

# Contract of Agency

## Meaning

Agency is an agreement by which a relation based upon an expressed or implied. There is one person the agent, who is authorized to act under the control of and for another, principal in negotiating and making contract with third person.

According to Indian Contract Act, 1872 “Contract of agency is a contract by which a person employs another person to do any act for himself or to represent him dealing with third person”

In Nepal there is Contract Act 2056 and In India there is Contract Act 1872 A.D.

The person who employs or appoints another person to do act on his behalf is known as principal. The principal should qualify i.e. mature to appoint an agent because principal is responsible for every work of the agent. In Nepal Principal should be over 16 and in India, Principal should over 18 years.

According to Black Law’s Dictionary “A fiduciary relationship created by express or implied contract or by law in which one party may act on behalf of another party and bind the other party by words or actions”

The principal is only responsible up to the extent to which the agent is assigned rights to do act beyond this boundary the principal isn’t responsible but the agent is self-responsible.

While making contract there may be or may not be consideration. Agency is process of delegating the authority by a principal to the agent to act and represent from his behalf.

The act done and representation made by an agent aren’t the act of the agent but arte regarded as the act of principal. Therefore rights and duties created by agent are the right and duties of the principal. However some acts relating to personal skill cannot be done through agency.

Following act can be done through Agency:-

- To do at for himself.
- To run commercial transaction by agent.
- To do transaction with third person.
- To establish legal relation with principal and third person.

We may note that the contract relating to agency is legally recognized in following criteria:-

- Whatever a person can lawfully do he may also does the same through an agent.
- He who acts through another is considered to have acted personally.

All Contracts are agreements but all agreements are not contracts.

Vishal Koirala

Editor at Notespal.com/BBA/BBS/ICAN/ICA

Admin at BBA Solution

Email:- zadeck.vishal@gmail.com/bkoirala88@yahoo.com

+977-9848264808/+977-9802964808

## + General Rule of Agency

- No essential of consideration
- Delegation of Authority
- Contractual capacity
- Agent can appoint sub agent with permission of Principal
- If the agent has removed, subagent is automatically terminated

## + Distinction between Agent and Servant

- Agent is a person who represents another in matter to relating contracts but servant is person employed by someone to do in a house for a payment.
- An agent is bound by lawful instructions of principal but is not under a direct control and supervision. He has a discretionary (Sobibek) power whereas servant acts under direct control and supervision of his owner. He has no discretionary power.
- An agent is employed with an authority to bring the principal into legal relations with third parties. He represents his principal in dealings with third party but servant does not ordinarily do this kind of acts.
- Mistakes made by an agent with authority are attributed to his principal. The agent isn't responsible personally for the act done but mistakes made by servant may make his master liable only when it is committed at the time of employment.
- Agent is a representative of the principal with a high status. A servant may act as an agent office master with low standard.
- An agent may work for several principals at some time. A servant usually provides services for only one master.
- An agent generally received commission for the acts done from his principal. A servant generally receives salary as remuneration from his master.

## + Model/ Methods of Creating Agency:-

Modes mean the way and methods. There are various ways or modes by which the relationship of principal and agent may arise.

- By Express Agreement  
Normally the authority given by principal to his agent is an express authority in such case; the agent may be appointed either by the words spoken or written or conduct of activities. For e.g. power of attorney.

Vishal Koirala

Editor at Notespal.com/BBA/BBS/ICAN/ICA

Admin at BBA Solution

Email:- zadeck.vishal@gmail.com/bkoirala88@yahoo.com

+977-9848264808/+977-9802964808

- **By Implied Agreement**  
Implied agreements are unexpressed agreement. Implied agreements/agency arises from the conduct, situation or relationship of the parties. It may be inferred from circumstances (*aaasaamaney paristhiti utpana huna sakney*) of the case; and things spoken or written or the ordinary course (*j hudai aaeyko cha*) of dealing may be accounted as circumstance of the case. Implies agency may come from different cases.
- **Agency by Estoppel (*bibandhan*)**  
If a person represents by words or conducts that another person is his agent and third party reasonably believes on such representation and enters into an agreement, the person who represents so is bound by the act of other this is known as the agency by estoppel. In this case of agency by estoppel, the third party must act in good faith and must rely on a representation of the agents authority to act as an agent.
- **Agency by Holding Out**  
This may arise from the relation of employer and employee. A manager is an agent of the company. The agency that is held due to any kind of business relationship is known as agency by holding out.
- **Agency by Necessity**  
In certain urgent circumstance the law confers (*pridit qarcha*) an authority on a person to act as an agent for the benefit of another such agency is called an agency of necessity (*aawosakta ley janmayeko*). In such cases, the agent must act in good faith and have to protect and preserve the interest of the principal.  
For example:- 'A' a common interest carrier carries dairy product of 'B' from Kathmandu to Narayanghat because of landslide, the carrier sold all dairy product on the way (transit) otherwise there was chance of damage of all goods. In such case 'B' cannot sue (*birodh hak dabi*) against 'A' because of no authority. Here 'A' is treated as an agent of 'B' by necessity.
- **Agency of Ratification (Later Acceptance) (*pustikaran dawaraa abhikaran*)**  
Even if the agent enters into a contract without the authority of the principal, the principal may subsequently ratify i.e. adopt the benefits and liabilities of a contact made on the principal's behalf. It may occur in two ways:-
  - Firstly, when a person acts one behalf of another without authority of the principal and principal adopt the transaction.
  - Secondly, when a person is an agent of another but he exceeds his authority and acts on behalf of principal and principal adopts the transaction.

