 175 - Pawnee's right as to extraordinary expenses incurred

The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

Section 176 - Pawnee's right where pawnor makes default

Commentary

If the pawnor makes default in payment of the debt, or performance, at the stipulated time, of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

Section 177 - Defaulting pawnor's right to redeem

Commentary

If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them ¹but he must, in that case, pay, in addition, any expenses which have arisen from his default.

1. For limitation, see the [Limitation Act, 1963](#) (36 of 1963), Schedule 1.

Section 178 - Pledge by mercantile agent

Commentary

1[178. Pledge by mercantile agent

Where a mercantile agent is, with the consent of the owner, in possession of goods or the document of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not authority to pledge.

Explanation.-In this section, the expressions 'mercantile agent' and 'documents of title' shall have the meanings assigned to them in the Indian Sale of Goods Act, 1930(3 of 1930).

1. Section178 and 178A Substituted by [Act 4 of 1930](#), section 2, for the original section178.

Section 178A - Pledge by person in possession under voidable contract

◀Commentary

When the pawnor has obtained possession of the goods pledged by him under a contract voidable under section 19 or section 19A, but the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title.]

Section 179 - Pledge where pawnor has only a limited interest

◀Commentary

Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

Section 180 - Suit by bailor or bailee against wrong-doer

◀Commentary

If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

Section 181 - Apportionment of relief or compensation obtained by such suits

Whatever is obtained by way of relief or compensation in such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

Section 182 - 'Agent' and 'Principal' defined

◀Commentary

An 'agent' is a person employed to do any act for another, or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the 'principal'.

Section 183 - Who may employ agent

◀Commentary

Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.

Section 184 - Who may be an agent

◀Commentary

As between the principal and third persons, any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.

Section 185 - Consideration not necessary

No consideration is necessary to create an agency.

Section 186 - Agent's authority may be expressed or implied

◀Commentary

The authority of an agent may be expressed or implied.^{[1](#)}

1. See, however, the [Registration Act, 1908](#) (16 of 1908), [section 33](#); See also the [Code of Civil Procedure, 1908](#) (5 of 1908), Schedule I, Order III Rule 4.

Section 187 - Definitions of express and implied authority

◀Commentary

An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

Illustration

A owns a shop in Serampur, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by B, and he is in the habit of ordering goods from C in the name of A for the purposes of the shop, and of paying for them out of A's funds with A's knowledge. B has an implied authority from A to order goods from C in the name of A for the purposes of the shop.

Section 188 - Extend of agent's authority

[←Commentary](#)

An agent having an authority to do an act, has authority to do every lawful thing which is necessary in order to do such act.

An agent having an authority to carry on a business, has authority to do every lawful thing necessary for the purpose, or usually done in the course, of conducting such business.

Illustration

(a) A is employed by B, residing in London, to recover at Bombay a debt due to B. A may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same.

(b) A constitutes B his agent to carry on his business of a shipbuilder. B may purchase timber and other materials, and hire workmen, for the purpose of carrying on the business.

Section 189 - Agent's authority in an emergency

An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.

Illustration

(a) An agent for sale may have goods repaired if it be necessary.

(b) A consigns provisions to B at Calcutta, with directions to send them immediately to C, at Cuttack. B may sell the provisions at Calcutta, if they will not bear the journey to Cuttack without spoiling.

Section 190 - When agent cannot delegate

An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or, from the nature of the agency, a sub-agent must, be employed.

Section 191 - 'Sub-agent' defined

A 'sub-agent' is a person employed by, and acting under the control of, the original agent in the business of the agency.

Section 192 - Representation of principal by sub-agent properly appointed

[←Commentary](#)

Where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal.

Agent's responsibility for sub-agent.--

The agent is responsible to the principal for the acts of the sub-agent.

Sub-agent's responsibility.—

The sub-agent is responsible for his acts to the agent, but not to the principal, except in case of fraud or willful wrong.

Section 193 - Agent's responsibility for sub-agent appointed without authority

Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal.

Section 194 - Relation between principal and person duly appointed by agent to act in business of agency

[Commentary](#)

Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

Illustration

(a) A directs B, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. B names C, an auctioneer, to conduct the sale. C is not a sub-agent, but is A's agent for the conduct of the sale.

(b) A authorizes B, a merchant in Calcutta, to recover the moneys due to A from C & Co. B instructs D, a solicitor, to take legal proceedings against C & Co. for the recovery of the money. D is not a sub-agent, but is solicitor for A.

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INDIAN CONTRACT ACT, 1872

Section 195 - Agent's duty in naming such person

In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and, if he does this, he is not responsible to the principal for the acts or negligence of the agent so selected.

Illustration

(a) A instructs B, a merchant, to buy a ship for him. B employs a ship-surveyor of good reputation to choose a ship for A. The surveyor makes the choice negligently and the ship turns out to be unseaworthy and is lost. B is not, but the surveyor is, responsible to A.

(b) A consigns goods to B, a merchant, for sale. B, in due course, employs an auctioneer in good credit to sell the goods of A, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. B is not responsible to A for the proceeds.

Section 196 - Right of person as to acts done for him without his authority. Effect of ratification

Commentary

Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratify them, the same effects will follow as if they had been performed by his authority.

Section 197 - Ratification may be expressed or implied

Commentary

Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

Illustration

(a) A, without authority, buys goods for B. Afterwards B sells them to C on his own account; B's conduct implies a ratification of the purchase made for him by A.

(b) A, without B's authority, lends B's money to C. Afterwards B accepts interest on the money from C. B's conduct implies a ratification of the loan.

Section 198 - Knowledge requisite for valid ratification

No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

Section 199 - Effect of ratifying unauthorized act forming part of a transaction

A person ratifying any unauthorized act done on his behalf ratifies the whole of the transaction of which such act formed a part.

Section 200 - Ratification of unauthorized act cannot injure third person

An act done by one person on behalf of another, without such other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.

Illustration

(a) A, not being authorized thereto by B, demands, on behalf of B, the delivery of a chattel, the property of B, from C, who is in possession of it. This demand cannot be ratified by B, so as to make C liable for damages for his refusal to deliver.

(b) A holds a lease from B, terminable on three months' notice. C, an unauthorized person, gives notice of termination to A. The notice cannot be ratified by B, so as to be binding on A.

Section 201 - Termination of agency

Commentary

An agency is terminated by the principal revoking his authority; or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

Section 202 - Termination of agency, where agent has an interest in subject-matter

Commentary

Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

Illustration

(a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death.

(b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself, out of the price, the amount of his own

advances. A cannot revoke this authority, nor is it terminated by his insanity or death.

Section 203 - When principal may revoke agents authority

◀◀Commentary

The principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

Section 204 - Revocation where authority has been partly exercised

The principal cannot revoke the authority given to his agent after the authority has been partly exercised so far as regards such acts and obligations as arise from acts already done in the agency.

Illustration

(a) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's moneys remaining in B's hands. B buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton.

(b) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's moneys remaining in B's hands. B buys 1,000 bales of cotton in A's name, and so as not to render himself personally liable for the price. A can revoke B's authority to pay for the cotton.

Section 205 - Compensation for revocation by principal, or renunciation by agent

◀◀Commentary

Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

Section 206 - Notice of revocation or renunciation

◀◀Commentary

Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

Section 207 - Revocation and renunciation may be expressed or implied

Revocation and renunciation may be expressed or may be implied in the conduct of that principal or agent respectively.

Illustration

A empowers B to let A's house. Afterwards A lets it himself. This is an implied revocation of B's authority.

Section 208 - When termination of agents authority takes effect as to agent and as to third persons

◀Commentary

The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

Illustration

(a) A directs B to sell goods for him, and agrees to give B five per cent commission on the price fetched by the goods. A afterwards, by letter, revokes B's authority. B after the letter is sent, but before he receives it, sells the goods for 100 rupees. The sale is binding on A, and B is entitled to five rupees as his commission.

(b) A, at Madras, by letter, directs B to sell for him some cotton lying in a warehouse in Bombay, and afterwards, by letter, revokes his authority to sell, and directs B to send the cotton to Madras. B, after receiving the second letter, enters into a contract with C, who knows of the first letter, but not of the second, for the sale to him of the cotton. C pays B the money, with which B absconds. C's payment is good as against A.

(c) A directs B, his agent, to pay certain money to C. A dies, and D takes out probate to his will. B, after A's death, but before hearing of it, pays the money to C. The payment is good as against D, the executor.

Section 209 - Agent's duty on termination of agency by principal's death or insanity

When an agency is terminated by the principal dying or termination becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

Section 210 - Termination of sub-agent's authority

◀Commentary

The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

Section 211 - Agent's duty in conducting principals business

◀Commentary

An agent is bound to conduct the business of his principal according to the directions given by the principal, or in the absence of any such directions according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent

acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.

Illustration

(a) A, an agent engaged in carrying on for B a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, on its to make such investment. A must make good to B the interest usually obtained by such investments.

(b) B, a broker, in whose business it is not the custom to sell on credit, sells goods of A on credit to C, whose credit at the time was very high. C, before payment, becomes insolvent. B must make good the loss to A.

Section 212 - Skill and diligence required from agent

◀Commentary

An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.

Illustration

(a) A, a merchant in Calcutta, has an agent, B, in London, to whom a sum of money is paid on A's account, with orders to remit. B retains the money for a considerable time. A, in consequence of not receiving the money, becomes insolvent. B is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss—as, e.g., by variation of rate of exchange—but not further.

(b) A, an agent for the sale of goods, having authority to sell on credit, sells to B on credit, without making the proper and usual enquiries as to the solvency of B. B, at the time of such sale, is insolvent. A must make compensation to his principal in respect of any loss thereby sustained.

(c) A, an insurance-broker employed by B to effect an insurance on a ship omits to see that the unusual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. A is bound to make good the loss to B.

(d) A, a merchant in England, directs B, his agent at Bombay, who accepts the agency, to send him 100 bales of cotton by a certain ship. B, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. B is bound to make good to A the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

Section 213 - Agent's accounts

◀Commentary

An agent is bound to render proper accounts to his principal on demand.

Section 214 - Agent's duty to communicate with principal

It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

Section 215 - Right of principal when agent deals, on his own account, in business of agency without principal consent

◀Commentary

If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

Illustration

(a) A directs B to sell A's estate. B buys the estate for himself in the name of C. A, on discovering that B has bought the estate for himself, may repudiate the sale, if he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

(b) A directs B to sell A's estate. B, on looking over the estate before selling it, finds a mine on the estate which is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A allows B to buy in ignorance of the existence of the mine. A, on discovering that B knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

Section 216 - Principal's right to benefit gained by agent dealing on his own account in business of agency

◀Commentary

If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

Illustration

A directs B, his agent, to buy a certain house for him. B tells A it cannot be bought, and buys the house for himself. A may, on discovering that B has bought the house, compel him to sell it to A at the price he gave for it.

Section 217 - Agent's right of retainer out of sums received on principal's account

◀Commentary

An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

Section 218 - Agent's duty to pay sums received for principal

Commentary

Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

Section 219 - When Agent's remuneration becomes due

Commentary

In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

Section 220 - Agent not entitled to remuneration for business misconducted

Commentary

An agent who is guilty of misconduct in the business of the agency, is not entitled to any remuneration in respect of that part of the business which he has misconducted.

Illustration

(a) A employs B to recover 1,00,000 rupees from C, and to lay it out on good security. B recovers the 1,00,000 rupees and lays out 90,000 rupees on good security, but lays out 10,000 rupees on security which he ought to have known to be bad, whereby A loses 2,000 rupees. B is entitled to remuneration for recovering the 1,00,000 rupees and for investing the 90,000 rupees. He is not entitled to any remuneration for investing the 10,000 rupees, and he must make good the 2,000 rupees to B.

(b) A employs B to recover 1,000 rupees from C. Through B's misconduct the money is not recovered. B is entitled to no remuneration for his services, and must make good the loss.

Section 221 - Agent's lien on principal's property

Commentary

In the absence of any contract to the contrary, an agent is entitled to retain goods, papers and other property, whether movable or immovable, of the principal received by him, until the amount

due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him.

Section 222 - Agent to be indemnified against consequences of lawful acts

◀Commentary

The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

Illustration

(a) B, at Singapore, under instructions from A of Calcutta, contracts with C to deliver certain goods to him. A does not send the goods to B, and C sues B for breach of contract. B informs A of the suit, and A authorizes him to defend the suit. B defends the suit, and is compelled to pay damages and costs, and incurs expenses. A is liable to B for such damages, costs and expenses.

(b) B, a broker at Calcutta, by the orders of A, a merchant there, contracts with C for the purchase of 10 casks of oil for A. Afterwards A refuses to receive the oil, and C sues B. B informs A, who repudiates the contract altogether. B defends, but unsuccessfully, and has to pay damages and costs and incurs expenses. A is liable to B for such damages, costs and expenses.

Section 223 - Agent to be indemnified against consequences of acts done in good faith

Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it cause an injury to the rights of third persons.

Illustration

(a) A, a decree-holder and entitled to execution of B's goods requires the officer of the Court to seize certain goods, representing them to be the goods of B. The officer seizes the goods, and is sued by C, the true owner of the goods. A is liable to indemnify the officer for the sum which he is compelled to pay to C, in consequence of obeying A's directions.

(b) B, at the request of A, sells goods in the possession of A, but which A had no right to dispose of. B does not know this, and hands over the proceeds of the sale to A. Afterwards C, the true owner of the goods, sues B and recovers the value of the goods and costs. A is liable to indemnify B for what he has been compelled to pay to C and for B's own expenses.

