NALSAR UNIVERSITY OF LAW HYDERABAD

MODULE-III (GENERAL PRINCIPLES OF LAW)

Presentation

On

FUNDAMENTAL ASPECTS OF LAW AND ITS RELEVANCE TO DEFENCE

by

Dr. Shaik Nazim Ahmed Shafi

B.Com., P.G.D.I.R.P.M.,P.G.D.C.A.,D.C.A.(*ERP-9(i)*,B.L.,LL.M. (Alig.) L.I.I.I., CCITM (Exports & Imports), Ph.D.

SATURDAY 14 SEP 2019 HRS: 14:00-16:00

CONTENTS

- Law of Contracts (It’s application in Defence Sector)
- Company Law (It’s application in Defence Sector)
- Competition Law (It’s application in Defence Sector)
- IPR (It’s application in Defence Sector)
- Taxation Laws (It’s application in Defence Sector)
- Insurance Laws (It’s application in Defence Sector)

1. Law of Contracts

1. Introduction
2. Proposal
3. Acceptance
4. Revocation
5. Creation of Legal Relations
6. Lawful Consideration
7. Lawful Object & Consideration
8. Capacity of Parties
9. Free Consent
10. Void Agreement
11. Contingent Contract
12. Performance of Contract
13. Discharge of Contract
14. Remedies for Breach of Contract
15. Quasi Contracts

Introduction to Law of Contracts

- Importance of Law of Contracts
- Nature and Scope
- Basis of the Law of Contract (Intention)
- Main Purpose of Law of Contracts (Element of Definiteness)
- Intention to Contract: (There must be Common Intention)
- Legislative Limitations on the Freedom of Contracts
- Contract Law based on ‘Promises’

Relevancy of Law of Contracts and Defence Matters

- There are four ‘foundational agreements’ that the USA enters into with its defence partners.

- **LEMOA :** **Logistics Exchange Memorandum of Agreement**; It is a facilitating agreement that establishes basic terms, conditions and procedures for reciprocal provision of Logistic Support, Supplies, and Services <u>between the armed forces of India and the United States</u>.

- **GSOMIA:** **General Security of Military Information Agreement** allows the two countries to directly share information on North Korea’s nuclear and missile activities, ensuring that the two US allies are aligned defensively.

- **COMCASA:** **Communications Compatibility and Security Agreement** It is an agreement relating to sales of more sensitive US military equipment.
- **BECA:** It refers to **Basic Exchange and Cooperation Agreement** for Geospatial Cooperation. This agreement would facilitate exchange of geospatial information between Indian and US for both military and civilian use.
- **Offset Agreement:** It involves trade in military goods and services and are alternatively called Industrial Compensation, Industrial Compensation, Offsets. It may be **generic agreement** or **counter-trade offset agreement.**

- **Industrial Security Agreements:** i.e. Transfer of Defence Technology for building combat jets.

2. Company Law

- **Company is an artificial person**
- **Types of Companies:**
- By Royal Charter (Formed by grant of a charter by the Crown)
- By Act of Parliament (Statutory Companies) (Ex: LIC)
- By Registration (Registered Companies)
- **Classification:**
- (a) Unlimited Companies
- (b) Companies Limited by Guarantee
- (c) Companies Limited by Shares (Public Companies and Private Co’s) etc.

- **Formation of a Company:** (a) Promoters (b) Pre-Incorporation contracts
- **Registration of a Company:** (a) Registrar of Companies; (b) Documents required for Registration (AA and MA); (c) Certificate of Incorporation
- **Company's Characteristics:** Corporate Personality; Limited Liability; Perpetual Succession; Transferability of Shares; Separate Property; Common Seal; Can enter into Contracts; Can sue and be sued;

- Corporation Veil
- Piercing the Corporate Veil
- **The Corporate Constitution :**
- Memorandum of Association (Name Clause; Registered Office Clause; Liability Clause; Capital Clause)
- Articles of Association (Alteration of Name; Alteration of Registered Office; Change of Objects)

Relevancy of Company Law in Defence Matters

- Perhaps the greatest progress can be found in the private sector from its journey in 2001 till date.
- The sector has seen many encouraging trends. Large defence projects are witnessing increasing private sector involvement.
- In the first development contract of its kind, the development of Battlefield Management System (BMS) was awarded to **two consortiums**, one comprising of leading private companies being Tata and L&T.

