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Difference between Wagering by Agreement and Contract of Insurance

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Agreements and contracts are part and parcel of our life. We cannot think of the corporate and business world without agreements and contracts. Even as a layman we come across several contracts every day that we never realise. Out of these, only valid agreements are enforceable by law and are called contracts but there are some other agreements that are either void ab initio, expressly declared as void by the Indian Contract Act 1872 itself, or made illegal by some other statutes, or are voidable, or are unenforceable, can't be enforced in a court of law. This article tends to analyse the difference between a Wagering by Agreement and a Contract of Insurance, where the former is expressly declared as void by the Act[1] *and the latter is a valid contract. Broadly speaking, the difference between the two lies in their enforceability and their effect on all agreements that are collateral to them.*

Keywords: *contract, wagering agreement, contract of insurance*.

INTRODUCTION

Before proceeding further in this article let's think of two scenarios of a person entering a contract:

[1] Indian Contract Act 1872

Scene 1: A person enters a contract because he is at some risk,

Scene 2: A person enters a contract in expectation of some benefits or reward by taking some risk.

In the first scenario, the person is entering a contract to mitigate his risk while in the second, he is brave enough to take a chance to bear some loss or to get some gain. These two scenarios, where the risk comes into the picture, tell a lot about the difference between a contract of insurance and wagering by agreement. However, the Contract Act, of 1872 nowhere describes the word 'risk' nor distinguishes the term 'contract' and 'agreement' based on 'risk'. Hence, the question arises what is an agreement and what is a contract? Contracts and agreements are related to each other in such a way that sometimes they are understood as the same and are used interchangeably. The rules regarding wagering by agreement are given under section 30 of the Indian Contract Act, of 1872. The Contract Act of 1872 provides a framework for all kinds of contracts found in any legislation. For example, through the contract of insurance is governed by the Insurance Act, of 1938 yet in insurance contracts, the basic rules of a contract laid in the Contract Act have to be followed.

A contract creates a contractual relationship. In a transaction, where both parties enjoy certain rights and both of them are under obligation to perform certain duties there is a contractual relationship. A contract, whether formal or informal, written or oral, or simply understood from the context, creates some legal right on part of both parties. Whenever in a contractual relationship a legal right is created on the part of one party there is an obligation corresponding to that right on part of the other party. To understand wagering by contract and contract of insurance under the light of rights and obligations let's delve a little bit deeper into the article further.

ALL CONTRACTS ARE AGREEMENTS BUT ALL AGREEMENTS ARE NOT CONTRACT

Sec. 2[h] of the Indian Contract Act defines ‘contract’ as "An agreement enforceable by law. It means a contract is the total of the agreement plus enforceability. To create a contract there must be an agreement between the parties. This agreement should be one that if one party breaches

the agreement, there must be some remedies available for the other party in a court of law. Such a legally binding agreement arises when both parties pay some consideration to each other to obtain the promise of the other party to do something or abstain from doing something. The term 'agreement' is defined under section 2(e) of the Act, as: "Every promise and every set of promises, forming the consideration for each other." Enforceability means the other party can bring an action against the defaulter party to the contract. If an agreement is such that no action can be brought against the party at fault, such an agreement can't be enforced. To be enforceable, the agreement must contain all the essential elements of a valid contract as described in Sec. 10 of the Act[2]. If an agreement lacks in any one or two elements as described in the section it becomes either void *ab initio* or voidable, or unenforceable depending on what element it is lacking.