In either cases if act is done on behalf of another (principal) and later principal adopts or rectifies the transaction there is an agency relationship between the parties. **(if one person does something without the permissions or authority of another person and another person makes good response for that work then it is known as Agency of**

Vishal Koirala

Editor at Notespal.com/BBA/BBS/ICAN/ICA

Admin at BBA Solution

Email:- zadeck.vishal@gmail.com/bkoirala88@yahoo.com

+977-9848264808/+977-9802964808

Ratification. In this case person is known as 'Agent' and another person is 'Principal'. Though another person (principal) gives positive response to person (agent) the date when person 'agent' starts the work for another person (principal) should be called the agency)

- Requisites for Valid Ratification
  - a. The principal must be named
  - b. Ratification must be done by the person to whom act is done
  - c. Ratification must be done by a person with full knowledge of material facts or with intent to take the risk of any irregularity
  - d. Ratification must be by a person competent to have authorized the transactions
  - e. Void or illegal contract cannot be ratified by the principal

## Rights of Agent

There are number of rights which an agent has against his principal and third parties. These are as follows:-

- Right to get remuneration  
If it is provided in the contract of agent agent has right to receive reasonably remuneration for his work for principal.
- Right of Lien (**dharanadhikar**)  
If agent is not paid lawful charges remunerations or expenses by his principal and of goods of principal are under his control he can retain (**rakhna**) the goods until the lawful charges is paid by principal. This right last (**lambina sakcha**) till the lawful charges are fully satisfied.
- Right to get indemnity  
If principal removes the agent without concrete reason agent has right to claim compensation from his principal. Therefore, agent has also right to continue business performance until nothing is wrong done by agent.

Vishal Koirala

Editor at Notespal.com/BBA/BBS/ICAN/ICA

Admin at BBA Solution

Email:- zadeck.vishal@gmail.com/bkoirala88@yahoo.com

+977-9848264808/+977-9802964808

## Duties of Agent

An agent owes a number of duties to his principal who varies in degree according to the nature of agency and circumstances of a case. These duties are as follows

- Duty to follow instructions/directions:-The first and foremost duty of an agent is to act strictly within the scope to the authority conferred (pradat qarievko) upon him and to carry out the instructions of the principal.
- To act under the terms of the contract:- An agent is obliged to perform each and every term mentioned in the contract towards his principal.
- Duty to communication:- In cases of difficulty, it will be also the agent's duty to communicate the principal and obtain his instructions while carrying the business agency.
- Not to delegate his authority:- An agent must not delegate his authority to delegate authority agent must have the permission of principal. As much as possible agent himself performs on behalf of principal.
- Duty not to make secret profit from agency:-An agent's duty is to be loyal to his principal. If an agent makes secret profit from its agency, the principal can demand all the profits from the agent.
- Duty to follow customs:- Where, however the principal has not given any instructions it is the duty of agent to follow the customs prevailing in the same kind of business at the place where the agent conducts his business.
- Duty to carry out the work with reasonable care, skill and diligence:- Agent is always bound to act with reasonable care, skill and diligence as he possesses and to make compensation to his principal in respect of direct consequences of his neglect or want of skill or misconduct.
- Duty to keep and render separate and correct accounts:- An agent must keep the money and property of the principal separate. He must keep true, correct and proper accounts of his all transactions on behalf of his principal and to be prepared all times to produce them to his principal.
- Duty to act with good faith:- An agent must act in good faith while representing the principal. Agent should not have any intention to cause harm to the principal.
- Not disclose confidential information:- Though the agent may have authority from his principal to deal on his accounts, agents are not allowed to disclose or leak the confidential information of the principal. It is the duty of agent to maintain privacy and secrecy of such confidential information of the principal.

Vishal Koirala

Editor at Notespal.com/BBA/BBS/ICAN/ICA

Admin at BBA Solution

Email:- zadeck.vishal@gmail.com/bkoirala88@yahoo.com

+977-9848264808/+977-9802964808

## Types of Agent

The agent within the limit of authority, acts on behalf of the principal and binds him or brings the principal in a contractual relation with third person. The principal is liable for the act of agent to the third persons. Agent can be classified into different types of basis which are as follows:-

- On the Basis of Limit of Authority
  - Specific Agent: - A specific agent is one who is appointed to perform a particular act or to represent in some particular transactions. For example, an agent appointed for sale of particular house.
  - General Agent: - A person hired to carry on a series of transaction relating to particular business, he is the one who has authority to do all acts connected with a particular trade, business or employment. For example, A manager of a firm.
  - Universal Agent:- This agent is appointed to do all acts and whose authority is unlimited and can do everything which the principal lawfully do.
  
- On the Basis of Nature of Act/Business
  - Mercantile Agent: - He is the agent appointed for mercantile or business activities. The business activities consist of both trade activities and commerce activities. There are different types of mercantile agent. They are as follows :-
    - a. Factor: - The agent to whom goods are entrusted for the purpose of selling them. He can sell the goods in his own name and can do such things as are usual and necessary in the course of such businesses.
    - b. Broker: - A broker is an agent who is employed to buy or sell goods on behalf of another. He is a middleman for purchase or sale of goods but he is not entrusted with the possession of goods and he doesn't sell or purchase the goods himself. He is appointed to bring about a contractual relation between principal and third parties.
    - c. Commission Agent: - Agents who act on behalf of another for commission of his act or service. Generally this type of agent buys or sells goods in the foreign market on behalf of his principal.
    - d. Auctioneer: - An auctioneer is an agent appointed by a seller to sell his goods by public auction for commission. He sales good by auction to the highest bidder in public competition.
    - e. Del-Credence Agent (***Thap Dasturi Abhikartaa***):- An agent who in extra commission guarantees his principal the person with whom he enters into contract on behalf of the principal shall perform their obligations

Vishal Koirala

Editor at [Notespal.com/BBA/BBS/ICAN/ICA](http://Notespal.com/BBA/BBS/ICAN/ICA)

Admin at [BBA Solution](http://BBA Solution)

Email:- [zadeck.vishal@gmail.com](mailto:zadeck.vishal@gmail.com)/[bkoirala88@yahoo.com](mailto:bkoirala88@yahoo.com)

+977-9848264808/+977-9802964808

otherwise he (agent) will be liable. He is surety (state of being sure) also.