Section 224 - Non-liability of employer of agent to do a criminal act

Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that Act.¹

Illustration

(a) A employs B to beat C, and agrees to indemnify him against all consequences of the act. B thereupon beats C, and has to pay damages to C for so doing. A is not liable to indemnify B for those damages.

(b) B, the proprietor of a newspaper, publishes, at A's request, a libel upon C in the paper, and A agrees to indemnify B against the consequences of the publication, and all costs and damages of any action in respect thereof. B is sued by C and has to pay damages, and also incurs expenses. A is not liable to B upon the indemnity.

1. See, section 24, supra.

Section 225 - Compensation to agent for injury caused by principal's neglect

The principal must make compensation to his agent in respect of injury¹ caused to such agent by the principal's neglect or want of skill.

Illustration

A employs B as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskillfully put up, and B is in consequence hurt. A must make compensation to B.

1. Cf. the Indian Fatal Accidents Act, 1855 (13 of 1855).

Section 226 - Enforcement and consequences of agent's contracts

◀Commentary

Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences, as if the contracts had been entered into and the acts done by the principal in person.

Illustration

(a) A buys goods from B, knowing that he is an agent for their sale, but not knowing who is the principal. B's principal is the person entitled to claim from A the price of the goods, and A cannot, in a suit by the principal, set-off against that claim a debt due to himself from B.

(b) A, being B's agent with authority to receive money on his behalf, receives from C a sum of money due to B. C is discharged of his obligation to pay the sum in question to B.

Section 227 - Principal how far bound, when agent exceeds authority

When an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so

much only of what he does as is within his authority is binding as between him and his principal.

Illustration

A, being owner of a ship and cargo, authorizes B to procure an insurance for 4,000 rupees on the ship. B procures a policy for 4,000 rupees on the ship, and another for the like sum on the cargo. A is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

Section 228 - Principal not bound when excess of agent's authority is not separable

←Commentary

Where an agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.

Illustration

A, authorizes B to buy 500 sheep for him. B buys 500 sheep and 200 lambs for one sum of 6,000 rupees. A may repudiate the whole transaction.

Section 229 - Consequences of notice given to agent

←Commentary

Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequences as if it had been given to or obtained by the principal.

Illustration

(a) A is employed by B to buy from C certain goods, of which C is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, A learns that the goods really belonged to D, but B is ignorant of that fact. B is not entitled to set-off a debt owing to him from C against the price of the goods.

(b) A is employed by B to buy from C goods of which C is the apparent owner. A was, before he was so employed, a servant of C, and then learnt that the goods really belonged to D, but B is ignorant of that fact. In spite of the knowledge of his agent, B may set-off against the price of the goods a debt owing to him from C.

Section 230 - Agent cannot personally enforce, nor be bound by, contracts on behalf of principal

←Commentary

In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them. Presumption of contract

to contrary.—

Such a contract shall be presumed to exist in the following cases:—

- (1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;
- (2) where the agent does not disclose the name of his principal;
- (3) where the principal, though disclosed, cannot be sued.

Section 231 - Rights of parties to a contract made by agent not disclosed

◀Commentary

If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfill the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

Section 232 - Performance of contract with agent supposed to be principal

Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.

Illustration

A, who owes 500 rupees to B, sells 1,000 rupees worth of rice to B. A is acting as agent for C in the transaction, but B has no knowledge nor reasonable ground of suspicion that such is the case. C cannot compel B to take the rice without allowing him to set-off A's debt.

Section 233 - Right of person dealing with agent personally liable

◀Commentary

In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.

Illustration

A enters into a contract with B to sell him 100 bales of cotton, and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both, for the price of the cotton.

Section 234 - Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable

When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

Section 235 - Liability of pretended agent

Commentary

A person untruly representing himself to be the authorized agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

Section 236 - Person falsely contracting as agent not entitled to performance

Commentary

A person with whom a contract has been entered into in the character of agent, is not entitled to require the performance of it, if he was in reality acting, not as agent, but on his own account.

Section 237 - Liability of principal inducing belief that agents unauthorized acts were authorized

Commentary

When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations, if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

Illustration

(a) A consigns goods to B for sale, and gives him instructions not to sell under a fixed price. C, being ignorant of B's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract.

(b) A entrusts B with negotiable instruments endorsed in blank. B sells them to C in violation of private orders from A. The sale is good.

Section 238 - Effect, on agreement, of misrepresentation or fraud by agent

Commentary

Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals; but

misrepresentations made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals.

Illustration

(a) A, being B's agent for the sale of goods, induces C to buy them by a misrepresentation, which he was not authorized by B to make. The contract is voidable, as between B and C, at the option of C.

(b) A, the captain of B's ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between B and the pretended consignor.

Section 239 to 266 - Repealed

Sections 239-266. [Rep. by the Indian Partnership Act, 1932 (9 of 1932), [section 73](#) and Schedule II.]

Schedule 1 - SCHEDULE

SCHEDULE

Enactments repealed:--

[Rep. by the Repealing and Amending Act, 1914 (10 of 1914) [section 3](#) and Schedule. II.]

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양자간 경제 협력에 관한 지침서

(Handbook on Systems and Processes
on Bilateral Official Development
Assistance)

BILATERAL **D**EVELOPMENT **A**SSISTANCE

A Handbook on **SYSTEMS** and **PROCESSES**



Department of Economic Affairs
Ministry of Finance
Government of India

BILATERAL **D**EVELOPMENT **A**SSISTANCE

A Handbook on **SYSTEMS** and **PROCESSES**



सत्यमेव जयते

Department of Economic Affairs
Ministry of Finance
Government of India



R. Gopalan
Secretary

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PREFACE

1. One of the major functions of the Department of Economic Affairs is to access external assistance from all multilateral as well as bilateral partners. It is well known that, during the last 50 years or so, India has been amongst the most important countries receiving external development assistance. Our endeavor has always been to attract and utilize assistance within the parameters of our national policies and priorities, so that it complements the efforts of the Government of India in achieving its objectives.
2. There is little doubt that the foreign assistance received by us has played a vital role in the provision of public goods and in meeting our infrastructure needs. The programmes have benefitted the country not only through the provision of additional resources but also by the sharing of best practices and transfer of skills and knowledge from the developed countries.
3. The “Handbook on Systems and Processes on Bilateral Official Development Assistance” is an attempt to document the Government of India’s policies and procedures with regard to external development assistance from bilateral sources. The absence of a comprehensive manual giving details of all the system, mechanisms and processes was deeply felt in the Bilateral Cooperation (BC) Division, which is the nodal Division dealing with all aspects of assistance from bilateral sources. The existence of major gaps in the understanding of various issues was especially sensed during the reviews of externally assisted projects with the State Governments, Line Ministries and the Project Implementing Authorities.
4. Hence, an intensive exercise was undertaken to document in detail each and every aspect of bilateral assistance, right from conceptualization of the project till the time of its evaluation. While the programmes and projects vary widely across many different sectors, the systems and processes are broadly the same. Thus, the effort has been to put together the important schemes and structures in one place so that this handbook serves as a reference point for all those involved in the various aspects of project preparation and its implementation.
5. I am sure that this Handbook will serve as a guide to not only officials of the Government of India, State Governments, Public Sector undertakings but also to the general public in understanding the complexities involved in accessing and utilizing the external assistance.
6. I would like to take this opportunity to compliment the BC Division for their hard work and diligence in preparing this Handbook.

(R. Gopalan)



ACKNOWLEDGEMENTS

The Handbook on System & Processes regarding Bilateral Development Assistance is designed to equip all stakeholders, distant and near, with all the nuances associated with an externally aided project from its conception to delivery. It is driven by need to place in public domain, procedures and other details that were conventionally known and shared but were not so explicitly spelt out. The Handbook draws its inspiration from our superiors. It also bears the imprint of hard work and sweat put in by all our colleagues.

I am deeply grateful to Shri R. Gopalan, Secretary, Economic Affairs, for being a pillar of support and encouragement in our efforts to be more open, focused and objective. In his reviews of the BC Division, he has been tremendously supportive of this idea.

The text would not have been what it is but for the enhanced depth and clarity provided by valued interventions of Madam Loretta Mary Vas, the then Special Secretary, Economic Affairs, true to her inimitable style, went through the manuscript word by word and gave us rare insight which we in BC Division would have missed even after intense consultations.

My heartiest thanks to all four Directors of BC Division, namely, Dr. Surendrakumar Bagde, Ms. Neeta Bhushan, Shri Peeyush Kumar and Shri Sagar Mehra who have devoted considerable time to this project. Each of them brought their specific experience of dealing with externally aided projects and the nuances associated with it. The multiplicity of views has enriched the content in no small measures. Shri Praveen Kumar Dudeja and Shri Anurag Rohatagi, Under Secretaries, have also given their inputs and views. I acknowledge their contribution too.

This note would be incomplete without placing on record a special gratitude for Dr. Surendrakumar Bagde who involved himself passionately in the preparation of this handbook and brought his unique zeal to this endeavor. Though I have been impatient with him at times regarding deadlines he has never let a passage skip his detailed scrutiny and critical appraisal. His experience and articulation has further lent strength to the document.

I deeply value the contribution of Shri Arvind Thakur, Section Officer. His imprint on the Handbook is substantial. I appreciate his willingness to take up responsibilities which are not even remotely his and he truly has been an asset for this project. My deepest gratitude to him.

I am hopeful that the Handbook with its objective of being comprehensive and clear will serve its purpose and benefit the reader.

Prabodh Saxena
Joint Secretary, Bilateral Cooperation
Department of Economic Affairs



ABBREVIATIONS

AAAD	Aid, Accounts & Audit Division
ADB	Asian Development Bank
AFD	French Agency for Development
CCEA	Cabinet Committee on Economic Affairs
DEA	Department of Economic Affairs
DFID	Department for International Development
DONER	Ministry of Development of North Eastern Region
EC	European Commission
EFC	Expenditure Finance Committee
EIA	Environmental Impact Assessment
EU	European Union
GFR	General Financial Rules
GoI	Government of India
GoJ	Government of Japan
IDA	International Development Association
JICA	Japan International Cooperation Agency
KfW	German Development Bank
MEA	Ministry of External Affairs
MHA	Ministry of Home Affairs
MoE&F	Ministry of Environment & Forests
NABARD	National Bank for Agriculture and Rural Development
NGO	Non-government Organization
ODA	Official Development Assistance
OECD	Organization for Economic Cooperation and Development
PIA	Project Implementing Agency
PIB	Public Investment Board
RRP	Resettlement & Rehabilitation Plan
SAPROF	Special Assistance for Project Formulation
SFC	Standing Finance Committee
SIDBI	Small Industries Development Bank of India
UK	United Kingdom



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INTRODUCTION

Mandate of the Department of Economic Affairs with respect to external development assistance

The Constitution distributes powers between Parliament and State legislatures as per the lists of entries in the Seventh Schedule to the Constitution. Under the Seventh Schedule of the Constitution, Union Government i.e., Government of India has been vested with powers to decide on the matters relating to “(i) Foreign affairs; all matters which bring the Union into relation with any foreign country, (ii) Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries, and (iii) Foreign loans”.

As per Government of India (Allocation of Business) Rules, 1961 Department of Economic Affairs (DEA) in the Ministry of Finance acts as nodal Department for all matters relating to:

- i. Loans, credits and grants from foreign countries, special agencies, non-governmental foundations agencies and voluntary bodies;
- ii. Loans, credits and grants from multilateral agencies;
- iii. Technical and Economic assistance received by India as under:
 - a. The United Nations Technical Assistance Administration Programmes.
 - b. Ad-hoc offers of technical assistance from various foreign countries, special agencies, non-Government entities.
 - c. United Nations Office of Project Services.
- iv. Technical assistance received by India from or given to foreign governments, international institutions and organizations, except such as are relatable to subjects allocated to any other Department.

Accordingly, all Central Ministries/Department, Central Public Enterprises and State Governments including their other organizations like urban local bodies; State Public Sector Enterprises are required to route their proposals through DEA for accessing external development assistance from bilateral and multilateral sources.

DEA has four Divisions for handling the subjects related to externally aided projects. **Bilateral** Cooperation Division accesses the external development assistance from the bilateral sources excluding Russia whereas Multilateral Institutions Division plays the same role for accessing the funds from multilateral financial institutions including, World Bank, Asian Development Bank, International Fund for Agricultural Development, etc. Externally aided projects funded by Russia and

“Department of Economic Affairs acts as the nodal department for all matters relating to external development finance.”

“Bilateral Assistance is accepted from all G-8 countries and the European Union. Non G-8 members of EU can provide Development Assistance, subject to a minimum of US \$ 25 million per annum.”

UNDP are handled in Multilateral Relations Division. The Aid, Accounts and Audit Division (AAAD) in the Department is responsible for implementing the financial covenants laid down in the agreement(s) executed by the DEA and the external funding agencies.

The organization chart of the Divisions in the Ministry of Finance handling the issue of external aid is at Appendix 1.

Role for external development assistance

The role of external assistance has been manifold but evolving in the Indian context. It initially imparted support for the country's balance of payment and foreign exchange needs and to promote food security. It also helped to release resources for meeting crucial poverty-alleviating expenditure. Over time, the role of external assistance either for meeting food security requirements or balance of payment support has become increasingly insignificant. However, given the competitive cost of such resources as well as their long-term availability, external development assistance continues to be useful as it also provides access to improved technology and best practices besides supporting projects in the social and infrastructure sectors and strengthening human and institutional capacities.