All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void[3]. A contract may be in writing, oral, formal, informal, or impliedly understood from the context of the transaction. However, where a law requires a contract to be made in writing, to be attested by witnesses, and to be registered, such requirements must be met for the contract to be enforceable[4]. To gather a better understanding of agreement and contract, it can be said that, "A contract is an agreement creating and defining obligations between the parties". Only those agreements are contracts that can be enforced in a court of law. Agreements for the breach of which the law provides no remedy are not contracts. Therefore, it is popularly said: **All Contracts are Agreements but All Agreements are Not Contracts.**

Thus, A contract is a legally enforceable agreement with specific legal remedies for breach. These remedies can be compensatory or can be equitable remedies like the specific performance of a contract, injunction, etc. From the ongoing discussion, it is quite clear what an agreement is and what a contract is. Wagering by agreement is expressly declared void by the virtue of section 30

[2] Indian Contract Act 1872
[3] Indian Contract Act 1872, s 10
[4] *Ibid*

of the Act[5] while an insurance contract is a perfectly valid contract and is based on contingent contracts that are given under Sections 31 to 36 of the Act. Both, wagering by agreement and contingent contracts are based on the happening or non-happening of a future uncertain event. Let's proceed to see the distinctive features of wagering by agreement and contract of insurance.

WAGERING BY AGREEMENT

WAGER: Meaning of:

'Wager', literally means 'to bet'. In a game of bet, one party wins and the other is bound to lose. For example, in a game of dice or predicting the winners in a football match. Suppose, 'A' bets with 'B' that if Virat Kohli hits a century in the next match 'A' will pay Rs 10,000 to 'B' but if he does not 'B' will pay Rs 10,000 to 'A'. The wager is a game of chance where no skill is required. In betting both parties equally have the risk to lose or the chance to win. In wagering by agreement, both parties may either win or lose. It never happens at any time that a party only wins but never loses or he only loses but never wins. The winning or losing of a party is a contingency that wholly depends upon a future uncertain event.

The game of betting prima facie seems to be a fair game. Who has not heard the story of the great epic Mahabharata? The game of dice was respected in the Mahabharata period. Mass genocide as a result of the war was considered a great evil. Every effort was made to avert the devastation of the war. Disputes between tribal communities were then settled through gambling and were not considered a social evil then. In *Thacker v Hardy Cotton*[6], L.J, described a wager as, "The essence of gaming and wagering is that one party is to win and the other to lose upon a future event which at the time of the contract is uncertain, that is to say if the event turns out one way A, will lose; but if it turns out the other way he will win."

[5] Indian Contract Act 1872
[6] *Thacker v Hardy Cotton* [1878] 4 QBD 685

ESSENTIAL ELEMENTS OF WAGERING AGREEMENTS

Based on the definition of the wagering agreement given in Carlil v Carbolic Smoke Ball Co.[7] the essential elements of a wagering agreement may be summarised as follows:

Two parties are professing to hold opposite views on the issue of a future uncertain event.

- Both parties mutually agree upon the determination of that event, the loser shall pay to the winner a sum of money or money's worth.
- There is no real consideration in a wagering agreement and the contracting parties have no interest other than the sum of stake he will so win or lose.
- The event must be uncertain and remains uncertain until the outcome of the event. If any of the parties controls the event, it is not a wagering agreement.
- If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering agreement.

Wager under Indian Law:

Indian law has not forbidden wagering agreements. The definition of wagering by agreement is not defined in the Indian Contract Act, however, section 30 only declares the wagering agreement to be void. It says, "Agreements by way of wager are void, and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made." Thus, where A bets with B that if Chennai Superkings wins the IPL trophy, A will pay Rs 1000 to B, and if not B will pay Rs 1000 to A. This is a void agreement. The winning party cannot recover anything made under the agreement. Section 30[8] is in three parts. In its second part, the section makes an exception in favour of certain prizes for horse racing. It says: 'This Section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum

[7] *Carlil v Carbolic Smoke Ball Co* [1892] 2 QB 484
[8] Indian Contract Act 1872

of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race.'

The section further states: "Nothing in this section shall be deemed to legalize any transaction connected with horse-racing, to which the provisions of section 294A of the Indian Penal Code (45 of 1860) apply". Under section 294A of the Indian Penal Code conducting of lottery is a punishable offence. Only government-authorized lottery is permitted. The person running the government-authorized lottery and the buyer of the same will not be guilty of a criminal offence but the lottery remains a wager as the lottery is a game of chance hence lottery business is a wagering transaction.

