TUTOR MARKED ASSIGNMENT

Course Code	:	**ECO - 05**
Course Title	:	**Mercantile Law**
Assignment Code	:	**ECO – 05/TMA/2016-17**
Coverage	:	**All Blocks**

Maximum Marks: 100

Attempt all the questions.

1. (a) "The law of contract is not the whole law of agreements nor it is the whole law of obligations". Comment.

   (b) "Mere silence as to facts is not fraud." Explain with examples.

   (10+10)

2. What is a breach of contract? Explain different types of damages available to an aggrieved party and the rules relating to them with suitable examples.

   (20)

3. Define consideration. Discuss the legal rules for valid consideration.

   (5+10)

4. (a) What is bailment? Explain the essentials of a contract of bailment.

   (b) Define 'Agent' and 'Principal'. Who may be an Agent?

   (10+10)

5. What do you understand by dissolution of a partnership firm? Explain the dissolution of firm by the order of the court.

   (5+10)

6. What is a warranty in a contract of sale? When can a breach of condition be treated as a breach of warranty?

   (2+8)

ASSIGNMENT SOLUTIONS GUIDE (2016-2017)

E.S.O.-5

Mercantile Law

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Attempt all the questions.

Q. 1. (a) "The law of contract is not the whole law of agreements nor it is the whole law of obligations".

Ans. In simple words, a contract is an agreement made between two or more persons to do or to abstain from doing a particular act.

According to Section 2(h) of the Indian Contract Act, 1872, 'An agreement enforceable by law is a contract.'

'A contract is an agreement, creating and defining the obligation between parties.' *– Salmond*

'Every agreement and promise enforceable at law is a contract.' *–Sir Fredrick Pollock*

'A contract is an agreement enforceable at law made between two or more persons by which rights are acquired by one or more to acts or forbearances on the part of others.' *–Sir William Anson*

On the basis of analysis of the above definitions, a contract must have the following two elements:

(i) An agreement

(ii) Its enforceability by law.

Section 10 provides for the essential elements for a valid contract, which include:

***(i)* Proper offer and proper acceptance:** There must be atleast two parties in order to create a valid contract, one making the offer and the other accepting it. Such offer and acceptance must be valid. The law has laid down specific rules for making the offer and its acceptance, that is, it must be absolute and unconditional.

***(ii)* An intention to create legal relationship:** The agreement must be capable of creating legal obligation among the parties. It does not that it is not a contract. As in case of social or domestic agreements the usual presumption is that the parties do not intend to create legal relationship however in commercial or business agreements, the usual presumption is that the parties intend to create legal relationship unless otherwise agreed upon.

***(iii)* Free consent of the parties:** It is essential that there must be free and genuine consent of the parties to the contract so as to create a valid contract. According to Section 14, Consent is said to be free when it is not caused by:

(a) coercion;

(b) undue influence;

(c) fraud;

(d) misrepresentation, and

(e) mistake. The contract is voidable at the option of the aggrieved party if the consent is obtained by any of the above four factors.

***(iv)* Capacity of parties:** The parties to the contract must be capable of entering into a contract. The contract is not valid if any of the parties in not competent to contract. According to Section 11 of the Act, states that, 'every

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

***(v)* Lawful consideration:** The agreement must be based on a consideration. Consideration means something in return. In other words, it is the price paid by one party to buy the promise of the other. The consideration may be past, present or future, however it must be real.

***(vi)* Lawful object:** An agreement which is made for any act which is prohibited by law is not valid. That is the object of an agreement must be lawful.

***(vii)* Agreements not expressly declared void:** Sections 24 to 30 clearly specify certain types of agreements, which have been expressly declared void.

***(viii)* Certainty of meaning:** The terms of the contract must be certain and unambiguous. As per Section 29 of the Indian Contract Act, 'agreements the meaning of which is not certain or capable of being made certain are void.'

***(ix)* Possibility of performance:** The terms of the agreement must be such are capable of performance. According to Section 56, 'an agreement to do an impossible act is void.'

***(x)* Legal formalities:** The agreement must comply with the required formalities as to writing, registration, stamping, etc. so necessary to make it enforceable at law.