Sources of bilateral development assistance

External development assistance, comprising loans, technical cooperation and grants, is accepted from multilateral and bilateral sources. Currently, all G-8 countries and the European Union are sources of bilateral assistance. Non G-8 European Union countries can also provide such assistance provided that they commit a minimum annual development package of US\$ 25 million.

All countries can provide bilateral development assistance directly to autonomous institutions, universities, NGOs subject to extant rules/procedures in this regard.

Recipients of external development assistance and classification of projects

External development assistance from bilateral and multilateral sources is received largely by the Government of India (i) for projects/programmes in the Central sector and (ii) on behalf of the State Governments for State sector projects/programmes to be implemented by the State Governments and/or local bodies and public sector undertakings. External development assistance to Central Public Sector Undertakings/ Financial Institutions and non-governmental organizations flow directly to these bodies without routing the funds through the Government of India accounts.

The projects/programmes are mainly classified as **Central projects** and **State Projects**.

- ◆ **Central Projects** are the projects implemented by Central Ministries/ Departments, Central Public Enterprises, Financial Institutions and Central autonomous bodies like Port Trusts. Some Central Projects are

implemented as Centrally Sponsored Schemes. These schemes are extended by the Union Government to States under Article 282 of the Constitution and backed by Central government grant money. Depending on the nature of the scheme, there is an expenditure sharing arrangement in which either the Central Government meets 100% expenditure or it is shared on pre-defined basis.

- ◆ **State Projects** are implemented by State Government Departments and State Public Enterprises, State Financial Institutions and State autonomous bodies.

From the accounting point of view, AAAD classifies externally aided projects and programmes into two categories namely “**Government Projects**” and “**Non-Government Projects**”.

- ◆ **Government Projects:** The projects and programmes where the external funds are being routed through the Consolidated Fund of India are classified as “Government Projects”. These include projects implemented by Central Government and State Governments. Government of India acts as borrower/recipient in all such cases and all financial obligations for repayment of loans and interest payments to external funding agencies are met by the DEA through AAAD.
- ◆ **Non-Government Projects:** Under the extant guidelines, Central Public Enterprises and Financial Institutions, receive external assistance directly from the multilateral or bilateral source. Concerned Central Public Enterprise/Financial Institution acts as borrower in such cases and Government of India provides sovereign guarantee where required. Such projects are classified as “Non-government Projects” and all repayments of loans and interests to external funding agencies in such cases are directly done by concerned borrower.

Some external development partners like French Agency for Development (Afd) sometimes classify projects as **sovereign** and **non-sovereign** Projects/programmes, where Government is either borrower/recipient or guarantor, are called “Sovereign Projects” and the projects for which the external development agencies are directly providing the funds to Central Public Sector Undertakings/Financial Institutions without sovereign guarantee are called “Non-sovereign Projects”.

Types of bilateral development programmes

Bilateral development assistance can broadly be categorized into following types:

- ◆ **Project Finance:** Project Finance is utilized to finance specific purpose such as construction or maintenance of roads, power plants, irrigation, water supply and sewerage facilities. The bilateral development assistance is used for the procurement of facilities, equipment and services, or for implementing civil works and other related works. Sometimes project finance is utilized for engineering services also at planning and appraisal stages of the projects. The activities in such cases include reviews of feasibility studies, detailed designing and preparation of bidding documents.

“External development finance is utilized for Project finance; Sector Programme Finance; Lines of Credit; Technical Co-operation.”

- ◆ **Sector Programme Finance:** Bilateral development assistance is provided to support development policies and institutional reforms in a specific prioritized sector, as in the education sector. Programme finance is channeled as budget support, uses local accounting systems and may not be linked to specific project activities. Generally, conditionalities and milestones are set for measuring the performance of the programmes and the bilateral development assistance is disbursed in tranches as milestones are achieved and conditionalities are fulfilled. Components requiring capital expenditure are also sometimes included in such programmes.
- ◆ **Financial Intermediary Loans (Lines of credit):** Financial intermediary loans are provided to the financial institutions like SIDBI, NABARD, etc. for the implementation of selected activities, such as the promotion of small- and medium-scale enterprises in manufacturing; promotion of self-help groups in agriculture, watershed development; and promotion of usage of alternative sources of energy. These loans act as 'two-step loans' because the fund utilization process involves two or more steps for channeling the funds to the end-beneficiaries who could be in the private sector.
- ◆ **Technical Cooperation:** External agencies implement technical cooperation programmes for enhancing the abilities of individuals, groups, institutions and organizations through capacity development, including advisory and technical expertise services and trainings. Technical cooperation programmes are mainly aimed at skill upgradation, organizational strengthening and procedural improvements. Technical cooperation programmes are provided as grants and normally take the following forms:
 - i. Consultancy services to carry out any activity related to development;
 - ii. Organizational reinforcement through provision of management and other operational or advisory personnel;
 - iii. Provision of advisers in policy analysis and formulation;
 - iv. Training;
 - v. Research and studies, including feasibility studies for capital projects; and
 - vi. Assistance for implementation of capital projects in the form of accompanying measures.

“Loans must have 25% concessionality, for it to qualify as Official Development Assistance.”

Grants, loans and concessionality

External development assistance mainly comes in two forms: grants and loans. Grants are transfers made in cash, goods or services without any obligation to repay whereas on loans, borrower has the obligations to repay principal, interest and any other charges agreed between the external agencies and the borrowers.

Concessionality (also called grant element) is a measure of the "softness" of a loan reflecting the benefit to the borrower compared to a loan at market rate. In broad terms, the concessionality of a loan is higher (i) the lower the interest rate, (ii) the longer the grace period, (iii) the longer the maturity period, and (iv) the more back-loaded the repayment profile.

For the purpose of defining bilateral development assistance as Official Development Assistance (ODA), loans must have concessionality of at least 25%.

(Grants have 100% concessionality. Among loans, World Bank's International Development Association (IDA) loan is the most concessional lending window. Except for the 0.75% service charge, an IDA loan is interest-free, grace period is 10 years, and it is to be repaid within 40 years. The grant element of IDA loan is about 70%. The IDA loan being offered by World Bank to India (which is called IDA Blend) is has slightly lower grant element as it has the maturity of 25 years instead of 40 years as in the case of pure IDA loans. World Bank is also charging interest rate @ 1.25% under IDA loans being provided to India-To be checked by MI Division).

Among the bilateral agencies, only DFID (UK) and the European Union provide development assistance to Government of India in the form of grants. The development assistance being received from all other bilateral agencies is mainly in the form of loans with varying degrees of concessionality.

The main terms and conditions for loans from main bilateral partners are at Appendix 2.

For technical cooperation projects, donors provide advisory services and no fund flow takes place. However, external agencies report their expenditure on technical cooperation as grant to Organization for Economic Cooperation and Development (OECD). Thus, the concessionality for technical cooperation project is 100%.

Currency risk and concessionality of Official Development Assistance

Official flows from foreign governments is defined as Official Development Assistance (ODA) by the OECD if it has a grant element of at least 25 percent, calculated against a notional reference rate of 10 percent per annum. As the long-term interest rates in most donor countries are now below 10 percent, and therefore attaining 25 percent grant element level has become easier. Therefore, as per the OECD, to qualify as ODA, loans must still be concessional in character, i.e., below market interest rates.

The discount rate of 10 percent for the calculation of the grant element is used irrespective of the country of origin of ODA. As the discount rate used in the calculation of the grant element is not the interest rate at which ODA is given by the donor country, it does not really give a correct idea about the concessionality. The difference in the interest rate on ODA and interest rate on commercial borrowing for the same tenor and currency, i.e., savings in the interest rate compared to the commercial borrowings, would give a better idea of the concessionality of ODA.

In the following paragraphs of this sub-section we explain how interest rate concessionality of ODA loans can be calculated. The other important purpose of this exercise is to help prospective borrowers understand the cost of raising resources through ODA compared to the commercial borrowing from that donor country.

Comparing cost of ODA with domestic borrowing is not possible for all tenor of loans but has been explained in the context of the JICA loan to SIDBI.

ODA loans carry low interest rate and offer varying degrees of concessionality. There is always a currency risk associated with ODA loans as they are in foreign currencies. Therefore, the true extent of concessionality of these loans can be obtained only after considering the cost of hedging the currency risk of these loans. The cost of hedging plus the interest rate of ODA loans would provide good indication of rupee-equivalent interest rate for ODA loans.

The ODA loans generally have long tenor, e.g., in case of Japanese ODA loans minimum tenor is 15 years and maximum is 40 years. However, the liquid market for hedging exists for tenor of up to 5 or 10 years. As the market for hedging the currency risk of long tenor loans is highly illiquid, assessment of the hedging cost for long tenor ODA loans would be unreliable. Thus, if we follow above method it is not possible to find a reliable estimate of the equivalent Rupee cost of borrowing for long tenor ODA loans and therefore we cannot determine the concessionality of these ODA loans.

However, some idea about the net cost of borrowing can be given. SIDBI has taken JICA loans of varying tenor and their borrowings in foreign currency are hedged. For SIDBI the JPY interest rate was 0.4% for a loan of 15 years tenor. Since, the market for 15 years currency swap is highly illiquid, SIDBI does currency swap for 5 or 10 years and rolls over the swap on maturity. Based on the swaps, the effective rupee cost for SIDBI works out to 6.15 percent for 5 years and 5.95 percent for 10 years. But, in view of the repricing risk at the maturity of the initial currency swaps, this Rupee cost may not be a reliable estimate.

However, there is another way to estimate concessionality of ODA loans - by comparing the cost of ODA loans with the indicative cost of raising funds of similar tenor in the foreign currency market.

Concessionality when Government of India raises funds in the foreign currency market: Consider the case of a 20-year ODA loan from Japan¹. The rate of interest charged by Government of Japan for ODA loan of 20 year tenor is 0.8 percent, except for projects in environmental sectors that are low interest loans. These loans have a grace period of 6 years so the repayment of principal starts in the 7th year and the principal is paid in 28 half-yearly installments. Let us assume that Government of Japan can raise 20 year money in Japanese Yen (JPY) at x percent². If Indian government were to raise 20 year money in JPY, then Government of India will have to pay a spread over x because of India's lower credit rating. Assume this spread to be y percent. Thus total cost of raising 20 year money in JPY for Government of India would be $(x+y)$ percent. Accordingly, the concessionality (c^*) of Japanese ODA is $(c^*=x+y-0.8)$ percent.

¹ The tenor of 20 years is assumed for convenience of availability of data.

² Even if repayment stream of Japanese Government bond and that of ODA loan from Japan is different, we can compare both the instruments by comparing their yield to maturity.

The yield to maturity for the Government of Japan bond of 20 year tenor is 2.0% (=x). Since Government of India does not raise money in international capital market, we assume that the credit spread for BBB- (same as India's rating) will be applicable to Government of India. This spread for 20 year JPY is 2.17%³, which would be the credit spread for GoI. The overall cost of borrowing by GoI would then be 4.17%.

Thus, the concessionalality for 20 year ODA loan from GoJ is

$$c^* = x + y - 0.8 = 2.0\% + 2.17\% - 0.8\%^4 = 3.37\%.$$

³ This spread is for BBB. India's foreign currency rating as per S&P is BBB- and therefore actual spread will be slightly higher than this. The information was obtained on February 4, 2011 from Bloomberg.

⁴ This ignores the transaction cost.



IDENTIFICATION OF PROJECTS AND PROGRAMMES

Preparation of the Preliminary Project Report (PPR)

The project cycle under the bilateral official development cooperation programmes starts with project implementing agency (PIA) preparing preliminary project report. The PIA should ensure that the project ideas/programmes are consistent with the priorities of the Government of India and State Governments enunciated in the current Five Year Plan. Central sectoral line ministries and/or the Planning Commission may be consulted for shaping up the idea.

The PIAs should send preliminary project report and all the requisite details in the prescribed format to DEA through their central line ministry. PIAs implementing state sector projects can send advance copy to DEA. The proforma for preparing Preliminary Project Reports for financial and technical cooperation are available at Appendix 3 and 4 respectively.

PIAs for the state sector projects should have obtained necessary approval of their State Governments before forwarding their proposal/preliminary project report to the relevant central line ministry.

Central Ministry/State Government/Public Sector Undertakings/Financial Institutions/any other Government/semi-Government agency should generally refrain from directly or indirectly approaching any bilateral development agency for accessing the bilateral development assistance before the formal proposal is forwarded by DEA to a bilateral development agency. Further discussions between the PIA and the bilateral development agency on the proposal can will be facilitated by DEA after formal communication is forwarded to the bilateral development agency.

PIAs shall ensure the following approvals before forwarding their proposals to DEA:

- ◆ **Central Line Ministry/Department** seeking Project Finance or Sector Programme Finance:
 - i. Approval of Planning Commission on the Preliminary Project Report.
- ◆ **State Government or its agency** seeking Project Finance or Sector Programme Finance:
 - i. Approval of the central line Ministry on the Preliminary Project Report.
 - ii. Approval of Ministry of External Affairs if the project activities are located in the States of Jammu & Kashmir and North-Eastern region.

“PIAs should prepare Preliminary Project Report; obtain necessary approvals, before submitting Preliminary Project Report to DEA.”

“Debt Sustainability clearance from Department of Expenditure is mandatory for any external loan assistance by States.”