- f. Bankers: - Bank and Bankers is the agent of the customers because the relationship between banker and customer is generally creditor and debtors. The bankers collect cheque, draft or bills or buys and sales securities on behalf and get commissions from the customer as considerations for services.
- Non-Mercantile Agent:- The agent who is unrelated with business activities. It includes estate agent, house agent, election agent, promoter, insurance agents, solicitors, clearing and forwarding agent etc. These include attorneys.

### Personal Responsibility of Agent (Nepal Contract Act 2056 Sec-60)

Though the agent is for representing the principal and act as agent is act of principal, there are number of situations in which an agent himself might be responsible. Except when provided in the contract, the agent shall be personally responsible for transaction made by him on behalf of principal in the following circumstances:-

- In case of he concludes a contract with 3<sup>rd</sup> party in relation to any transaction with provision for personal responsibility. **(yedi contract mai agent jimeywar huncha bhaniyo bhane)**
- In case of any work has been done for or on behalf of an unidentified principal person. **(Principal identify nabhaey ko contract garyo bhane)**.
- In case the principal cannot be sued for any reason. **(Principal lai birodh garna nasakiney awastha raheycha bhane)**
- In case of anything has been done in 'contravention' (opposition, **biparit**) of the contract relating to the appointment of agent of beyond his authority. **(Adhikar bhanda baira biparit kaam bhayo bhane)**
- In case, contract has been signed in his own name **(principal ko thau ma agent ley aafno name uleykha garey ma principal ko name hatayema)**
- In case of any fraud or cheating has been committed in the course of transaction.
- In case of the agent has to bear personal liability according to the nature of the trade.
- In case the interest of the agent is also involved in the transaction.

Vishal Koirala

Editor at Notespal.com/BBA/BBS/ICAN/ICA

Admin at BBA Solution

Email:- zadeck.vishal@gmail.com/bkoirala88@yahoo.com

+977-9848264808/+977-9802964808

## ✚ Termination of Agency (Abhikaran ko samapti)

The parties by an agreement can create a contract of agency. Similarly, by an agreement they can terminate it. If agency is made for some specific purpose and for a fixed time period the agency terminates when purposes are achieved or time is lapse (bityeo bhaney). There are various modes in which the agency can be terminated:-

- By the act of the parties
  - Mutual Agreement
  - Revocation by the principal (Adhikar firta lieyra)
  - Renunciation (Paritayq) by the agent
  - Rescinding (Cancel) the authority by the principal
  
- By operation of law
  - By performance: - If agency is made for certain purpose on the completion of achievements of purpose the agency is terminated.
  - By expiry of time fixed: - If time is fixed for the agency, whether or not purposes are fulfilled, and the agency is terminated after expiry of time fixed.
  - Insanity of principal (unsound mind):- If the principal become insane the contract can be terminated. Not only principal it also applies in case of agent as well.
  - Death of either party: - The death of the principal or agent terminates the contract of agency.
  - Insolvency of principal: - After the insolvency or bankruptcy of principal if agent acts on behalf of principal he himself will be liable for that not the principal. So after the insolvency the contract of agency terminates.
  - Destruction of the subject matter:- If the subject matter for which agency was created, destroyed it terminates the contract of agency.
  - By dissolution of company: - If the company dissolves the agent will have no more authority provided by the company or principal, and then contract of agency terminates.
  - By the happening of any event rendering the agency unlawful: - If subsequent (pachi) to the contract, law change in such way which invalidated the transaction, then the agency also terminates. Subsequent to the contract, if principal and agent became alien enemy the contract of agency also terminated.

Vishal Koirala

Editor at Notespal.com/BBA/BBS/ICAN/ICA

Admin at BBA Solution

Email:- zadeck.vishal@gmail.com/bkoirala88@yahoo.com

+977-9848264808/+977-9802964808

## Contract of Sale of Goods

### + Meaning

A contract of sales of good is a contract at where seller transfers or agrees to transfer the property in goods to the buyer for price. As we know, to be a contract, there must be more than one party i.e. the buyer is one party and seller is another party. If there is no transfer of property from seller to buyer there is no contract of sale of goods and such is to be done for price.

The Contract of sale of goods without consideration/price is not regarded as contract of sale of goods. The price must be there in contract of sale of goods.

### + Definitions

According to English Sale of Goods Act, "A contract of sale of goods is a contract where by the sale of transfer on agrees to transfer the property in goods to the buyer for a money consideration called the price".

According to Indian Contract of Sale of Goods Act 1930, "A contract whereby the sale of transfer or agrees to transfer the goods to the buyer."

According to Nepal Contract Act 2056 B.S., "It shall be deemed (***bujineycha***) to be a contract of sale of goods if any seller, immediately transfer or agrees to transfer goods to the buyer."

Goods means any kind of moveable property other than actionable claim such as debt, promissory notes and money includes stocks and share growing crops, grass and things attached to the farming part of land. Therefore, it is a contract between buyer and seller to buy and sell goods for consideration/price. Transfer of property in goods for price is an essence of the definition of sales of goods.

### + Features/Characteristics/Essentials of contract of sale of goods

- Two Parties: - As like other contract there must be two distinct parties i.e. a buyer and seller and the parties must be competent to contract. This is the primary feature of contract of sale of goods.
- Goods: - The subject matter of contract necessarily is of goods. Goods mean and include all the moveable property except than the land and attached to the land. Transfer of immovable property is not regulated by the rule of contract of sale of goods.
- Transfer of Property (Ownership): - Property here means ownership. It can be owned and passed the owner and holder transfers the right of ownership as well as the possessions. For the sale of goods ownership should be transferred. Only transfer of

Vishal Koirala

Editor at Notespal.com/BBA/BBS/ICAN/ICA

Admin at BBA Solution

Email:- zadeck.vishal@gmail.com/bkoirala88@yahoo.com

+977-9848264808/+977-9802964808

possession cannot be termed as transfer of property. There must be transfer of general property as distinguished from special property in exceptional case; the non-owner can also transfer the property under his control.