(b) "Mere silence as to facts is not fraud." Explain with examples.

Ans. According to Section 17, "Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud." In other words, mere silence on the part to the contract about certain material facts relating to the subject-matter of the contract does not generally amount to fraud.

The general rule states that a party to the contract is under no legal obligation to disclose the whole truth to the other party or to give him the whole information in his possession. For example, 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 a fraud.

There are two exceptions to the general rule where silence does amount to fraud, namely:

1. Where the circumstances of the case are such that, regards being had to them, it is the duty of the person keeping silence to speak: This duty to speak arises in the following cases:

***(a)* Fiduciary Relationship:** When one party reposes trust and confidence in the other, the party must reveal the truth. For example, A sells by auction a horse to B, his daughter who has just come of age. Here, the relation between the parties are such that it becomes A's duty to tell B about the unsoundness of the horse.

***(b)* Contracts of absolute good faith:** Where one party has to depend upon the good faith of the other, the other party is bound to speak. For example, in all contracts of insurance, it is the duty of the proposer to make full disclosure of all material facts to the insurance company.

2. Where the silence is, in itself, equivalent to speech: In certain cases, where the silence is treated as speech, the silence of a person amounts to fraud. For example, A is selling his Horse to B. The horse appears to be sound. Even then B says to A, 'If you don't deny it, I shall assume that the horse is sound' A says nothing. Here A's silence is equivalent to speech.

Q. 2. What is a breach of contract? Explain different types of damages availabe to an aggrieved party and the rules relating to them with suitable examples.

Ans. A breach of contract occurs if any of the party fails or refuses to perform his part of the contract or by his act makes it impossible to perform his obligation under the contract. The aggrieved party is discharged from performing his obligation in case of breach. The breach of contract may arise in two ways, namely, *(a)* Anticipatory breach and *(b)* Actual breach.

In case when a contract is broken by a party, then the other party has the following remedies available with it, namely:

***(i)* Rescission of the contract:** Section 39 of the Act states that when a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract. This further discharges the aggrieved party from all the obligations under the contract.

However, Section 75 also provides that the person rightfully rescinding the contract can make a claim for the compensation of any loss or damage sustained through the non-fulfilment of the contract.

***(ii)* Suit for damages:** The aggrieved party also has the right to claim for damages apart from rescinding the contract. It can also be said that, damages are the monetary compensation allowed for loss suffered by the aggrieved party due to the breach of the contract. The object of damages is that the aggrieved party is put in the financial position which would have existed had there was no breach of the contract and also to punish the party at fault.

The leading case Hadley *v.* Baxendale is used as the basis for the judgments for the rules pertaining to damages. As per the case; H's mill was stopped due to the breakdown of a shaft, he delivered the shaft to B, a common carrier, to be taken to a manufacturer to copy it and make a new one. H had not made it known to B that delay would result in loss of profits. By some neglet on part of B, the delivery of the shaft was delayed in transit beyond a reasonable time. It was held that B was not liable for loss of profits during the period of delay.

Section 73 deals with the compensation for loss or damage caused by breach of contract is based on the above case, which states that the aggrieved party may claim damages as follows:

(a) Such damages which naturally arose in the usual course of things from such breach. This relates to ordinary damages arising in the usual course of things.

(b) Such damages which the parties knew, when they made the contract, to be likely to result from the breach. This relates to special damages.

(c) The above compensation is not to be given for any remote or indirect loss or damage sustained by reason of the breach, and

(d) Such compensation of damages arising from breach of quasi-contracts shall be same as in any other contract.

***(iii)* Suit for specific performance:** Where the aggrieved party is not interested in damages or in monetary compensation, then in that case, the court may direct the defaulting party to carry out the promise according to the terms of the contract, which is referred to as 'specific performance' of the contract.

***(iv)* Suit for injunction:** Where the party is in breach of a negative term of a contract, the court may be the issue of an order, prohibit him from doing so. This court order is referred to as injunction.

***(v)* Suit upon Quantum Meruit:** This remedy provides for certain exceptions on the basis of quantum meruit. The right of claiming the payment for work already done, before the repudiation of the contract or its further performance becoming impossible is called the right to quantum meruit.