- iii. Approval of Ministry of Home Affairs if the project activities are located in the States of Jammu & Kashmir and north-eastern region.
 - iv. Approval of the Ministry of Development of North-Eastern Region if the project activities are located in north-east States.
 - v. Assurance of the State Government to make adequate budget provisions in the State Plan for implementing the project.
 - vi. Debt-sustainability clearance from the Department of Expenditure for any borrowing proposed from the external development agency.
- ◆ **Central Public Sector Undertakings/Financial Institutions/other such central seeking Project Finance or Financial Intermediary Loans:**
 - i. Approval of their central administrative Ministries on the Preliminary Project Report.
 - ii. Approval of Ministry of External Affairs if the project activities are located in the States of Jammu & Kashmir and north-eastern region.
 - iii. Approval of Ministry of Home Affairs if the project activities are located in the States of Jammu & Kashmir and north-eastern region.
 - iv. Approval of the Ministry of Development of North-Eastern Region if the project activities are located in north-east States.
 - v. Approval of the central sectoral Ministry on the Preliminary Project Report where proposed activities are for sectoral areas outside the mandate of the central administrative Ministry.
 - ◆ **Technical Cooperation:**
 - i. Approval at the Secretary level in the concerned sectoral/administrative Ministry on the Preliminary Project Report.
 - ii. Approval of Ministry of External Affairs if the project activities are located in the States of Jammu & Kashmir and north-eastern region.
 - iii. Approval of Ministry of Home Affairs if the project activities are located in the States of Jammu & Kashmir and north-eastern region.
 - iv. Approval of the Ministry of Development of North-Eastern Region if the project activities are located in north-east States.

“DEA endeavors to ensure even distribution of External Assistance to States/Sectors.”

Examination of the Preliminary Project Report in DEA

DEA shall carry out due diligence of the Preliminary Project Reports with due diligence before forwarding it to the foreign Governments/development agencies for external development assistance, giving consideration to equity factors in the allocation of the available resources through external assistance.

Some external agencies like JICA require submission of the Detailed Project Report by PIAs for initiating appraisals of the projects. It is thus advisable that PIAs prepare the DPRs to avoid any delay in the process.

Once the PPR is cleared, the State Government or the concerned Ministry/ Department of the Central Government should submit a detailed project proposal (DPR). The DPR should adequately reflect following dimensions in measurable terms:

- ◆ Techno-economic features - economic viability, social cost benefit, value addition, etc.
- ◆ Ecological features - land use, ecological sustainability, etc.
- ◆ Socio-cultural features - target population and gender matters, participation, social impact, etc.
- ◆ Institutional features - institutional and organizational analysis, capacity building, training, etc.

It should be in accordance with the generic structure as suggested in Department of Expenditure's O.M. No. 1(2)-PF-II/03 dated 7th May, 2003 (see Appendix 4). An objective oriented project design in a matrix format along with work plan, cost and time schedule indicating target/output, cashflow statement, etc. should also be a part of DPR (see Appendix 5). The proposal of the State government should reach DEA through the Ministry concerned in the Central Government along with their appraisal/comments. Proposals of Central Sectoral Ministries should have the concurrence of the Planning Commission. DEA would process on the basis of the comments of the Central sectoral Ministry and Planning Commission.

DPR should be submitted with the approval of the competent authority in the State Government. It should also have all the necessary statutory and non-statutory clearances.

Project Preparedness Checklist

A Project Preparedness Checklist has been drawn up to assess the readiness of the proposal for formally posing to the foreign Government/development agency and for signing agreements with the external agency once the proposal is accepted for appraisal by the external agency. Apart from looking into the broad aims and objectives of the project, clarity should be ensured on project components activities and outcomes, role of various stakeholders, cost estimates, status of clearances, land acquisition, monitoring mechanisms etc. Details are as follows:

Sl. No.	Subject
1	Whether the Preliminary Project Report in the prescribed format is available?
2	Whether project proposal has the approval of the concerned central line ministry?
3	Whether project proposal has the approval of the concerned central sectoral ministry where the activities proposed are not in the mandate of administrative ministry?

Sl. No.	Subject
4	In case of Central Projects, whether the approval of the Planning Commission has been obtained?
5	In case of State Projects seeking external loans, whether the debt-sustainability clearance from the Department of Expenditure has been obtained?
6	In case of proposal pertaining to north-eastern States and J&K, whether the proposal has the requisite clearances of MEA/MHA/DONER?
7	Status of land acquisition, if required: <ol style="list-style-type: none"> i. Total land to be acquired: ii. Actual land acquired so far: iii. Target Land acquisition completion date: iv. Is there any legal issue or any other obstacle being faced by the acquisition authority which could push the target dates mentioned. If so please write in detail.
8	Whether Environmental Impact Assessment clearance required? If yes, whether the proposal to MoE&F has been submitted? If not, when it is likely to be submitted?
9	Whether Forest clearance required? If yes, whether the proposal to MoE&F has been submitted? If not, when it is likely to be submitted?
10	Whether Resettlement & Rehabilitation issues involved? If yes, whether the R&R plan prepared?
11	Whether the project involves setting up a separate Project Management Unit? Details about proposed structure.

Project Preparedness Checklist for signing the Agreements with the external agencies is as under:

Sl. No.	Subject
1	In case of Central Sector projects, whether the proposal has been approved by the competent authority as the case may be viz., SFC/EFC/PIB/CCEA?
2	In case of Central Sector projects, whether the budgetary provision has been made in the Demand for Grants?
3	In case of the State Sector Projects, whether the budgetary provisions have been made in the Annual Plan of the State?
4	In case of the Non-Government Projects requiring sovereign guarantee, whether the approval of the Budget Division on sovereign guarantee has been taken? And whether the borrower and concerned administrative ministry have concurred to the terms and conditions of the sovereign guarantee?



ACTIVITIES PRIOR TO SIGNING OF AGREEMENTS

Pre-commitment studies and appraisals by bilateral development agencies

After formal communication of the proposals from DEA, external development agencies field fact finding or project identification missions with the concurrence of DEA to assess the project or programme and carry out further technical appraisals for finalizing the detailed economic and engineering feasibility report. Appraisal covers four major aspects of the project: technical, institutional, economic, and financial. The objectives of the Appraisals are to ensure that projects are soundly designed, appropriately engineered, and follow accepted standards. The appraisal mission looks into technical alternatives considered, solutions proposed, and expected results. The investment programme for the sector, the strengths and weaknesses of public and private sectoral institutions, and key government policies are all examined. Financial appraisal is concerned with recovering investment and operating costs from project beneficiaries, the amount of counterpart funding required and what portions of project cost are admissible as loan. Usually external development agencies find the project feasible, another appraisal mission will be sent to go in to detail on various aspects mentioned above. The appraisal mission prepares a report (also called minutes of discussion) that sets its findings and recommends terms and conditions of the loan.

It should be ensured that the terms of reference for appraisals are drawn up clearly and with reference to specific objectives. PIAs should provide adequate assistance to enable appraisal mission to complete the work expeditiously.

After the project proposals have been posed to the funding agency by the DEA a briefing meeting with the DEA is normally held at the beginning of the Mission as well as a formal wrap-up/debriefing meeting at the conclusion of the Mission. The project authorities, concerned State Government and concerned central sectoral/line ministry also participate.

Negotiations and commitments

Negotiation is the last stage at which the external development agency and the borrower endeavor to agree on the measures necessary to assure the success of the project. The bilateral development partners formally communicate pledging of funds for the projects after successful completion of negotiations. Germany and France pledge funds during the structured annual bilateral Negotiation meetings.

“Assessment by the Donor Agencies – Appraisal Missions may evaluate the proposals in the field.”

“Budget Division in the DEA is the competent authority to decide regarding Sovereign Guarantees, in accordance with FRBM limit of 0.5% of the GDP.”

Sovereign guarantees

External agencies generally desire guarantee of the Government of India for direct support to Central Public Enterprises and Financial Institutions. The decision on providing sovereign guarantee is taken by the Budget Division who examine the proposal of providing sovereign guarantee on the basis of 'headroom' available under Fiscal Responsibility and Budget Management (FRBM) Rules. The FRBM Rules prescribe a cap of 0.5% of GDP in any financial year on the quantum of guarantees that the Central Government can assume in the particular financial year. The 'headroom' thus created is consumed by the Central government in extending guarantees primarily on loans from multilateral/bilateral agencies, bond issues and other loans raised by various Public Sector Undertakings/Public Sector Financial Institutions. For obtaining the final approval for sovereign guarantee, the concerned Central Public Enterprise/Financial Institution shall have to send request in the prescribed format (Appendix 7) given in the General Financial Rules, 2005 through their central administrative ministry to concerned Credit Section in DEA for forwarding the request to the Budget Division. The sovereign guarantees for externally aided projects are provided with guarantee fee @ 1.2% p.a. on the loan component, however, no guarantee fee is charged on the grant component. A back-to-back Counter-Guarantee Fee Agreement is signed between the Central Public Enterprise/Financial Institution and concerned central administrative ministry to ensure the terms and conditions specified by the Budget Division for providing sovereign guarantee.

Finalization and signing of agreements

DEA signs the Loan/Financing Agreements on behalf of the Government of India for all "Government Projects" being implemented by Central Ministries or State Governments with external assistance. In case, separate project agreements for defining project activities are to be signed, such documents are signed by the concerned PIAs and line ministries with the external donor agencies. In case of JICA, 'minutes of discussion' of appraisal missions contain the agreed project activities. The 'minutes of discussion' are signed by PIA, Line ministry and donor agencies and agreed by DEA. Signing of these documents means acceptance of financial terms and conditions by the State Governments, PIAs and Line Ministries. Similarly grant agreements are also signed by DEA. However, for some donors, the beneficiary Ministries or Departments can execute grant agreements for Technical Cooperation with the approval of DEA.

Central Public Sector Enterprises/Financial Institutions negotiate and sign Loan/Financing Agreements for "Non-government Projects" with external funding agency, however, the concerned Central Public Sector Enterprise/Financial Institution has to take the approval of DEA through their central administrative Ministry before signing the relevant Agreements. Guarantee Agreements for loan components are signed by DEA with external development agencies. For grant components, guarantee agreements are generally signed between the concerned line Ministry and the external development agency and such agreements are more in a nature of assurance for utilizing the grant for its intended purpose.

Considering that the consent of Ministry of Law on the contents of loan/financing agreements and guarantee agreements to be signed by GoI are necessary, it is advisable that templates of loan/financing agreements and guarantee agreements are developed on mutual consultations with approvals of legal authorities from the both sides. It may help in avoiding unnecessary delay likely to be caused from approaching legal authorities on each and every case.

As per Department of Legal Affairs' Notification No. GSR 1330 dated September 29, 1962, "all agreements and contracts made in exercise of the executive power of the Union with the Government of any foreign State or with the United Nations Organization shall be executed on behalf of the President and authenticated by the persons specified in the Schedule hereto annexed". As per the Schedule annexed to the Notification, Secretary, Special Secretary, Additional Secretary, Joint Secretary or where there is no Additional Secretary or a Joint Secretary, a Deputy Secretary to the Central Government in the appropriate Ministry or Department can sign such agreements with Government of any foreign State.

As per Department of Economic Affairs' Notification No. GSR 205(E) dated March 07, 1984, "all agreements and contracts made in exercise of the executive power of the Union with any foreign bank or financial institution, whether in pursuance of any arrangement with any foreign State for bilateral financial assistance or otherwise shall be executed and authenticated on behalf of the President by the Minister of Finance, the Head of an Indian Mission in foreign country (Ambassador, High Commissioner, Minister in-charge of Legation, Charge d' Affaires and Acting High Commissioner), Secretary, Additional Secretary, Joint Secretary, Director or Deputy Secretary in the Department of Economic Affairs or Minister (Economic) in the Indian Embassy in USA".

“Department of Legal Affairs does the legal vetting of Loan Agreements.”

Legal opinions and other conditions precedent to effectuation of the agreements

After conclusion of the loan agreements, legal opinion from the Department of Legal Affairs is obtained on the format prescribed by the external development agency. The legal opinion and evidence of authority executed by DEA (in the prescribed format by the development agency) along with the specimen signatures of officers authorized to sign and deliver claim documents in respect of a particular project are sent to the external development agency. In respect of Government projects, AAAD nominates their officer to sign such claim documents. Upon finding the documents correct, the loan agreements are made effective by the external development agencies to start the disbursement of the approved assistance.



FUND FLOW MECHANISM

Structure of Government Accounts

Before discussing the flow of funds under externally aided projects, it may perhaps be necessary to first get acquainted with the structure of Government Accounts and Budget. All revenues received by Government by way of taxation and other non-tax revenue receipts flowing to Government in connection with the conduct of Government business like receipts from Railways, Posts, Transport etc. are credited into the Consolidated Fund. Similarly, all loans raised by Government by issue of public notifications, treasury bills (internal debt) and loans/grants obtained from foreign governments and international monetary institutions (external debt) and all moneys received by Government in repayment of loans and interest there on are also credited into this Fund. All expenditure incurred by the Government for the conduct of its business including repayment of internal and external debt and release of loans to States/Union Territory Governments for various purposes is debited against this Fund. No amount can be withdrawn from this Fund without authorization from the legislature.

“Releases from Consolidated Fund are done on the basis of Annual Financial Statement approved by Parliament.”