- Price: - The price performs the role of considerations in the contract of sale of goods. It is managed or measured in money. The exchange of goods for another or barter system does not govern by the sale of goods. However, there is nothing to prevent them from consideration being partly in money and partly in goods.
- No Formality: - The law doesn't prescribe any particular form to constitute a valid contract of sale neither payment nor delivery is necessary at the time of making contract of sale. Such a contract may be made either orally or in written or partly orally partly written or may be even implied form, the conduct of parties.
- Essentials Elements of Valid Contract: - The contract of sale of goods to be a valid it must satisfy all the essential elements of a valid contract. For example offer and acceptance, legality of objective and considerations, possibility of performance, free consent, clarity etc.

### Sales and Agreement to Sell:-

Where the property (ownership) in the goods is transferred from the seller to the buyer mean-time, the contract is called a sale; but where the transfer of property in the goods is to take place at a future time the contract is called agreement to sell.

- Difference between Sale and Agreement to Sell:-

Bases of Difference	Sale	Agreement to Sell
1. Nature of Contract	Sale means contract already done and fulfilled at present.	It means contract regarding the future contingencies.
2. Price	The price of goods is fixed/ predetermined at the time of sale of agreement.	The price may or may not be fixed at the time of agreement to sell.
3. Risks	After the sale, even if the goods are under control of seller. The buyer himself liable for the risk of losses.	Even if there is agreement to sell, until goods are sold, the seller will be liable for the risks of the goods during that time.
4. Time to Perform Contract	The sale of agreement is performed /completed instantly.	Agreement to sell is completed after the completion of term and conditions.
5. Condition	Sale agreement is	Agreement to sell is a

Vishal Koirala

Editor at [Notespal.com/BBA/BBS/ICAN/ICA](http://Notespal.com/BBA/BBS/ICAN/ICA)

Admin at BBA Solution

Email:- [zadeck.vishal@gmail.com](mailto:zadeck.vishal@gmail.com)/[bkoirala88@yahoo.com](mailto:bkoirala88@yahoo.com)

+977-9848264808/+977-9802964808

	condition free contract.	contract with various conditions which to be performed until goods are sold.
6. Ownership	In sale agreement, the ownership in goods is to the buyer.	In agreement to sell, the ownership of goods is still not transferred to the buyer.
7. Rights of Resale	Even if the sold goods are with seller, he can't resale it anymore to the third parties.	Even if the agreement to sell is made, the sellers can resale goods to the third party if he wants but lawfully.
8. Rights of Seller	If the sale of contract is done but buyer refuses to pay price, the seller has right to claim price and compensation.	If the agreement to sell is done and buyer refuses to pay price the seller have only right to sue the compensation not the price.
9. Rights of Buyer	If after the sale of contract is done seller refuses to handover goods, the buyer has right to claim both full price and compensation. It also applies in case, the seller sold goods to 3 <sup>rd</sup> party after sale agreement is done.	If agreement to sell is done and seller refuses to handover, the buyer has only right to sue for compensations. Buyer cannot sue to get handover of the goods.

## Conditions and Warranty

A contract of sale of goods contains various terms or stipulation regarding the quality of goods, price, mode of payment, delivery of goods, its time and its place etc. But all of them are not equal importance. Some of this stipulation may be major terms which go the very root of the contract and that breach may frustrate the very purpose of the contrast, while others may be minor terms which are not so vital that their breach may seem to be a breach of contract as such. In laws of sales major terms are called 'conditions' and minor terms are called 'warranties'. If there is breach of the conditions and warranties, the buyer can avoid the contract or may claim damages therefore.

Vishal Koirala

Editor at [Notespal.com/BBA/BBS/ICAN/ICA](http://Notespal.com/BBA/BBS/ICAN/ICA)

Admin at [BBA Solution](http://BBA Solution)

Email:- [zadeck.vishal@gmail.com](mailto:zadeck.vishal@gmail.com)/[bkoirala88@yahoo.com](mailto:bkoirala88@yahoo.com)

+977-9848264808/+977-9802964808

According to the Indian Sale of Goods Act 1930 “A condition is a stipulation essential to the main purpose of the contract, the breach of which gives the aggrieved party right to repudiate the contract itself”

A warranty is a stipulation collateral or subordinate to the main purpose of the contract, the breach of which gives the aggrieved party the right to sue for damages only and not avoid contract itself. In contract of sale of goods, warranties may be implied or expressed warranties.

## + Implied Conditions

Unless otherwise agreed, the law incorporates into a contract of sale of goods the following implied conditions:-

- Condition as to Title (right):- In every contract of sale of goods the first implied condition on the part of seller is that he has right to sell the goods and in case of agreement to sell he will have a right to sell the goods at the time when ownership is to pass. Ordinarily, seller has right to sell goods if either he is the owner of the goods or as owners agent.
- In a Sale by Description:- Where there is a contract of sale of goods by description, there is an implied condition that the goods shall correspond with the description.
- In a Sale by Sample:- If goods are sold by sample, the whole bulk of goods must correspond with sample; and the buyer has right to confirm whether the bulk is correspond with sample or not.
- In a Sale by Sample as well as by description, there is an implied condition that bulk of the goods shall correspond both with the sample and with the description. If goods supplied correspond only with sample and not with description or vice-versa the buyer is entitled to reject goods.
- Condition as to Fitness or Quality:- An implied condition is deemed to exist on the part of seller that goods supplied shall be reasonable fit for the purpose for which the buyer wants them. The buyer himself must examine the goods thoroughly.
- Condition as to Merchantability (*bayparik qunastar*):- This condition is implied only where the sale is by description. The goods should be of merchantable quality.
- Condition as to Wholesomeness: - This condition is implied only in a contract of sale of eatables goods. In such cases the goods supplied must not only answer to description and be merchantable but must also be wholesome. The wholesome means the goods must be medically fit to eat.