According to the law, in case of anticipatory breach, the aggrieved party has the following two options:

(i) He can rescind the contract and claim damages for breach of contract without waiting until the due date for performance, or

(ii) He may treat the contract as operative and wait till the due date for performance and claim damages, if the promise still remains unperformed.

If the promisee treats the contract as Operative, that is, waits till the due date for performance, then:

(i) The promisor may perform his promise on or before the due date of performance and the promisee will be bound to accept the performance.

(ii) The promisor may take advantage of the discharge by supervening impossibility arising between the date of breach and the due date of the performance and in such a case, the promisee shall lose his right to sue for damages.

When the promisee rescinds the contract at the date of breach then the amount of damages will be equal to the difference between the price prevailing on the due date of breach and the contract price. Whereas, when the promisee, does not rescind the contract at the date of breach, the amount of damages will be equal to the difference between the price prevailing on the due sate of performance and the contract price.

Q. 3. Define consideration. Discuss the legal rules for valid consideration.

Ans. The term consideration is referred in the sense of *quid-pro-quo* in mercantile law which in turn means something in return. This something may refer to some benefit, right, interest or profit that may accrue to one party or it may be some forbearance detriment, loss or responsibility upon the other party. In simple words, consideration is the price for which the promise of the other is bought.

According to ***Sir Pollock***, "Consideration is the price for which the promise of the other is bought, and the promise thus given for value is enforceable."

According to Section 2(d) of the Indian Contract Act defines Consideration as "When at the desire of the promisor, the promisee or any other person has done or abstain 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."

For example, A agrees to sell his house to B for Rs. 10,00,000. Here, B's promise to pay Rs. 10,00,000 is the consideration for A's promise to sell the house and A's to sell the house is the consideration for B's promise to pay Rs. 10,00,000.

There are three types of Considerations, namely:

(a) Past Consideration

(b) Present Consideration

(c) Future Consideration

***(a)* Past Consideration:** The words used in Section 2(d) are 'has done or abstain from doing' refer to past. Past consideration is something wholly done, forborne or suffered before the making of the agreement.

For example, A, a minor was given the benefit of certain services by the plaintiff. The plaintiff rendered those services, not voluntarily but at the desire of A. These services were continued even after majority at the request of A, who subsequently promised to pay an annuity to the plaintiff. It was held that the past consideration was a good consideration. (Leading case: Sindhe *v.* Abraham).

***(b)* Present Consideration:** The consideration which moves simultaneously with the promise is referred to as present consideration. For example, cash sales.

***(c)* Future Consideration:** When the consideration is to move at a future date, it is referred as future consideration. It converts into a promise to be performed in the future. For example, A promises B to deliver him 100 bags of wheat at a future data, to which B promises to pay for it on delivery.

According to Section 10 of the Act, consideration is an important element for a contract to be valid. It also states that all contracts have two parts, namely *(a)* the promise, and *(b)* the consideration for the promise. It has been added in Section 25 of the Act that any contract without consideration is treated as void.

The person who makes a promise to do or to abstain from doing something usually does so as a return for some loss, damage, or inconvenience that may have or may have been occasioned to the other party in due respect of the promise. As per the law the consideration for the promises is regarded as the benefit so received or the loss, damage, inconvenience so caused. It is based on the principle of 'No Consideration No Contract'.

The above argument is illustrated through a leading case of Abdul Aziz *v.* Mazum Ali, where a person verbally promised the Secretary of the Mosque Committee to subscribe Rs. 500 for rebuilding of a mosque. Later, he declined to pay the same amount. Therefore, it was held that there was no consideration and thus the agreement was void.

However, Section 185 of the Indian Contract Act states that there are certain exceptions to the above rule, that is, there are certain cases were a contract without consideration is treated as valid. And thus are enforceable by law. These circumstances include:

***(i)* Agreements in Writing and Registered:** An agreement without consideration is considered valid if it is:

(a) Expressed in writing;

(b) Registered under the law currently in force;

(c) Made on account of natural love and affection; and

(d) Is between parties standing in a near relation to each other. (Leading Case: Venkataswamy *v.* Rangaswamy; Rajlakhi Devi *v.* Bhootnath)

However, for the agreement to be valid under this clause the agreement must be the result of natural love and affection.