Release of funds from the Consolidated Fund to Central Ministries and State Governments

Constitution of India requires that for every financial year, a statement of the estimated receipts and expenditure of the Government of India for that year in the form of Annual Financial Statement has to be laid before the lower House of the Parliament i.e., Lok Sabha. The Annual Financial Statement or Union Budget includes estimates of receipts and disbursements in the three accounts of Consolidated Fund, Contingency Fund and Public Account. The estimates of expenditure from the Consolidated Fund included in the Annual Financial Statement and required to be approved by the lower House of the Parliament are submitted in the form of Demands for Grants. Generally, one Demand of Grants is presented in respect of each Ministry or Department, however, in respect of large Ministries or Departments, more than one Demand for Grants are presented. Ministries/Departments have to make project-wise budgetary allocations in their respective Demand for Grants for expected external development finance to be received by their projects/programmes during a financial year. In case of State specific projects the requirements are under DDG of Department of Expenditure.

In order to meet the imbalance between the resource raising capacity and responsibilities assigned to State Governments, plan assistance is extended to the States out of the central Budget. While the total amount available for the purpose is determined by the Ministry of Finance on the basis of budget estimates, inter se allocation for the States are made by the Planning Commission. Central assistance

“Office of Controller of Aid, Accounts & Audit plays pivotal role in receiving and repaying external assistance.”

to supplement State’s resources for financing the State Plans is provided as a lump sum and without specifying any particular scheme or project. Such assistance is called “Normal Central Assistance”. As all the external development finance from the external agencies is received by the Central Government, such development finance is passed on to the State Governments through the central budget in the form of “Additional Central Assistance for Externally Aided Projects (ACA for EAPs)”. For the Agreements signed prior to 01.04.2005, external development finance to “Non-Special Category States” was released as ACA for EAPs in the loan/grant ratio of 70:30. However, now for the Agreements signed on or after 01.04.2005, transfer of external development finance to “Non-Special Category States” is done on “back-to-back” basis on same terms and conditions as attached to such development finance by external funding agencies. For “Special Category” States viz., Arunachal Pradesh, Assam, Himachal Pradesh, Jammu & Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura and Uttarakhand, external loan is still being transferred on loan/grant ratio of 10:90, as was done prior to 01.04.2005. The terms and conditions for loan component of such ACA to Special Category States are similar to the terms and conditions of Normal Central Assistance.

Flow of funds from donor agencies to PIAs

External development assistance from bilateral and multilateral agencies is received largely by the Government of India to implement central and/or State sector projects. External assistance in these cases are routed through government account i.e., Consolidated Fund and are released to Departments of Union Government and State Governments through their respective Demand for Grants and Additional Central Assistance for Externally Aided Projects respectively.

AAAD prepares estimates on annual aid flows that are incorporated in the Annual Plan and Annual Budget. The estimates of aid receipts for incorporation in the Receipt Budget are finalized in consultation with the Credit Sections in DEA and project authorities and furnished to the Budget Division by the AAAD. Corresponding expenditure estimates are furnished by the administrative ministries to their respective financial advisers for onward transmission to the Budget Division for inclusion in the Expenditure Budget. AAAD also finalizes the estimates of payments, including repayment of loans, interest, and other charges, etc., based on the amortization schedule and related information. These estimates are also sent to the Budget Division for incorporation in the Expenditure Budget.

The external development assistance flow from the funding agency in foreign currency and is received in the Reserve Bank of India (RBI)’s account maintained with the Central Bank of external partners country and is routed to the RBI, Mumbai who remits the rupee equivalent to the account of AAAD at RBI, New Delhi. In case of Japan International Cooperation Agency, the fund is received by Bank of India, Tokyo who deposits it into RBI account. The remittances are accounted as external loan/grant receipts in the Consolidated Fund of India.

Under the extant policy, Public Sector Enterprises (PSEs) and Financial Institutions (FIs) receive external development assistance directly from external funding agencies. External funds in such cases do not flow through the government account.

“PSEs & FIs receive external assistance directly from lending agencies.”

Methods of disbursement

External development assistance is disbursed by external agencies by operating the following methods:

- ◆ **Reimbursement procedure:** Under this procedure, the PIA initially incurs expenditure and subsequently claims the amount from the external agency through the AAAD. Eligible expenditure out of the incurred expenditure is then reimbursed by the external agency. There are two ways of dealing with the reimbursement claims as given below:
 - a. **Reimbursement through Special Account (Revolving Fund Scheme):** Under this procedure, the external agency releases the estimated expenditure for the projects as initial advance for the respective loan or credit or grant agreement. Such initial deposit is received in foreign currency by RBI, Mumbai and Rupee equivalent is passed on to the account of AAAD maintained at RBI, New Delhi through Government Foreign Transaction (GFT) advice. However, RBI, Mumbai maintains a loan wise proforma account for liquidation of advance received from Funding Agency. AAAD, on receipt of reimbursement claims from PIA, sends an advice to RBI, Mumbai advising them to debit the Special Account with equivalent of the amount of the eligible claim. Office of CAAA consolidates all such claims and submits to external agency for replenishment of Special Account. This is accompanied by a statement of debits and credits made during the period by RBI, Mumbai and supporting documents received from the PIA.
 - b. **Reimbursement outside Special Account:** Under this procedure (where there is no provision in the loan or credit agreement for the Special Account or the balance in the Special Account is 'Nil') AAAD sends the reimbursement claims received from the PIA to the external agency after checking the eligibility aspect. The external agency thereafter disburses the eligible expenditure to the borrower's account with RBI, Mumbai, who shall pass on the Rupee equivalent to the account of the AAAD at RBI, New Delhi by issue of Government Foreign Transaction (GFT) advice.

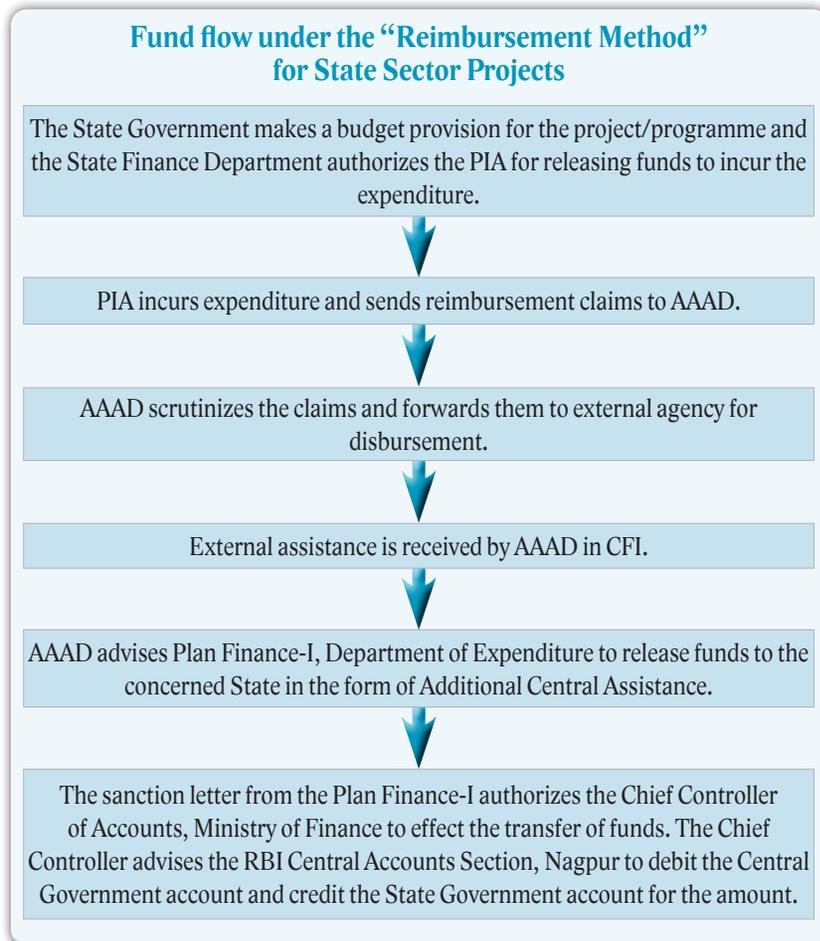
“PIAs incur expenditure and subsequently claim re-imburement from donor agencies through AAAD.”

Fund flow under the “Reimbursement Method” for Central Sector Government Projects

Based on the budget provision, the Ministry spends money on the project.

Ministry sends claim for reimbursement to AAAD.

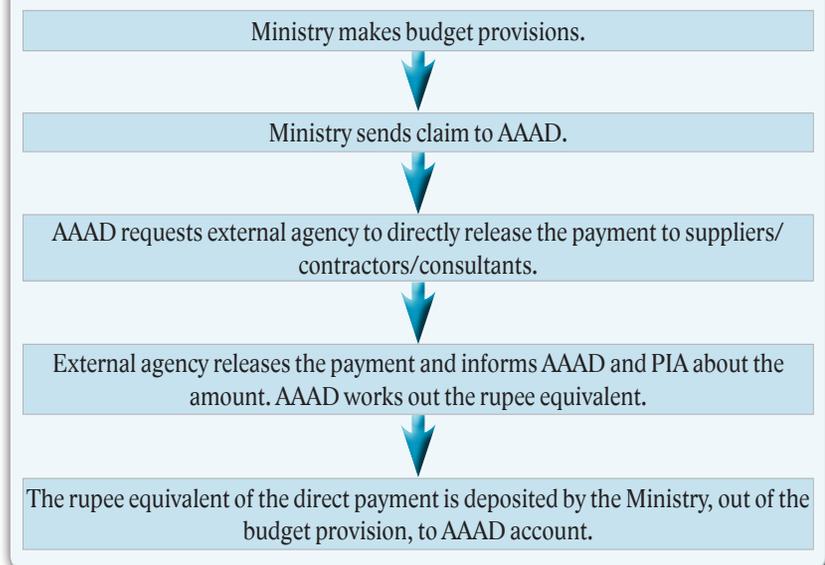
AAAD arranges reimbursement from the external agency, which gets into the Consolidated Fund as a receipt (CFI).



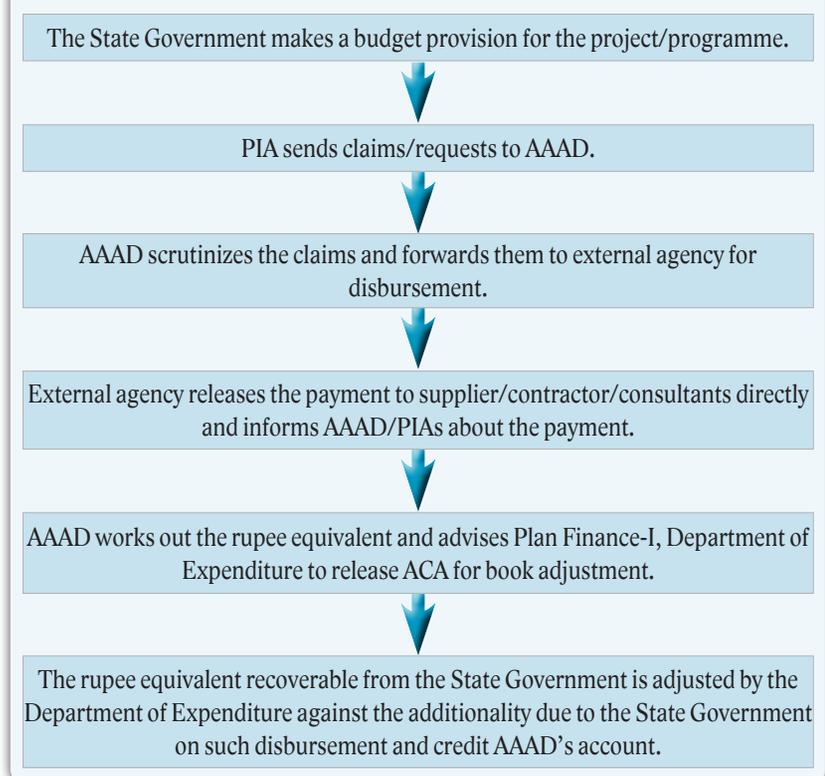
“External Agency may make direct payments to the contractor/supplier on the basis of claims submitted by PIAs through AAAD.”

Direct Payment Procedure: Under this procedure, the external agency, on the request of the PIA (received through AAAD), duly supported by relevant documents, directly pays to the contractor/supplier/consultant. The external agency then appraises the AAAD and the PIA of the particulars of the payment made. AAAD works out the rupee equivalent of the foreign currency payment which is recovered by AAAD from the PIAs or State Governments which have availed of the Direct Payment Procedure. In the case of Central Projects and Centrally Sponsored Projects, the concerned Ministry or Department deposits rupee equivalent of the foreign currency in the account of AAAD. In case of State Sector projects, AAAD recommends book adjustment ACA to Plan Finance Division of Department of Expenditure as and when direct disbursement intimated by external agencies and requesting them to release the amount to the State concerned notionally and recover the same for credit to AAAD’s account. The Plan Finance Division issues a sanction for the amount to be released to the State concerned and for simultaneous recovery and credit back to the account of the AAAD. While submitting the claim to AAAD, the PIAs should confirm that Budget Provision is available to cover the rupee equivalent of the proposed Direct Payment, failing which such a claim may be returned.

Fund flow under the “Direct Payment Method” for Central Sector Government Projects



Fund flow under the “Direct Payment Method” for Central Sector Government Project



Accounting of aid material and equipment

Detailed instructions for the accounting of aid material, equipment and other commodities from foreign countries are laid down in the Civil Accounts Manual. As per these instructions, the value of technical services or cost of experts deputed by foreign agencies at their own cost does not have to be incorporated in Government Accounts. But any support in the form of materials, equipment and other commodities, even if received as a part of the Technical Cooperation agreement, has to be brought into Government accounts as explained in the Civil Accounts Manual.