Vishal Koirala

Editor at Notespal.com/BBA/BBS/ICAN/ICA

Admin at BBA Solution

Email:- zadeck.vishal@gmail.com/bkoirala88@yahoo.com

+977-9848264808/+977-9802964808

**Conclusion: - The things which are not directly mentioned on conditions but both parties have to agree that conditions because of the law of country are known as implied condition.**

## Implied Warranties

Unless otherwise agreed, the law also incorporates into contract of sale of goods the following implied warranties:-

- Warranty of Quiet Possession:- In every contract of sale of goods the first implied warranty on the part of seller is the buyer shall have and enjoy quiet possession of goods. If the buyer is in any way, disturbed in the enjoyment of the goods in consequence of the seller's defective title (right) to sell, he can claim damage from the seller.
- Warranty of Freedom from Encumbrances:- The next implied warranty on the part of the seller is that the goods shall be free from any charges or encumbrance in favor of any third party not declared or known to the buyer before at the time when contract is made. The buyer is entitled that the goods are not subject to any charges or rights in favor of third party. If his possession is, in any way disturbed by reason of existence of any charges or encumbrances on the goods in favor of any third party, he shall have a right to claim damages for breach of this warranty.
- Implied Warranty to Disclose the Dangerous Nature of Goods:- In case the goods sold are dangerous nature, the seller must warn the ignorant buyer of the probable danger. Otherwise if injury caused, there is breach of warranty and the buyer is entitled to claim damages.
- Warranty Implied by Custom and Usage of Trade:- An implied warranty as to quality or fitness for a particular purpose may be annexed by the usage of trade or customs.
- Warranty as to Purity of Goods:- In case the seller sent impure goods to buyer breaching terms he can claim compensation with seller.

**Note:- If the seller breaches above mentioned implied warranties, the buyer can claim compensation with seller.**

Vishal Koirala

Editor at Notespal.com/BBA/BBS/ICAN/ICA

Admin at BBA Solution

Email:- zadeck.vishal@gmail.com/bkoirala88@yahoo.com

+977-9848264808/+977-9802964808

## + Transfer of Property

Sale is primarily a transfer of property in goods by the seller to the buyer. The fresh transfer of property in goods means transfer of ownership of the goods. Property in goods is different from possession of goods. Possession refers to the custody over the goods so for the sale of goods the property in goods should be transferred with possession.

The property in goods may transfer from seller to the buyer but the goods may be in possession of seller as unpaid seller or as a bailee for the buyer only the transfer of possession cannot be termed as a transfer of property until ownership is not handed over from seller to the buyer, it can't be said transfer of property.

In exceptional case, the non-owner can also transfer the property under his control.

## + Rules Regarding the transfer of Ownership

There are generally 3 types of goods in contract of sale of goods. These are:-

- Specific/Ascertain Goods
- General/Unascertained Goods
- Contingent Goods
  
- Rules regarding Specific Goods:-
  - If a contract has been made to sell specific goods, delivery of such goods shall be made according to the terms of the contract. If any, if not, the intention must be gathered from the terms of contract, the conduct of parties and circumstances of the case.
  - Where there is contract for sale of specific goods in a deliverable state, the property transfer to the buyer, when contract is made or when the price is paid.
  - Where there is a contract to sell specific goods not in deliverable state, the ownership doesn't transfer to the buyer until that things is done and the buyer is notice up it.
  - Where there is contract if sell of specific goods, in a deliverable state but seller is bound to measure, test or do something with reference to the goods for the purpose of ascertaining the price, the property doesn't transfer until that thing is done and the buyer notice of it.
  - Except as otherwise stated in the contract, contract shall be deemed to have been made in way to deliver goods or to be sold at the someplace where it is placed.

Vishal Koirala

Editor at [Notespal.com/BBA/BBS/ICAN/ICA](http://Notespal.com/BBA/BBS/ICAN/ICA)

Admin at [BBA Solution](http://BBA Solution)

Email:- [zadeck.vishal@gmail.com](mailto:zadeck.vishal@gmail.com)/[bkoirala88@yahoo.com](mailto:bkoirala88@yahoo.com)

+977-9848264808/+977-9802964808

- If the period is stated in the contract, the goods must transfer within such specific period.
- Unless otherwise stated in the contract, the ownership of goods won't be deemed transferred until basic document concerned with ownership aren't handover by the seller to buyer.
- Rules regarding Unascertained Goods  
Goods which are not identified at the time agreed upon the contract of sale of goods are called unascertained goods. They are defined and inculcated only by descriptions:-
  - The ownership of unascertained goods doesn't transfer until the goods are ascertained.
  - The ownership of unascertained goods doesn't transfer until an unconditional appropriation (sarta rahit bargikaran/ bibhajan) of the goods is made.
  - If the goods are delivered to the carrier, and the right of disposal is reserved with the seller, the ownership doesn't transfer to the buyer.
  - If goods delivered to the carrier, the seller must issue the related documents in the name of the buyer and if right of disposal is not reserved with seller, the ownership of goods transferred to the buyer.

### + Distinction Between Condition and Warranty

- A condition is a stipulation which is essential to the main purpose of the contract whereas a warranty is a stipulation which is collateral or subordinate to the main purpose of contract.
- The breach of a condition gives the aggrieved party the right to repudiate the contract and also claim compensation whereas the breach of warranty gives the aggrieved party a right to claim damages only, not to repudiate contract itself.
- A breach of condition may be treated as a breach of warranty but a breach of warranty cannot be termed/treated as the breach of condition.