***(ii)* Promise to Compensate:** According to Section 25(2) of the Act, a promise made without consideration is valid if:

(a) It is a promise to compensate (wholly or in part);

(b) The person to be compensated has already done something voluntarily, or has done something which the promisor was legally compellable to do.

For example, A supports B's infant son without asking. B promises to pay A's expenses for doing so. This is treated as a contract.

***(iii)* Promise to pay a debt barred by limitation act:** According to Section 25(3) of the Act states that a promise to pay a debt barred by Limitation Act shall be valid without consideration as legally it remain no longer claimable. If a debt is not claimed under a time frame of 3 years then it gets barred as per the Limitation Act. On the other hand, a promise to pay a time barred debt will be valid if:

(a) The promise is out into writing;

(b) Signed by the debtor or his agent; and

(c) Related to a debt which the creditor might have enforced payment of but for the law of limitation.

For example, X owes Y Rs. 800, but the debt is time barred. X signs a writing promise to pay Rs. 600 on account of the debt. This is a valid contract under Section 23.

***(iv)* Completed Gifts:** Complete gifts refer to gifts made and accepted. These need to be based on natural love and affection or near relation; however the gifts must be complete. A promise to gift is not valid.

***(v)* Agency:** No consideration is required for the creation of an agency. As without any consideration being passed on the agent he remains a gratuitous agent and is not bound to do work entrusted to him.

***(vi)* Charity:** If a person promises to contribute to charity and on this faith the promisee undertakes a liability to the extent of the promised subscription, the contract is treated as valid. (Leading Case: Kedarnath *v.* Gorie Mohammad).

Q. 4. (a) What is bailment? Explain the essentials of a contract of bailment

Ans. Bailment is described as the delivery of goods by one person to another for some purpose upon the condition that the goods would be, when the purpose is accomplished be returned to the bailor or to any other person, according to the directions of the bailor. It has been classified in the following three heads, namely: for the exclusive benefit of the bailor, for the exclusive benefit of the bailee and for the mutual benefit of the bailor and bailee. It can also be differentiated between gratuitous and non-gratuitous bailment on the basis of reward.

Lien is described as the bailee’s right to keep the goods in his possession until he is paid his dues. Lien may be classified as particular or general lien. A particular lien is available only against the goods in respect of which the bailee has rendered any service, labour or skill. Here as general lien signifies the bailee's right to retain the goods bailed as well as any other property of the bailor till the time the claims of the bailee are satisfied. On the expiry of the fixed period or on the fulfilment of the object of the bailment, the bailment comes to an end.

Pledge is a special kind of bailment where a thing is delivered as security for the repayment of a debt or for the performance of a promise. The rights and duties of the pawnor and pawnee are almost the same as that of the bailor and bailee. In case there is any default in the payment of the debt by the pawnor then the pawnee may sell the goods after giving a notice to the pawnor and thereby satisfying his debt. The pawnee is required to return the excess amount to the pawnor if the sale proceeds are greater then the amount due.

According to Section 148 of the Indian Contract Act, "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 essentials of a valid contract are as follows:

***(i)* Agreement:** It is the basic requirement for creating a bailment, that is, an agreement between the bailor and the bailee must exist. Bailor is the person, who bails the goods and the bailee is the person to whom the goods are bailed. The agreement between the two may either be express or implied.

***(ii)* Delivery of Goods:** The essence of bailment is that there is delivery of the goods from the bailor to the bailee. It is only the bailment of movable goods which is allowed. Also the fact that the transfer of the goods is done voluntarily, and in accordance with the contract. It also states that the delivery of the possession may be actual or constructive.

***(iii)* Purpose:** The goods are delivered for some purpose in bailment, which is in contemplation of both the bailor and the bailee.