MONITORING AND EVALUATION

Basic principles of monitoring and evaluation

Monitoring: Monitoring is a continuous internal process to check the progress of development intervention against pre-defined objectives, targets and activities planned for implementation of the project.

Evaluation: An evaluation is an assessment, as systematic and objective as possible, of an ongoing or completed project programme or policy, its design, implementation and results. The aim is to determine the relevance and fulfillment of objectives, developmental efficiency, effectiveness, impact and sustainability.

Good monitoring and evaluation facilitates improvement of performance by focusing on project delivery outcomes and impact. It also ensures a system to record lessons learnt to improve the design and performance of projects and programmes.

Institutional mechanisms for monitoring and evaluation in DEA

Monitoring of projects funded by bilateral partners is presently being carried out in DEA in the following ways:

- i. Annual Negotiations/Talks/Consultations with the bilateral partners;
- ii. Annual Tripartite Review Meetings at the State level under the Chairmanship of Chief Secretary of the State concerned;
- iii. Review Meetings in DEA with concerned stakeholders.

In terms of the guidelines issued by DEA in May, 2005, all the Central Ministries/ Departments and State Governments have to comply with the following instructions regarding Evaluation of projects:

Evaluation arrangements for the project, whether concurrent, mid-term or post-project should be spelt out in the project proposal.

- ◆ Concurrent evaluation should focus on in-depth reflection at a point considered significant in the project cycle/programme. This could be at the end of the work phase or when ever special circumstances demand or at the closure of the project.
- ◆ Project authorities are required to submit (a) project completion report of the physical-financial parameters and (b) evaluation report on the project object-achievement parameters after completion of the project.
- ◆ Two or three years after completion of the project, an Impact Assessment Study may also be conducted on selected projects preferably by reputed neutral institutions or organizations to ascertain the actual achievement and retention of project objectives vis-s-vis the targeted project objectives.

“Monitoring & Evaluation are integral part of DEA review.”

“DEA has structured institutional mechanisms with all bilateral partners.”

Project evaluation mechanism instituted by external funding agencies

External funding agencies have instituted a project evaluation mechanism in order to identify the factors of success or failures and to assess the sustainability of impact. JICA conducts an evaluation of each project using the plan-do-check-act (PDCA) cycle criteria encompassing the pre-implementation, implementation, post-implementation and feedback stages. Two types of ex-post evaluation – individual project evaluation and thematic evaluation are conducted by JICA.

On-going projects are also routinely evaluated by UK (DFID) using a mix of process, ex-ante, ex-post and impact evaluations. Since January 2011, DFID has made it mandatory for all new project design to incorporate evidence of what works, and assurance of Value for Money that the intervention will be cost-effective. This includes evidence gathered from empirical research, impact evaluation or other peer-reviewed sources, both qualitative and quantitative.

German Development Organizations have a well placed Project Evaluation system. Appraisal of the project in the form of ex-ante assessment of a project/ programme is undertaken by KfW/GIZ, defining objectives & indicators, costs & financing, etc. After the project is Implemented by GIZ or by the funded partner, Annual reports are generated based on monitoring and/or mid-term evaluations. Ex- post evaluations are also undertaken by KfW/GIZ. While evaluating projects, OECD criteria are followed by German Organizations.

“External donor agencies conduct ex-post evaluations.”

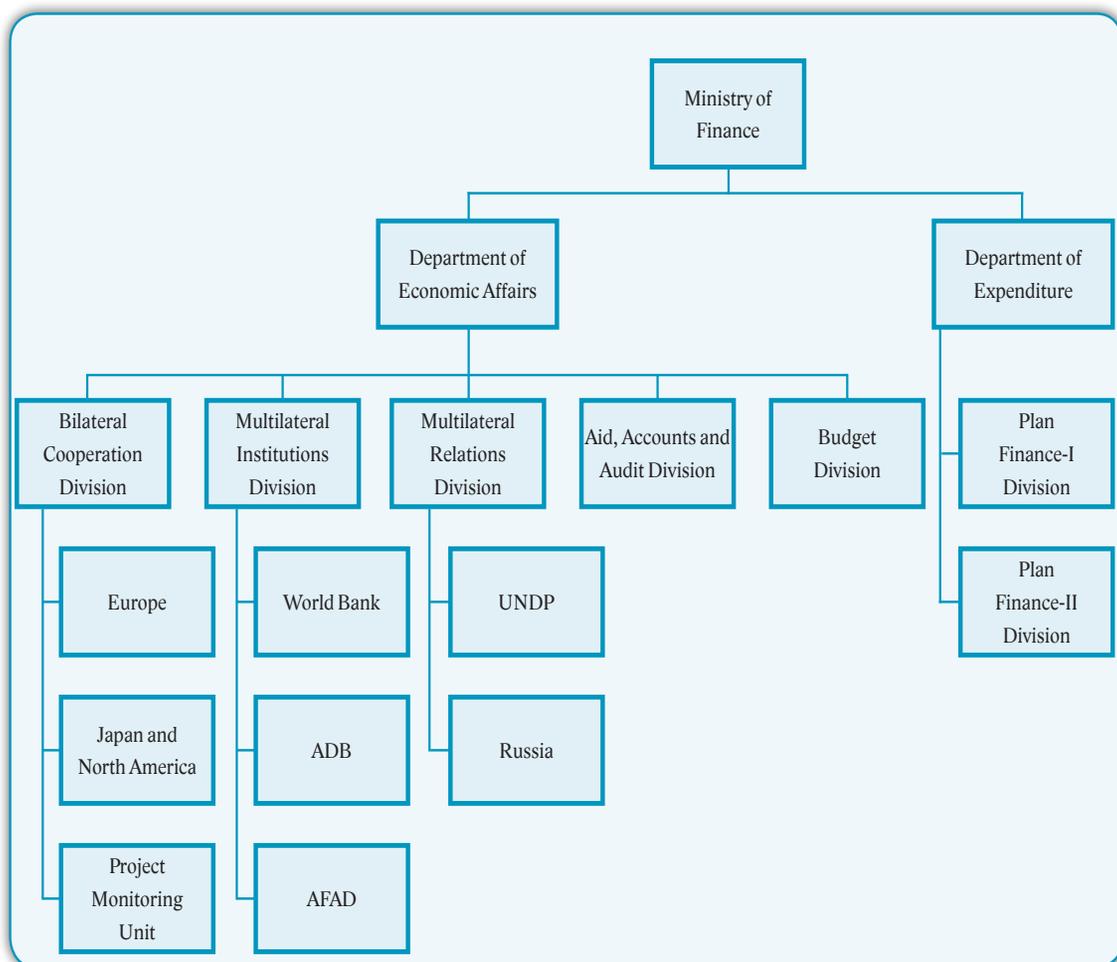
France (AFD) undertakes the evaluation of the projects at several levels to ensure the technical, economic and financial viability of its action. Its current performance evaluation system rests on the principles of systematization, decentralization, outsourcing localization, robustness & credibility and partnership. USAID conducts periodic evaluation of projects including in-depth, analytical and scientific, externally-conducted, mid-term and final project reviews.

Project Evaluation Reports prepared by the external funding agencies are shared with DEA on need basis. DEA factors into account, if required, such evaluation while considering additional project to a State/Line Ministry.

APPENDICES

Appendix – 1

Organization chart of the Divisions in the Ministry of Finance handling various aspects of external development assistance



Appendix – 2

Proforma for preparation of Preliminary Project Report for bilateral financial cooperation

Request for seeking financial cooperation from *(please indicate the name of the bilateral agency)*

Part-I: Project summary						
1.	Project Name					
2.	Project Implementing Agency					
3.	<ul style="list-style-type: none"> ◆ Central Line Ministry (in case of Central Sector Project) ◆ Administrative State Government (in case of State Sector Project) 					
4.	Sectoral area of the project					
5.	Central Sectoral Line Ministry					
6.	Broad objectives of the project					
7.	Location of the project (specify Districts)					
8.	Total estimated cost of the project (in Rs. crore)					
9.	Components of total estimated cost (in Rs. crore)					
	Source	Loan/Credit	Grant	Equity	Other (specify)	Total
	Total estimated cost					<i>(sum above)</i>
10.	<ul style="list-style-type: none"> ◆ Total bilateral development assistance proposed (specify both in Rupees and in donor currency) ◆ Additional technical cooperation component, if any and activities proposed to be implemented through technical cooperation 					
11.	Project implementation period					
12.	Whether any separate institutional arrangement is required to be established for implementation of the project?					
13.	Details of statutory clearances required for implementations of the project					
14.	Statutory clearances obtained					
15.	Details of debt sustainability clearance from the Department of Expenditure for State Sector project					
16.	Details of previous phase(s), if any. Whether any impact assessment has been made for previous phase?					
Part-II: Basic design of the project						
17.	Goals and objectives of the project and its linkages with government priority and programmes					
18.	Activities proposed in the project					

19.	Quantifiable outputs and outcomes of the project																				
20.	Target population																				
21.	Does the project require of sector adjustment policy formulation? If yes, give details																				
22.	Whether any feasibility study/pre-appraisal/pre-investment study has been conducted? If yes, its details of its findings																				
23.	Linkages with completed or ongoing project (s) of similar nature																				
	<table border="1"> <thead> <tr> <th>Sl. No.</th> <th>Name of the project</th> <th>Implementation period</th> <th>Quantifiable outcome achieved/targeted</th> <th>Total cost of the project (in Rs. crore)</th> </tr> </thead> <tbody> <tr> <td></td> <td>Proposed project</td> <td></td> <td></td> <td></td> </tr> <tr> <td></td> <td>Completed projects</td> <td></td> <td></td> <td></td> </tr> <tr> <td></td> <td>Ongoing projects</td> <td></td> <td></td> <td></td> </tr> </tbody> </table>	Sl. No.	Name of the project	Implementation period	Quantifiable outcome achieved/targeted	Total cost of the project (in Rs. crore)		Proposed project					Completed projects					Ongoing projects			
Sl. No.	Name of the project	Implementation period	Quantifiable outcome achieved/targeted	Total cost of the project (in Rs. crore)																	
	Proposed project																				
	Completed projects																				
	Ongoing projects																				
24.	<p>Details on costs of following to be funded from the bilateral official development assistance:</p> <ul style="list-style-type: none"> ◆ Separate institutional arrangement to be established, its organizational arrangements, responsibility and accountability of key personnel. ◆ Numbers of experts and personnel to be resourced from outside the Project Implementing Agency and Government. ◆ Procurement of equipment and services. 																				
25.	Detailed year-wise physical and financial target plan with quantifiable and qualitative (verifiable) target indicators. The target plan should also include year-wise utilization of proposed bilateral development assistance.																				
26.	<p>Does the project involve land acquisition? If so, please indicate:</p> <ol style="list-style-type: none"> i. Total land to be acquired ii. Actual land acquired so far iii. Target Land acquisition completion date iv. Is there any legal issue or any other obstacle being faced by the acquisition authority which could push the target dates mentioned. If so please write in detail. 																				
27.	Does the project involve resettlement and rehabilitation? If so, indicate its magnitude, cost and present status of plan.																				
28.	Whether Environmental Impact Assessment clearance required? If yes, whether the proposal to MoE&F has been submitted? If not, when it is likely to be submitted?																				
29.	Whether Forest clearance required? If yes, whether the proposal to MoE&F has been submitted? If not, when it is likely to be submitted?																				
30.	Whether the private sector or NGO participation is also proposed in the project? If yes, please describe the nature of the proposed involvement?																				
31.	Brief description on the effects and impacts on (i) environment including land, water, air, bio-diversity etc. (ii) women and children (iii) employment (iv) poverty alleviation and (v) productivity and economic growth																				

Signature of the Head of the
Project Implementation Agency
with seal and date

Appendix – 3

Proforma for preparation of Preliminary Project Report for bilateral technical cooperation

Request for seeking technical cooperation from (*please indicate the name of the bilateral agency*)

Part-I: Project summary			
1.	Project Name		
2.	Project Implementing Agency		
3.	<ul style="list-style-type: none"> ◆ Central Line Ministry (in case of Central Sector Project). ◆ Administrative State Government (in case of State Sector Project). 		
4.	Sectoral area of the project.		
5.	Central Sectoral Line Ministry.		
6.	Broad objectives of the project.		
7.	Location of the project (specify Districts).		
8.	Total estimated cost of the project (in Rs. crore).		
9.	Components of total estimated cost (in Rs. crore).		
	Source	In kind (equivalent amount)	In cash
	PIA		
	Ministry		
	State Govt.		
	Bilateral agency		
	Other external agency		
	Total estimated cost		<i>(Sum above)</i>
10.	Amount of bilateral technical cooperation proposed (specify both in Rupees and in donor currency).		
11.	Project implementation period.		
12.	Whether any separate institutional arrangement is required to be established for implementation of the project?.		
13.	Details of statutory clearances required for implementations of the project.		
14.	Statutory clearances obtained.		
15.	Details of previous phase(s), if any. Whether any impact assessment has been made for previous phase?		