### + Transfer of Title by Non-Owner

Generally, only the current title owner can legally transfer the tittle to a new owner. The person, who owns legal title or property, will remain until he/she decides to transfer the title to somebody else. Accordingly, an unauthorized transfer of title by anybody other than owner generally has no legal effect, which means the owner continues holding title to the property while the person who received the invalid transfer of title owns nothing.

Vishal Koirala

Editor at Notespal.com/BBA/BBS/ICAN/ICA

Admin at BBA Solution

Email:- zadeck.vishal@gmail.com/bkoirala88@yahoo.com

+977-9848264808/+977-9802964808

The law clearly states that only the real or current owner has right to entrust the title to a buyer/new owner. But there are exceptional cases in which title can be transferred by non-owner i.e. by agent, which law also has described. The law sometimes protects a good faith purchaser who pays value for title, but only if the purchaser had some legitimate reason for believing that the non-owner who transferred title was owner or authorized agent of the owner. However, if the actual owner had no knowledge of the transfer and did not make any representation or perform any actions to give the purchaser a reason to rely on the non-owners transfer, then the original current owner must likely to retain title, while the good faith purchaser will have to seek reimbursement from the non-owner who attempted to transfer title.

The condition as which the transfer of property by non-owner could take place are as follows:-

- Sale by Mercantile Agent:- The Mercantile Agent only after having authority can sale goods to a buyer in such case a good title to the goods but if such goods are sold without authority then that doesn't get validity.
- Sale by One of Joint Owner:- If goods belong to more than one owner and a co-owner can give a valid title to the buyer.
- Sale by a Person in Possession of Goods Under a Voidable Contract:- A person who has obtained possessions of goods under a voidable contract can give a valid title to the buyer before such a contract rescind (cancel).
- Sale by Seller in Possession of Goods After Sale:- When goods sale by the seller but it is still in seller's possession and resale them to next buyer, the second buyer get good title of the goods but for this there must be the acceptance or permissions of the original buyer.
- Resale by Unpaid Seller:- In according to Nepalese Contract Act, When a seller becomes on unpaid seller, he can exercise his right of lien, stoppage in transit and can resale the goods to next buyer and this new buyer gets a good title of the goods as against the original buyer even though no notice of resale has been given to the original buyer.
- Sale by a Finder of Lost Goods:- According to Indian Contract of Sale of Goods Act, In some condition the finder of lost goods is entitled to sell the goods found if this found goods are perishable in nature the finder can sale the goods.
- Sale by a Pledgee/Pawnee (**Bandhaqarhita/Dhito Sarancha**):- In case of failure repayment the debt or performing the promise by pledger or pawned, a pledgee/Pawnee can sell the goods pledged with him.
- Sale by an Official Receiver/Assignee:- An official receiver or assignee can also sale the goods of the insolvent person. If he has been declared insolvent and the buyer get a good title but the insolvent person must be the owner of the goods.
- Sale by Estoppel:- According to Indian Contract of Sale of Goods Act, under some circumstances, the owner of goods by his words or conduct causes the buyer to believe that the seller has right to sell or has an owner's authority to sell the goods, and induces

Vishal Koirala

Editor at Notespal.com/BBA/BBS/ICAN/ICA

Admin at BBA Solution

Email:- zadeck.vishal@gmail.com/bkoirala88@yahoo.com

+977-9848264808/+977-9802964808

him to buy them bonfires. He can't afterwards pledge that his false his conduct or words prevent him to do so and the buyer gets a better title to the goods.

- Sale by a Buyer in Possessions of Goods an Agreement to Sale:- According to Indian Contract of Sale of Goods Act, in following condition the buyer of such goods gets a good title to them than the seller in agreement to sell.
  - The new buyer must have bought the goods in good faith.
  - The new buyer must have no notice that seller have defective title to the goods

### ✚ **Caveat Emptor** (*Kreta Sawadhani*)

The term 'Caveat Emptor' is Latin word which means 'let the buyer beware'. In other words it is not the part of the seller's duty to point out defects of the goods which he offers for sale rather it is duty of buyer to satisfy him about the quality as well as suitability of goods. This doctrine points out that in a contract of sale of goods the seller is under no duty to reveal undisclosed defects about the goods sold. Therefore, when a person buys some goods, he must examine them thoroughly. If the goods turn out to be defective or do not suit his purpose or if he depends upon his own skill and judgment and makes a bad selection, he cannot blame anybody. Thus the rule is that there is no implied condition or warranty as to the quality or fitness for any particular purpose of goods supplied under the contract of sale of goods.

- Exceptions of Caveat Emptor :-

The doctrine caveat emptor has certain important exceptions which are as follows:-

- Where seller sells goods by misrepresentation:- If while selling goods seller misrepresents about the quality of goods, the rule of Caveat Emptor does not apply.
- Goods sold by fraud:- If seller makes any kind of fraud the buyer may unable to judge the goods or may wrongly judge the goods so this time the doctrine doesn't apply.
- Purchase by disclosing the objective:- If buyer defines the objective of purchasing goods, the doctrine doesn't hold. The supplier in this case, must supply goods fit for the purpose of buyer, otherwise seller will be liable.
- Where buyer buys goods by description:- The selling of goods by description of buyer in such case the caveat emptor doesn't apply.
- Goods sold by sample
- Goods sold by both samples and description
- Goods are not of merchantable
- Where hidden defects are exist in goods

Vishal Koirala

Editor at [Notespal.com/BBA/BBS/ICAN/ICA](http://Notespal.com/BBA/BBS/ICAN/ICA)

Admin at [BBA Solution](http://BBA Solution)

Email:- [zadeck.vishal@gmail.com](mailto:zadeck.vishal@gmail.com)/[bkoirala88@yahoo.com](mailto:bkoirala88@yahoo.com)

+977-9848264808/+977-9802964808

## + Unpaid Seller

A seller who is unable to collect or get the whole price within a due period is deemed to be an unpaid seller. If goods are sold of full cash payment instantly then there is no any question arises about unpaid seller but if goods are sold on credit and seller is unable to collect full price within allocated credit period to the buyer he becomes an unpaid seller.