- The joint bid submitted by the **two private players Tata and Airbus** for the ‘Avro Replacement Program’ was approved in May 2015.
- In another first of its kind contract, the government has permitted **DRDO to transfer the relevant technology to private firms** as seen in the Licensing Agreement for Transfer of Technology signed by L&T for the Unmanned Ariel Vehicle Lakshya.

- Defence production in India has long been dominated by state-run entities such as the **Ordnance Factories** (“OFs”),
- **Defence Public Sector Undertakings** (“DPSUs”) and the
- **Defence Research and Development Organization** (“DRDO”). The size, vast resources and experience of public sector defence production entities constantly places them under a scanner of high expectation for maximum output and delivery.

3. Competition Law

- The **Competition Act**, **2002** was enacted by the Parliament of India and governs Indian **competition** law.
- To prohibit acquisitions, mergers, amalgamations etc. between enterprises which have or are likely to have an appreciable adverse effect on **competition** in market(s) in India.
- The purpose of Competition law is that The **law aims** to promote healthy **competition**. It bans anti- competitive agreements between firms such as agreements to fix prices or to carve up markets, and it makes it illegal for businesses to abuse a dominant market position.

Relevancy of Competition Law in Defence Matters

- **Defence Public Sector Undertakings:** The DPSUs have always enjoyed the status of preferred supplier of India’s defence equipment and products. One of the routes has been through nomination - **a method of allocating defence contracts without a tender process.** This has successfully insulated the DPSUs from competition from the private sector. However, the MoD has now reduced this practice significantly through the route of **open tenders**, allowing level playing field of competition.

4. IPR Laws

- Intellectual property rights refers to the general term for the **assignment of property rights through patents, copyrights and trademarks**. These property rights allow the holder to exercise a monopoly on the use of the item for a specified period.
- A right that is had by a person or by a company to have exclusive rights to use its own plans, ideas, or other intangible assets without the worry of competition, at least for a specific period of time. **These rights can include copyrights, patents, trademarks, and trade secrets.**

Relevancy of IPR Laws in Defence Matters

- The following is a list of legislative provisions relating to **intersection of defence and security,** and Intellectual Property (‘IP’) in India.
- Where these provisions are silent regarding ownership and assignment of IP with regard to Transfer of Technology arrangements, **the agreements between the parties prevail.**
- Relevant Statutes:
  - The Patents Act, 1970;
  - The Designs Act, 2000 etc.

The Defence Procurement Procedure 2016 and Intellectual Property:

- For ‘Make’ projects, the DPP provides extensive Guiding Principles (‘GPs’) on the allocation of IP rights of the Government under Appendix H to Chapter III. Under these principles, for most circumstances, **the contractor retains the ownership of the IP generated under the contract,** <u>with the Government only **retaining a license** as per the terms given herein</u>. However, if during the development of a prototype, the Government identifies a technology or product as being sensitive and requiring restricted access, through the Integrated Project Management Team (“IPMT”) or any other expert body, **it shall retain the full ownership of the IP of such a technology or product.** The types of IP covered herein can be divided into two categories: a. Inventions and patents; b. Technology licensing

- **The Government gains licenses over the:**
- **a) subject inventions and associated data, and**
- **b) all other data generated under the ‘Make’ contract.**
- The rights accorded to the Government here are termed ‘Government Purpose Rights’ (‘GPRs’), which mature into ‘Unlimited Rights’ after ten years from the vesting of such GPRs’ with the Government. ‘Government Purpose’ for the purpose of the GPs has been defined as an activity in which the Government of India is a party, including cooperative agreements with international or multinational defence organizations, or sales or transfers by the Government of India to foreign Government or international organizations. **‘Government Purposes’ here also includes competitive procurement, but expressly does not include the rights to use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes or to authorize others to do so.**

5. Taxation Laws

- **Corporate Income Tax:** Income tax in India is levied under the Income Tax Act, 1961 ("ITA"). While residents are taxed on their worldwide income, non-residents are only taxed on income arising from sources in India. A company is said to be resident in India if it is incorporated in India or its place of effective management is located in India.