Part-II: Basic design of the project																	
16.	Goals and objectives of the project and its linkages with government priority and programmes.																
17.	Activities proposed in the project.																
18.	Linkages with completed or ongoing project (s) of similar nature <table border="1" data-bbox="391 622 1318 782"> <thead> <tr> <th>Sl. No.</th> <th>Name of the project</th> <th>Implementation period</th> <th>External agency</th> </tr> </thead> <tbody> <tr> <td></td> <td>Proposed project</td> <td></td> <td></td> </tr> <tr> <td></td> <td>Completed projects</td> <td></td> <td></td> </tr> <tr> <td></td> <td>Ongoing projects</td> <td></td> <td></td> </tr> </tbody> </table>	Sl. No.	Name of the project	Implementation period	External agency		Proposed project				Completed projects				Ongoing projects		
Sl. No.	Name of the project	Implementation period	External agency														
	Proposed project																
	Completed projects																
	Ongoing projects																
19.	<p>Details on proposed implementation arrangements:</p> <ul style="list-style-type: none"> ◆ Parties, their roles and responsibilities including the clarification on the accountability for the resources. ◆ Proposed composition of Steering Committee to be set up for implementation. 																
20.	<p>Details on separate institutional arrangement to be established:</p> <ul style="list-style-type: none"> ◆ Its organizational arrangements, responsibility and accountability of key personnel. ◆ Numbers of foreign and local experts and personnel to be resourced from outside the Project Implementing Agency. ◆ Details of commodities and equipments to be procured. 																
21.	The details of training (including foreign trainings) needs to be implemented under the project.																
22.	Detailed year-wise physical and financial target plan with quantifiable and qualitative (verifiable) target indicators. The target plan should also include year-wise utilization of proposed cooperation.																
23.	Whether the private sector or NGO participation is also proposed in the project? If yes, please describe the nature of the proposed involvement?																

Signature of the Head of the
Project Implementation Agency
with seal and date

Appendix – 4

DOE's OM No. 1(2)-PE.II/03 dated 7th May, 2003

Generic structure of DPR

- i. **Context/background:** This section should provide a brief description of the sector/sub-sector, the national priority, strategy and policy framework as well as a brief description of the existing situation.
- ii. **Problems to be addressed:** This section should elaborate the problems to be addressed through the project/scheme at the local/regional/national level, as the case may be. Evidence regarding the nature and magnitude of the problems should be presented, supported by baseline data/surveys/reports. Clear evidence should be available regarding the nature and magnitude of the problems to be addressed.
- iii. **Project Objectives:** This section should indicate the Development Objectives proposed to be achieved, ranked in order of importance. The deliverables/output for each Development Objective should be spelt out clearly. This section should also provide a general description of the project.
- iv. **Target beneficiaries:** There should be clear identification of target beneficiaries. Stakeholder analysis should be undertaken, including consultation with stakeholders at the time of project formulation. Options regarding cost sharing and beneficiary participation should be explored and incorporated in the project. Impact of the project on weaker section of society, positive or negative, should be assessed and remedial steps suggested in case of adverse impact.
- v. **Project strategy:** This section should present an analysis of alternative strategies available to achieve the Development Objectives. Reasons for selecting the proposed strategy should be brought out. Involvement of NGOs should be considered. Basis for prioritization of locations should be indicated (where relevant). Options and opportunity for leveraging government funds through public-private partnership must be given priority and explored in depth.
- vi. **Legal Framework:** This section should present the legal framework within which the project will be implemented and strength and weakness of the legal framework in so far as it impacts on achievement of project objectives.
- vii. **Environmental Impact assessment:** Environmental impact assessment should be undertaken, wherever required and measures identified to mitigate adverse impact, if any. Issues relating to land acquisition diversion of forest land, rehabilitation and resettlement should be addressed in this section.
- viii. **On-going initiatives:** This section should provide a description of ongoing initiatives and the manner in which duplication will be avoided and synergy created through the proposed project.
- ix. **Technology issues:** This section should elaborate on technology choices, if any, evaluation of options, as well as the basis for choice of technology for the proposed project.
- x. **Management arrangements:** Responsibility of different agencies for project management and implementation should be elaborated. The organization structure at various levels as well as monitoring and coordination arrangements should be spelt out.

- xii. **Time frame:** This section should indicate the proposed 'Zero' date for commencement and also provide a PERT/CPM chart, wherever relevant.
- xiii. **Risk analysis:** This section should focus on identification and assessment of project risks and how these are proposed to be mitigated. Risk analysis could include legal/contractual risks, environmental risks, revenue risks, project management risks, regulatory risks, etc.
- xiv. **Evaluation:** This section should focus on lessons learnt from evaluation of similar projects implemented in the past. Evaluation arrangements for the project, whether concurrent and mid-term or post-project should be spelt out. It may be noted that continuation of projects/schemes from one Plan period to another will not be permissible without an independent, in depth evaluation being undertaken.
- xv. **Success criteria:** Success criteria to assess whether the Development Objectives have been achieved should be spelt out in measurable terms. Base-line data should be available against which success of the project will be assessed at the end of the project (Impact assessment). In this regard, it is essential that the base-line surveys be undertaken in case of large, beneficiary-oriented projects.

Success criteria for each Deliverable/Output of the project should also be specified in measurable terms to assess achievement against proximate goals.
- xvi. **Financial and economic analysis:** Financial and economic analysis of the project may be undertaken where the financial returns are quantifiable. This analysis would generally be required for investment and infrastructure projects, but may not always be feasible for social sector projects where the benefits cannot be easily quantified.
- xvii. **Sustainability:** Issues relating to sustainability, including stakeholder commitment, operation and maintenance of assets after project completion, and other related issues should be addressed in this section.

Note: Requirement of the EFC/PIB format may also be kept in view while preparing the DPR.

OM. No. 1(2)-PF. II/03, dated 7th May, 2003

Appendix – 5

An outline of Matrix

Strategy	Indicators	Sources/Mean of verification	Assumptions/Risks
Goal (Linked up with a government priority/ programme/policy).			
Objectives (Purpose/expected benefits).			
Output/Results (Goods/services/materials/expected changes, the target population will get, which they cannot achieve on their own without intervention of the project).			
Activities (Tasks/actions to be carried out by utilizing resources, viz. human, financial, equipment, etc.).	Input/Costs		

Appendix – 6

Terms and conditions of loans from main bilateral partners as on 01.01.2011

Japan

	Standard/ Option	Interest Rate	Repayment period (Year)	Grace period (Year)	Conditions of procurement
General Terms	Standard	1.40	30	10	Untied
	Option 1	0.80	20	6	
	Option 2	0.70	15	5	
Preferential Terms	Standard	0.65	40	10	Untied
	Option 1	0.55	30	10	
	Option 2	0.50	20	6	
	Option 3	0.40	15	5	
STEP	Standard	0.20	40	10	Tied
	Option	0.10	30	10	

- ◆ The interest rate in respect of consultancy portion would be 0.01%.
- ◆ The Commitment Charges @ 0.1% would be payable (on six monthly basis) from 120 days of signing of the loan agreement on the undisbursed JICA loan amount, till the completion of the project.

Germany

Particulars	Standard loan	Reduced interest loan	Development loan
Interest rate	0.75%	KfW's refinancing cost at 6-month	EURIBOR minus 75 basis points.
Maturity	40 years inclusive of 10 years grace period	12 years including 3 years grace period	20 years including 5 years grace period.
Commitment charges	0.25% p.a. on the undrawn loan amount after 3 months of signing of agreement	0.25% p.a. on the undrawn tranche amount after 6 months of signing of the Loan Agreement.	0.25% p.a. on the undrawn loan amount after 3 months of signing of agreement.
Management fee	None	0.25% payable within 30 days of signing of agreement. Refundable if first disbursement is made within 1 year of the signing.	

France

Particulars	Sovereign projects	Non-sovereign projects
Interest rate	6-month EURIBOR or an equivalent fixed rate without margin. (Minimum interest rate ("floor") of 0.25%)	6-months EURIBOR or an equivalent fixed rate, with a margin either null or positive to be negotiated on a case by case basis. (Minimum interest rate ("floor") of 0.25%).
Maturity	20 years including grace period of 5 years (could be less upon request of the borrower)	
Commitment Charges, etc.	No charges in the nature of commitment charges, insurance costs, appraisal fees or called by whatever name.	0.25% maximum on the undisbursed amount starting after 6 months of signing of the Loan Agreement. It could be modified on a case by case basis depending on the nature of the project, particularly in the case of financing whose disbursements would be made by tranches. No insurance costs or appraisal fees will be charged.
Other Charges	Interest rate hedging costs incurred in order to comply within ODA requirements will be borne by AfD. Other than above no other charges or encumbrances shall ordinarily be applicable on the borrower.	Interest rate hedging costs incurred in order to comply within ODA requirements will be borne by AfD.
Prepayment Charges	Under certain conditions determined by the Loan Agreement, if the borrower chooses to prepay a loan, the conditions, including charges of prepayment if any, as mutually agreed between Borrower and AfD, will be set out in the Loan Agreement.	

Appendix – 7

Format for furnishing data for availing sovereign guarantee

Form GFR 44

[See Rule 252 of General Financial Rules, 2005]

Name of the Ministry/ Department:

Name of Public Sector Undertaking/entity:

Year	Turnover	Profit after tax	Sundry debtors	Current ratio	If audited by CAG, profit after tax, taking into account the comments of CAG	In case of targets set by BIFR, the same for turnover and profit
X-2						
X-1						
X*						

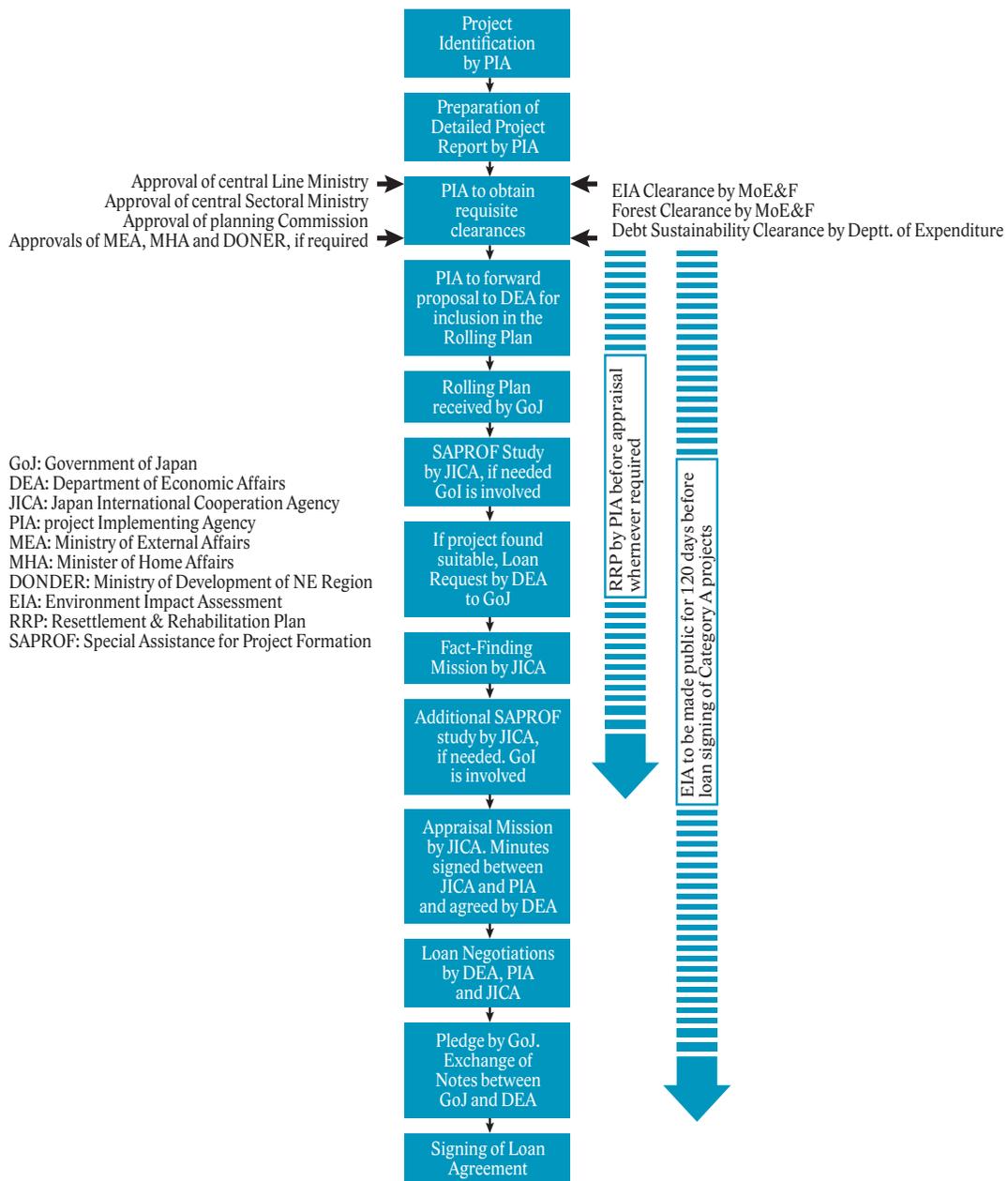
Where 'X' is the immediate preceding financial year.

In case of proposal seeking extension of guarantee it may specifically be indicated whether the guarantee fee for the preceding financial has been paid or not. The amount paid and date of payment should be indicated. In case of default in payment it may be indicated whether default fee in terms of Rule 247 (2) has been levied.