In case the transaction is made and a bill of exchange or other negotiable instruments was received but dishonored, the seller becomes unpaid seller.

## + Rights of an Unpaid Seller:-

- Rights Against Goods:-

Where the property in the goods has passed to the buyer an unpaid seller has the following rights against goods:-

- Rights of Lien: - A lien is a right to retain/possession of goods until payment of the price. The unpaid seller can use this right in following conditions:-
  - a. When goods have been sold without any stipulation as credit
  - b. If sold in credit but credit time expired
  - c. When buyer becomes insolvent
  - d. The price or part of price remain unpaid
- Right of Stoppage Goods in Transit:- Where unpaid seller parted with the possession of goods but goods not yet come to buyer, the law confers right to seller to stop goods in transit if the buyer become insolvent. The following condition must be proved:-
  - a. When goods are in transit
  - b. When price is not paid
  - c. When buyer becomes insolvent
- Right of Resale:- An unpaid seller also entitled with right of resale of goods. The unpaid seller can resale the goods in following conditions:-
  - a. When the goods are perishable nature
  - b. When seller expressly reserve right of resale in case of buyers of default.
  - c. Where seller gives notice to buyer of his intention to resale and buyer doesn't pay price within reasonable time.

- Rights Against Buyer

There are some rights which an unpaid seller may enforce against buyer as follows:-

- Right to sue for price (ownership must have been transferred)
- Right to sue for damages
- Right to rescind the contract

Vishal Koirala

Editor at Notespal.com/BBA/BBS/ICAN/ICA

Admin at BBA Solution

Email:- zadeck.vishal@gmail.com/bkoirala88@yahoo.com

+977-9848264808/+977-9802964808

## + Duties of Unpaid Seller

- To deliver what was promised, if any.
- To fulfill responsibility according to the contract.
- To wait for payment up to credit period.
- Should give notice to the buyer if he is unpaid seller.
- Should only case file if adequate proof and evidence he has

Vishal Koirala

Editor at Notespal.com/BBA/BBS/ICAN/ICA

Admin at BBA Solution

Email:- zadeck.vishal@gmail.com/bkoirala88@yahoo.com

+977-9848264808/+977-9802964808

## Contract of Carriage

### + Meaning

The term carriage means transporting goods or passenger from one place to another that may be within or outside the country. The conveying of goods or passengers from one place to another is carriage.

Nepal Contract Act only includes carriage goods and excludes carriage by air and sea. The person or firm who receives the goods for the purpose of carriage or transportation is a profession is called carrier. According to Nepal Contract Act the person employed for carriage on wage or agent or person acting under him are not carrier for the purpose of the Act.

Any natural person or legal person or firm who does the profession of carrying goods as a business is carrier.

According to Indian Contract Act 1865, "A contract whereby a person or company agrees to carry goods or people from one place to another in return for a payment is known as contract of carriage."

According to Nepal Contract Act, "A contract relating to transportation shall be deemed to have been concluded if it provides the transportation of goods from one place to another."

The law regulates the behaviour of carrier and consigner and it is a subject matter of law relating to carriage. Here, term Law of Carriage may be defined as the branch of law which deals with carriers of goods or passenger by an express or implied contract through land water and air.

### + Natures of Carriage

- Carriage may be internal or external
- Carriage contract also may include in the bill or receipt
- Carriage contract normally always for charge but sometimes without charge as well
- Carriage may be both goods or passengers

### + Common Carrier

The person either normal or legal, who carry the goods of other whether the owner's goods or consignor's goods from one place to another for money or payment is known as common carrier. Any individual, firm or company who transports goods as a business for money without discrimination from one place to another is called common carrier.

Vishal Koirala

Editor at [Notespal.com/BBA/BBS/ICAN/ICA](http://Notespal.com/BBA/BBS/ICAN/ICA)

Admin at [BBA Solution](http://BBA Solution)

Email:- [zadeck.vishal@gmail.com](mailto:zadeck.vishal@gmail.com)/[bkoirala88@yahoo.com](mailto:bkoirala88@yahoo.com)

+977-9848264808/+977-9802964808

## + Feature/Characteristics of Common Carrier

- Carrier may either carry goods or passengers.
- Carrier may be an individual, a firm or a company except govt. agencies.
- Carrier may carry/convey goods by any means as prescribed in the contract.
- Carrier carries the goods without discrimination and biases.
- Carrier takes responsibility of conveying and delivering goods to the specified destination and to specified person.
- Carrier carriage goods normally for charges but sometimes without charge as well.
- Carrier may convey goods through different routes such are land, sea and air.

## + Difference between Common Carrier and Private Carrier

Bases	Common Carrier	Private Carrier
1. Scope	The scope of work of common carrier is in large	Scope of work of private carrier is limited
2. Reserve of Right	The common carrier doesn't reserve right to reject the goods	The private carrier reserves his right to reject the goods
3. Charges	The common carrier always takes fair charge	The private carrier may transport goods unequal or without charge
4. Discretionary Power	The common carrier has no discretionary power to carry the goods	The private carrier has discretionary power to carry the goods
5. Liability	Generally, liability of common carrier is govern by special laws	The liability of private carrier is depend on mutual agreement
6. Discrimination	The common carrier doesn't any discrimination to anyone	The private carrier may favor or discriminate during the transportation
7. Routes	Normally, common carriage the goods through customary routes	The private carrier is free to choose his route and change as well
8. Regularity	The common carrier carry goods regularly as a business and profession	The private carrier is not in regular business it is not his profession