- **Dividends**: Dividends distributed by Indian companies are **subject to a dividend distribution tax ("DDT") at the rate of around 15%** (calculated on a gross-up basis), payable by the company. However, except as stated immediately below, **no further Indian taxes are payable by the shareholders on such dividend income once DDT is paid.** Accordingly, there should be no withholding tax applicable on the payment of dividends to a non-resident.

- **Interest, Royalties and Fees for Technical Services:** Interest **earned by a non-resident may be taxed at rates** ranging between 5% to around 40%, depending on the nature of the debt instrument. The withholding tax on royalties and fees for technical services earned by a non-resident is 10%.
- **Capital Gains:** **Gains earned by a resident company from the transfer of capital assets situated anywhere in the world are taxable in India.**
- **Withholding Taxes:** Tax would have to be withheld at the applicable rate on all **payments made to a non-resident**, which are taxable in India.
- **Double Tax Avoidance Treaties:** India has entered into more than 80 treaties for avoidance of double taxation. A taxpayer may be taxed either under domestic law provisions or the tax treaty to the extent it is more beneficial.

- **Anti-Avoidance:** A number of specific anti-avoidance rules are enforced in India. **Cross-border transactions between related parties would be viewed for tax purposes** on an arm's length basis. Transfer pricing rules apply to certain domestic transactions as well. General anti avoidance rules ("GAAR") have become effective from April 1, 2017.
- **Indirect Taxes:** Indirect taxes are imposed at the central and state level on expenses incurred. Currently, prominent indirect taxes being levied include customs duty and the goods and services tax ("GST"). The rate of these taxes vary depending on the product and / or service.

Relevancy of Tax Laws in Defence Matters

- In an effort to soothe the nerves of Indian defence firms, the **Centre is mulling Customs duty exemption on the import of spare parts** under programmes that were rolled out before April 1, 2017.
- **The exemption will be granted in order to bring the Indian firms on a par with foreign OEMs** who are provided tax exemption on the projects they develop. The Customs duty is being paid by the Indian government on behalf of the foreign OEMs, sources in the Ministry of Defence said.
- According to current norms, while foreign **original equipment manufacturers** (OEMs) in the country **are given tax concessions on the items they import into the country to build a certain armament,** Indian companies end up paying Customs duty.

6. Insurance Laws

- **Insurance** is a means of protection from financial loss. It is a form of risk management, primarily used to hedge against the risk of a contingent or uncertain loss. An entity which provides **insurance** is known as an insurer, **insurance** company, **insurance** carrier or underwriter.

- Seven Principles of Insurance:

i. Principle of Utmost Good Faith
ii. Principle of Insurable Interest
iii. Principle of Indemnity
iv. Principle of Contribution
v. Principle of Subrogation
vi. Principle of Loss Minimisation
vii. Principle of Cause Proxima

Relevancy of Insurance Laws in Defence Matters

- **Sale and Purchase of Defence equipment** is international in nature, hence it becomes **International Contract**.
- To support the Insurance for the goods shipped, **INCO Terms** should be used like FOB, CIF etc.
- It is a common practice in the commercial world to insure goods in transit. Briefly, the **following reasons compel traders to contract transport insurance:**
- **Protection against financial losses** resulting from damage, pilferage, theft and non-receipt of entire or part of a consignment; and • Protection against financial claims that can be made against the owner of goods on board a vessel in case of a "declared general average" (the goods themselves being undamaged).

END SLIDE