***(iv)* Return of Goods:** The goods which form the subject matter of the bailment should be returned to the bailor or disposed of according to the directions from the bailor, that is, after the accomplishment of purpose or after the expiry of the bailment period the goods must be returned. The bailee is entitled to perform the following duties, namely:

1. Duty to take reasonable care of the goods bailed: According to Section 151 of the Indian Contracts Act, states the degree of care which a bailee is required to take with respect of the goods bailed by him. The law sates that it is the duty of the bailee who is bound to take care of the goods bailed by him as a man in ordinary circumstances would take care of his own goods of the same bulk, quality and value as the goods bailed.

Section 153 of the Act states the standard care of ordinary prudent man may be increased by entering into a contract, between the bailor and the bailee.

2. Not to make any unauthorized use of goods: The bailed goods need to be used in accordance with the terms of the bailment and it is thus the duty of the bailee to ensure the terms are met. In case, the terms are not met then the contract is voidable at the option of the bailor. And the bailee would also be responsible for compensating the bailor for any damage caused to the goods by such inconsistent use of the bailed goods.

(b) Define 'Agent' and 'Principal' Who may be an Agent?

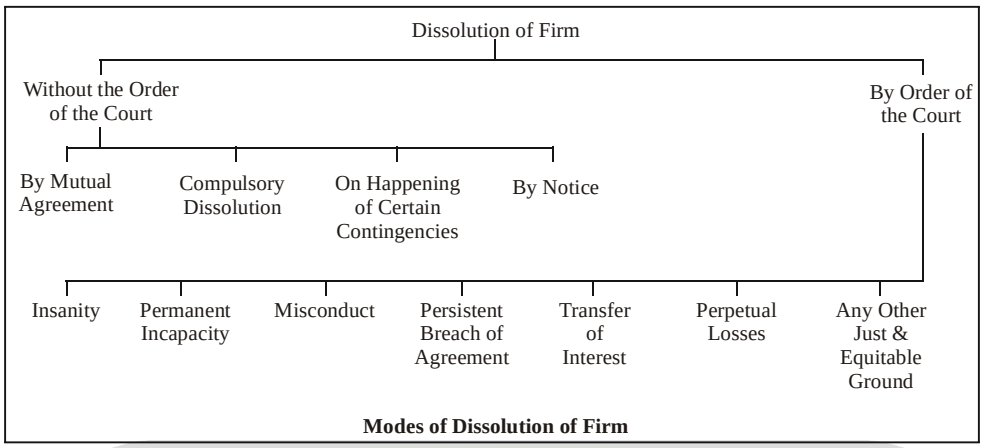
Ans. According to Section 182 of the Indian Contract Act, "An agent is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the principal." In other words, an agent is a connecting link between his principal and third parties.

The principal is simply the Person or group of people who authorises an agent to act on his behalf. The principal is who gives the agent his authority to act and to make decisions. The principal does not typically make day to day decisions himself, but is legally the owner of the business and can give directions to the agent acting on his behalf.

Q. 5. What do you understand by dissolution of a partnership firm? Explain the dissolution of firm by the order of the court.

Ans. According to Section 39, dissolution of a firm means the dissolution of partnership between all the partners of a firm. That is, where there is complete breakdown of relationship between all the partners, dissolution of firm takes place. The business of the firm in such a situation is discontinued. That is, completely stoped, and the assets are realised while the liabilities are paid off and the surplus, if any, is distributed among the partners according to their rights.

The dissolution of the firm may take place either without the order of the court or by an order of the court. This can be depicted by the following figure:



Modes of Dissolution of Firm

Section 44 of the Partnership Act deals with those grounds on which the court may order the dissolution of the firm, on the receipt of petition by a partner. These grounds are:

***(a)* Insanity:** Where the partners becomes insane, that is, he becomes uncapable of forming a rational judgement, it is treated as a valid ground for the dissolution of the firm. A suit may be filed either by any other partner of the firm or by the next friend of the partner, who has become of unsound mind. In case of a dormant partner, since he does not take an active part in the conduct of the business of the firm, the court may not order dissolution of the firm.

***(b)* Permanent Incapacity:** Any other partner may file a petition for the dissolution of the firm in the case where a partner has become permanently incapable of performing his duties as a partner. However, if the incapacity is termporary, the court will not pass an order for dissolution. (Leading case: Whitwell V. Arthus)

***(c)* Misconduct:** When a partner is guilty of misconduct which is likely to adversely affect the carrying on of the business, the court may allow dissolution of a firm on account of misconduct of any partner other than the one filing a suit for dissolution.