Vishal Koirala

Editor at Notespal.com/BBA/BBS/ICAN/ICA

Admin at BBA Solution

Email:- zadeck.vishal@gmail.com/bkoirala88@yahoo.com

+977-9848264808/+977-9802964808

## + Rights of Common Carrier

- A common carrier is entitled to get the agreed remuneration or a reasonable remuneration for his service. He can demand advance as well.
- He has right to retain goods and refuse delivery until payment are settled. He has also right to lien.
- Generally, common carrier is bound to deliver goods without discrimination but in following condition he may reject to carry the goods:-
  - If no room is available in the vehicle
  - The goods offered aren't of the time he profess to carry
  - The destination is not that he usually travels
  - The goods are offered as an unreasonable hour
  - The goods are not properly packed
  - Reasonable charges is not paid
- He can sell the goods if they are of perishable nature
- He can recover damages from consignor, because of dangerous nature of goods and if not explained to carrier by him
- If consignee refuses to take goods are arrived at prescribed place, the common carrier can take reasonable step
- A common carrier is entitled to get agreed or reasonable fee
- If carrier provides extra facility services to the goods he is entitled to charge additional fees accordingly

## + Duties of a Common Carrier

- Carrier must carry and deliver goods at prescribed place and at proper condition
- He must carry goods with reasonable care
- He must carry and deliver goods within time or within reasonable time
- He is bound to carry every person's goods and not to discriminate to anyone
- The carrier must follow customary routes
- In case goods received from consignor are lost destroyed, broken, harmed or in any case they do not reach their destination in proper condition for any reason, the carrier shall be liable.
- The carrier must follow instructions to him

Vishal Koirala

Editor at Notespal.com/BBA/BBS/ICAN/ICA

Admin at BBA Solution

Email:- zadeck.vishal@gmail.com/bkoirala88@yahoo.com

+977-9848264808/+977-9802964808

## + Contract of Affreightment

The carriage of goods through sea or by ship from one part to another there is a contract between the owner of goods and the owner of ship or master of ship or shipping company by receiving charges is known as contract of affreightment. A ship owner undertakes to carry the goods of another in consideration of remuneration called 'freight' in the contract of affreightment.

## + Parties of Contract

- Ship Owner: - A person, owner of ship who undertakes to transport the goods are called a ship owner.
- Charter/Consignor: - A person who hires the ship and delivers the goods to the ship owner for transportation is called charter or consignor.
- Consignee: - A person to whom the goods are addressed and to whom the ship owner should deliver the goods is called consignee.

## + Types of Affreightment Contract

The contract of Affreightment is of two kinds:-

- Charter Party  
A charter party is a contract of affreightment between charter and ship owner entered into for hiring entire ship or a major portion of ship thereof to carry goods from one place to another through sea route. The payment depends up on what kind of charter party agreement is done. The charter party contract is of following kinds:-
  - Voyage Charter:- If ship is hired to carry goods from one part to another, this is known as voyage charter.
  - Time Charter:- If ship is chartered within a fixed period of time to cargo, is known as time charter. The charges are independent from the quantity of goods.
  - Charter with Demise:- Charter of ship with its ownership as well as crew member under control is known as charter under demise. In such case, the whole liability of goods as well as ship has to bear by charter himself.
  - Charter without Demise:- The charter of ship in which the crew members and ownership of ship is under of ship owner is known as charter without denies. In this, the contract is made only related to the carriage of goods.

Vishal Koirala

Editor at Notespal.com/BBA/BBS/ICAN/ICA

Admin at BBA Solution

Email:- zadeck.vishal@gmail.com/bkoirala88@yahoo.com

+977-9848264808/+977-9802964808

Implied Warranties in Charter Party:-

- The ship should be fit for voyage
- The ship should be ready at any time for voyage
- The crew member should be able to do successful customary
- The goods shouldn't be illegal dangerous nature as well as perishable nature

- Bill of Lading

In this type, the consignor doesn't hire entire or major portion of ship but the pays money and ship owner agrees to carry the goods along with others goods. A bill of lading is a receipt given by the ship owner to the consignor about the list of goods loaded and amount of price.

In bill of lading there is direct contract between the consignor or owner of the goods and the owner of the ship.

Characteristic of Bill of Lading:-

- It is a contract between ship owner and owner of goods for the carriage of goods through sea routes.
- It is an evidence of receipt goods.
- It is a document of title over the goods.
- It is a semi-negotiable instrument

### Difference between Charter Party and Bill of Lading

Bases	Charter Party	Bill of Lading
1. Nature of Contract	Contract about chartering of whole ship	Contract of carriage and receipt of goods to be carried
2. Rights	The goods owner has right over ship during voyage	The owner of goods doesn't have right over ship
3. Destinations	It is made for specific voyage or time period	It is prepared to carry goods from one place to another
4. Conditions	In this, the term and conditions are clearly specified to both charterer and ship owner	In this, no necessity to mention/specify any terms and conditions
5. Compensation	In this, if any damages or harm to the goods, the ship owner or shipping company aren't responsible	In this, the damages if any the ship owner or shipping company is responsible for this

Vishal Koirala

Editor at Notespal.com/BBA/BBS/ICAN/ICA

Admin at BBA Solution

Email:- zadeck.vishal@gmail.com/bkoirala88@yahoo.com

+977-9848264808/+977-9802964808

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Let's Cheers for free education...!!

Vishal Koirala

Editor at [Notespal.com](http://Notespal.com)/BBA/BBS/ICAN/ICA

Admin at BBA Solution

Email:- [zadeck.vishal@gmail.com](mailto:zadeck.vishal@gmail.com)/[bkoirala88@yahoo.com](mailto:bkoirala88@yahoo.com)

+977-9848264808/+977-9802964808

Vishal Koirala  
Editor at Notespal.com/BBA/BBS/ICAN/ICA  
Admin at BBA Solution  
Email:- zadeck.vishal@gmail.com/bkoirala88@yahoo.com  
+977-9848264808/+977-9802964808