Appendix – 8

Flow charts of processes involved before signing of loan agreements

Processes in ODA Loans from Japan



Appendix – 9

Quarterly progress report

For Quarter ending on:

Summary

1. Name of the Project:
2. Loan agreement id (e.g. ID-P number for JICA loan):
3. Name of Project Implementing Agency:
4. Name of Central Line Ministry:
5. Geographical location of the project (District/State):
6. Date of signing loan agreement:
7. Date of effectuation:
8. Date of closing:
9. Date of completion of project:
10. Date of award of consultancy (if already awarded):
11. Date of closure of consultancy (if already awarded):
12. Project cost :
 - i. Original
 - ii. Revised
13. Loan portion:
14. Counterpart funding:
15. Project Description:
16. Major components of the project:

Financial progress

1. Cumulative disbursement till last quarter: (in foreign currency/INR):
2. (a) % age of disbursement against project cost :
- (b) % age of disbursement against JICA loan:
- (c) Budget Estimate/Revised Estimate for Current Financial Year (both external component and counterpart funding to be indicated separately)

	Total (Rs. Cr.)	JICA (Rs. Cr.)	Counterpart (Rs. Cr.)
BE/RE			

(d) Loan disbursement forecast made to JICA for CFY (quarter-wise)

		Forecast 2011				Total
		Q1	Q2	Q3	Q4	
Disbursement	Target					
	Achieved					
	Achievement in % age					

Physical progress

Physical deliverables as per Annual Work Plan

(Current Financial Year)

Sl. No.	Planned Activity	Achievement Q1/ Q2/ Q3/ Q4	Budget estimate	Total expenditure	Loan disbursement

Major Issues

Sl. No.	Issues	Action planned	Results

Issues related to land acquisition/resettlement

1. Land acquisition (quantum of total land required for the project, govt. land already in possession, land acquired from private parties and land to be acquired is to be indicated):
2. Resettlement and Rehabilitation Issues: Provide details on activities planned and target date for completion of the activities:



Department of Economic Affairs
Ministry of Finance
Government of India



별첨3

**상품 및 서비스 조달을
위한 정책 및 절차에 관한
매뉴얼**

**(The Manual on Policies and
Procedures for Purchase of Goods and
Services)**

상품 및 서비스 조달을 위한 정책 및 절차에 관한 매뉴얼
(The Manual on Policies and Procedures for Purchase of Goods and Services)은
아래 링크 참조.

1. Directorate General of Supplies & Disposals (DGS&D) Manual:

<https://cga.nic.in/writereaddata/DGS&DManual.pdf>

2. Manual for Procurement of Consultancy & Other Services

<https://doe.gov.in/manuals/manual-procurement-consultancy-other-services-updated-june-2022>

3. Manual for Procurement of Goods

<https://doe.gov.in/manuals/manual-procurement-goods-updated-june-2022>

4. Manual for Procurement of Works

<https://doe.gov.in/manuals/manual-procurement-works-updated-june-2022>



일반재정규칙 2017

(General Financial Rules, 2017)



into small quantities to make piecemeal purchases to avoid the necessity of obtaining the sanction of higher authority required with reference to the estimated value of the total demand.

Rule 158 Purchase of goods by obtaining bids.

Except in cases covered under Rule 154, 155, and 156(1), Ministries or Departments shall procure goods under the powers referred to in Rule 147 above by following the standard method of obtaining bids in :

- (i) Advertised Tender Enquiry
- (ii) Limited Tender Enquiry
- (iii) Two-Stage Bidding
- (iv) Single Tender Enquiry
- (v) Electronic Reverse Auctions

Rule 159 E-Publishing

- (i) It is mandatory for all Ministries/ Departments of the Central Government, their attached and Subordinate Offices and Autonomous /Statutory Bodies to publish their tender enquiries, corrigenda thereon and details of bid awards on the Central Public Procurement Portal (CPPP).
- (ii) Individual cases where confidentiality is required, for reasons of national security, would be exempted from the mandatory e-publishing requirement. The decision to exempt any case on the said grounds should be approved by the Secretary of the Ministry/ Department with the concurrence of the concerned Financial Advisor. In the case of Autonomous Bodies and Statutory Bodies' approval of the Head of the Body with the concurrence of the Head of the Finance should be obtained in each such case. Statistical information on the number of cases in which exemption was granted and the value of the concerned contract should be intimated on a Quarterly basis to the Ministry of Finance, Department of Expenditure.
- (iii) The above instructions apply to all Tender Enquiries, Requests for Proposals, Requests for Expressions of Interest, Notice for pre Qualification/ Registration or any other notice

inviting bids or proposals in any form whether they are advertised, issued to limited number of parties or to a single party.

- (iv) In the case of procurements made through DGS&D Rate Contracts or through any other Central Procurement Organizations (CPOs) only award details need to be published.
- (v) These instructions would not apply to procurements made in terms of provisions of Rules 154 (Purchase of goods without quotations) or 155 (Purchase of goods by purchase committee) of General Financial Rules.

Rule 160 E-Procurement

- (i) It is mandatory for Ministries/ Departments to receive all bids through e-procurement portals in respect of all procurements.
- (ii) Ministries/ Departments which do not have a large volume of procurement or carry out procurements required only for day-to-day running of offices and also have not initiated e-procurement through any other solution provided so far, may use e-procurement solution developed by NIC. Other Ministries/ Departments may either use e-procurement solution developed by NIC or engage any other service provider following due process.
- (iii) These instructions will not apply to procurements made by Ministries / Departments through DGS&D Rate Contracts.
- (iv) In individual case where national security and strategic considerations demands confidentiality, Ministries/ Departments may exempt such cases from e-procurement after seeking approval of concerned Secretary and with concurrence of Financial Advisers.
- (v) In case of tenders floated by Indian Missions Abroad, Competent Authority to decide the tender, may exempt such case from e-procurement.

Rule 161 Advertised Tender Enquiry

- (i) Subject to exceptions incorporated



under Rule 154, 155, 162 and 166, invitation to tenders by advertisement should be used for procurement of goods of estimated value of Rs. 25 lakhs (Rupees Twenty Five Lakh) and above. Advertisement in such cases should be given on Central Public Procurement Portal (CPPP) at www.eprocure.gov.in and on GeM. An organisation having its own website should also publish all its advertised tender enquiries on the website.

- (ii) The organisation should also post the complete bidding document in its website and on CPPP to enable prospective bidders to make use of the document by downloading from the web site.
- (iii) The advertisements for invitation of tenders should give the complete web address from where the bidding documents can be downloaded.
- (iv) In order to promote wider participation and ease of bidding, no cost of tender document may be charged for the tender documents downloaded by the bidders.
- (iv) Where the Ministry or Department feels that the goods of the required quality, specifications etc., may not be available in the country and it is necessary to also look for suitable competitive offers from abroad, the Ministry or Department may send copies of the tender notice to the Indian Embassies abroad as well as to the foreign Embassies in India. The selection of the embassies will depend on the possibility of availability of the required goods in such countries. In such cases e-procurement as per Rule 160 may not be insisted.
- (v) Ordinarily, the minimum time to be allowed for submission of bids should be three weeks from the date of publication of the tender notice or availability of the bidding document for sale, whichever is later. Where the Department also contemplates obtaining bids from abroad, the minimum period should be kept as four weeks for both domestic and foreign bidders.

Rule 162 Limited Tender Enquiry

- (i) This method may be adopted when estimated value of the goods to be procured is up to Rupees Twenty five Lakhs. Copies of the bidding document should be sent directly by speed post/registered post/courier/ e-mail to firms which are borne on the list of registered suppliers for the goods in question as referred under Rule 150 above. The number of supplier firms in Limited Tender Enquiry should be more than three. Efforts should be made to identify a higher number of approved suppliers to obtain more responsive bids on competitive basis.

Further, an organisation should publish its limited tender enquiries on Central Public Procurement Portal (CPPP) as per Rule 159. Apart from CPPP, the organisations should publish the tender enquiries on the Department's or Ministry's web site.

- (ii) The unsolicited bids should not be accepted. However Ministries/ Departments should evolve a system by which interested firms can register and bid in next round of tendering.
- (iii) Purchase through Limited Tender Enquiry may be adopted even where the estimated value of the procurement is more than Rupees twenty-five Lakhs, in the following circumstances.
 - (a) The competent authority in the Ministry or Department certifies that the demand is urgent and any additional expenditure involved by not procuring through advertised tender enquiry is justified in view of urgency. The Ministry or Department should also put on record the nature of the urgency and reasons why the procurement could not be anticipated.
 - (b) There are sufficient reasons, to be recorded in writing by the competent authority, indicating that it will not be in public interest to procure the goods through advertised tender enquiry.
 - (c) The sources of supply are definitely known and possibility of



fresh source(s) beyond those being tapped is remote.

- (iv) Sufficient time should be allowed for submission of bids in Limited Tender Enquiry cases.

Rule 163 Two bid system (simultaneous receipt of separate technical and financial bids) : For purchasing high value plant, machinery etc. of a complex and technical nature, bids may be obtained in two parts as under :

- (i) Technical bid consisting of all technical details along with commercial terms and conditions; and
- (ii) Financial bid indicating item-wise price for the items mentioned in the technical bid.

The technical bid and the financial bid should be sealed by the bidder in separate covers duly super-scribed and both these sealed covers are to be put in a bigger cover which should also be sealed and duly super-scribed. The technical bids are to be opened by the purchasing Ministry or Department at the first instance and evaluated by a competent committee or authority. At the second stage financial bids of only these technically acceptable offers should be opened after intimating them the date and time of opening the financial bid for further evaluation and ranking before awarding the contract.

Rule 164 Two-Stage Bidding (Obtain bids in two stages with receipt of financial bids after receipt and evaluation of technical bids)

- (i) Ministry/Department may procure the subject matter of procurement by the method of two-stage bidding, if
- (a) it is not feasible to formulate detailed specifications or identify specific characteristics for the subject matter of procurement, without receiving inputs regarding its technical aspects from bidders; or
- (b) the character of the subject matter of procurement is subject to rapid technological advances or market fluctuations or both; or
- (c) Ministry/Department seeks to enter into a contract for the purpose of research, experiment,

study or development, except where the contract includes the production of items in quantities sufficient to establish their commercial viability or to recover research and development costs; or

- (d) The bidder is expected to carry out a detailed survey or investigation and undertake a comprehensive assessment of risks, costs and obligations associated with the particular procurement.
- (ii) The procedure for two stage bidding shall include the following, namely:—
- (a) in the first stage of the bidding process, the Ministry/Department shall invite bids through advertised tender containing the technical aspects and contractual terms and conditions of the proposed procurement without a bid price;
- (b) all first stage bids, which are otherwise eligible, shall be evaluated through an appropriate committee constituted by the Ministry/Department;
- (c) the committee may hold discussions with the bidders and if any such discussion is held, equal opportunity shall be given to all bidders to participate in the discussions;
- (d) in revising the relevant terms and conditions of the procurement, the procuring entity shall not modify the fundamental nature of the procurement itself, but may add, amend or omit any specification of the subject matter of procurement or criterion for evaluation;
- (e) in the second stage of the bidding process, the procuring entity shall invite bids from all those bidders whose bids at the first stage were not rejected, to present final bid with bid prices in response to a revised set of terms and conditions of the procurement;
- (f) any bidder, invited to bid but not in a position to supply the subject



matter of procurement due to modification in the specifications or terms and conditions, may withdraw from the bidding proceedings without forfeiting any bid security that he may have been required to provide or being penalised in any way, by declaring his intention to withdraw from the procurement proceedings with adequate justification.

Rule 165 Late Bids. In the case of advertised tender enquiry or limited tender enquiry, late bids (i.e. bids received after the specified date and time for receipt of bids) should not be considered.

Rule 166 Single Tender Enquiry. Procurement from a single source may be resorted to in the following circumstances :

- (i) It is in the knowledge of the user department that only a particular firm is the manufacturer of the required goods
- (ii) In a case of emergency, the required goods are necessarily to be purchased from a particular source and the reason for such decision is to be recorded and approval of competent authority obtained.
- (iii) For standardisation of machinery or spare parts to be compatible to the existing sets of equipment (on the advice of a competent technical expert and approved by the competent authority), the required item is to be purchased only from a selected firm

Note : Proprietary Article Certificate in the following form is to be provided by the Ministry/Department before procuring the goods from a single source under the provision of sub Rule 166 (i) and 166 (iii) as applicable.

- (i) The indented goods are manufactured by M/s.....
- (ii) No other make or model is acceptable for the following reasons :
- (iii) Concurrence of finance wing to the proposal vide:
- (iv) Approval of the competent authority vide:

(Signature with date and designation of the indenting officer)

Rule 167 Electronic Reverse Auction

(i) Electronic Reverse Auction means an online real-time purchasing technique utilised by the procuring entity to select the successful bid, which involves presentation by bidders of successively more favourable bids during a scheduled period of time and automatic evaluation of bids;

(ii) A procuring entity may choose to procure a subject matter of procurement by the electronic reverse auction method, if:

- (a) It is feasible for the procuring entity to formulate a detailed description of the subject matter of the procurement;
- (b) There is a competitive market of bidders anticipated to be qualified to participate in the electronic reverse auction, so that effective competition is ensured;
- (c) The criteria to be used by the procuring entity in determining the successful bid are quantifiable and can be expressed in monetary terms; and

(iii) The procedure for electronic reverse auction shall include the following, namely:

- (a) The procuring entity shall solicit bids through an invitation to the electronic reverse auction to be published or communicated in accordance with the provisions similar to e-procurement; and
- (b) The invitation shall, in addition to the information as specified in e-procurement, include details relating to access to and registration for the auction, opening and closing of the auction and Norms for conduct of the auction.

Rule 168 Contents of Bidding Document

All the terms, conditions, stipulations and information to be incorporated in the bidding document are to be shown in the appropriate chapters as below :-

Chapter – 1: Instructions to Bidders.