***(d)* Persistent Breach of Agreement:** When a partner, other than the partner suing, wilfully or persistently commits breach of agreement relating to the management of the affairs of the firm or he conducts himself in such a manner or that it is not practicable for other partners to reasonably carry on the business in partnership with him, the court may order dissolution. It can also be said that, in case of acts of embezzlement, fraudulent breach of trust or keeping erroneous accounts the court may order dissolution of the firm.

***(e)* Transfer of Interest:** The court may order dissolution when a partner has in any way:

(i) Transferred the whole of his interest in a firm to a third party.

(ii) Allowed his share to be charged on account of a decree passsed by a court towards payment of liabilities of that partner, or

(iii) Allowed his share to be sold in the recovery of arrears of land revenue.

***(f)* Perpetual Losses:** Where the business of the firm cannot be carried on except at a loss, the court may order dissolution of the firm.

***(g)* Any other just and equitable ground:** If it can be provided to the satisfaction of the court that any other ground is just and equitable to dissolve the firm, then the court may order dissolution of the firm.

1. Dissolution without the order of the court may take place in the following ways:

***(a)* By Mutual Agreement:** Same as firm comes into existence by Mutual agreement, it can also be dissolved by mutual agreement among the existing partners.

***(b)* Compulsory Dissolution:** The firm is compulsory dissolved in the following two circumstances, namely:

(i) If all the partners, or all but one partner, of the firm are declared insolvent, or

(ii) If some event takes place which makes it unlawful for the business of the firm to be carried on.

***(c)* On Happening of certain Contingencies:** According to Section 42, unless otherwise agreed by the partners, the firm may be dissolved on the basis of these four contingencies:

(i) On the expiry of the fixed term for which the firm was constituted.

(ii) On the completion of one or more adventures or undertakings.

(iii) On the death of a partner.

(iv) On the adjudication of a partner as insolvent.

***(d)* By Notice:** The firm may be dissolved by any partner by giving notice in writing to all the other partners where the partnership is at will.

2. Dissolution by an Order of the Court: According to Section 44 of the Partnership Act, the court may order dissolution on receiving a petition from a partner provided it is satisfied in the interest of justice.

The partners may present the petition before the court for obtaining a dissolution order. These grounds are:

(a) Insanity

(b) Permanent incapacity

(c) Misconduct

(d) Persistent breach of agreement

(e) Transfer of interest

(f) Perpetual losses

(g) Any other just and equitable ground.

Q. 6. What is a warranty in a contract of sale? When can a breach of condition be treated as a breach of warranty?

Ans. According to Section 12(3) of the Sale of Goods Act, 1930, a warranty, is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to claim for damages but not to a right to reject the goods and treat the contract as repudiated.'

As per Section 13, there are certain circumstances where condition is descended to the level of a warranty. That's the buyer loses his right to reject the goods, though he can claim damages. This will happen in the following cases:

***(a)* Wavier by Buyer:** In case, where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may:

(i) Waive the condition;

(ii) Elect to treat the breach of condition as a breach of warranty.

The conditions may be express or implied, are for the benefit of the buyer, thus, he may waive the breach of a condition and accept the performance short of it. This makes him liable for the price however, he may only recover the damages if any. After exercising his option, the buyer cannot later compel the seller for its fulfilment.

***(b)* Compulsory treatment of breach of condition as breach of warranty:** In the case, when the contract of sale is not severable and the buyer has accepted the goods or part thereof, the breach of any condition to be fulfilled by the seller can be treated as a breach of warranty.

According to Section 42 of the Act, the buyer is deemed to have accepted the goods:

(i) When he intimates to the seller that he has accepted them, or

(ii) When the goods have been delivered to him:

- *(a)* He does any act in relation to them which is inconsistent with ownership of the seller.
- *(b)* When, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

The buyer may exercise his right to reject the remaining goods in case where the contract is severable and the buyer has accepted part of the goods.