Exceptions to a wagering transaction:

Besides horse racing[9], share trading and contract of insurance are exceptions to wagering agreements. In share market trading the parties have a genuine intention to do legitimate business. Share market trading requires analyzing skills and calculation of risk. If the parties trade in the share market like gambling then it will be a wagering agreement and therefore void. "To constitute a wagering contract, neither party should intend to perform the contract itself, but only to pay the differences[10]"

Agreements collateral to a void agreement are valid:

Void agreements, being partly illegal and unlawful, are against public policy. A void agreement is considered no agreement at all so it cannot be enforced in a court of law. Agreements collateral to the void agreement is perfectly valid. However, in Bombay, wagering agreements have been declared illegal by the Avoiding Wagers (Amendment Act), 1865. Therefore, in Bombay, a wagering agreement being illegal is void not only between the immediate parties but also all the agreements collateral to it are also void.

[9] Indian Contract Act 1872, s 30
[10] Pollock and Mulla, *Indian Contract Act 1872 (16th* edn., Lexis Nexis 2022*)*

Suppose A bets with B and loses a sum of the amount. Since the wager is void, B cannot bring an action to recover this amount from A anywhere in India. Now, if A applies to C for a loan of that amount to pay to B. Here, C paid the money under or in respect of a wagering transaction. The transaction between A and C is valid as it is collateral to the main 'wagering transaction' between A and B. Thus C can recover his loan amount from A. But in Bombay C cannot recover from A because in Bombay wagering agreement has been made illegal.

In *Gherulal Parekh v Mahadeo Das*[11], the Supreme Court laid down that though a wager is void and unenforceable, the transaction's collateral to the main transaction is valid and can be enforced as it is not unlawful under section 23 of the Contract Act.

CONTRACT OF INSURANCE

Contracts of insurance are legally binding agreements between two competent parties. It has all the essential elements of a valid contract. In insurance contracts, one party is called the insurer (the company) and the other is called the insured (the individual or entity). A contract of insurance is a unilateral contract where only one party i.e., the insurer makes an enforceable promise to pay for the losses of the insured in case of any mishap. In consideration of the insurer's promise, the insured takes the responsibility to pay premiums and report accidents to keep the policy active.

Contracts of insurance, indemnity, and guarantee are contingent contracts. Section 31 of the Indian Contract Act, of 1872 defines a 'contingent contract' as "a contract to do or not to do something, if some event, collateral to such contract, does or does not happen. For instance, A contracts to pay to B Rs 10,000 if B's house is burnt. This is a contingent contract because the performance of the contract can be demanded only when the house is burnt. All insurances like Life insurance, Fire insurance, Health insurance, and Marine insurance are contingent contracts.

Some basic principles of insurance contracts:

[11] *Gherulal Parekh v Mahadeo Das* [1959] AIR 781

1. **Utmost Good Faith:** This principle is based on the Latin maxim Uberrima Fides or Berrima fides. The contract of insurance requires that both parties must deal in good faith, making a full declaration of all material facts in the insurance contract. Any misrepresentation would lead the contract to be void. For instance, A buys health insurance concealing his habit of extreme smoking. Later he develops lung cancer. The insurance company is not liable to pay.

2. **Insurable interest:** It is the insurable interest in something due to which a person or entity takes out an insurance policy because when loss or damage occurs to that very thing would cause the person to suffer a financial or another kind of loss. A person has an insurable interest only in his own house and not in his neighbour's house. Thus, he would take an insurance policy to protect his house from any financial loss arising from damage.

3. **Indemnity:** This principle of insurance is only available in general insurance. According to this principle, the insurer promises to make good on the loss of the insured.

DISTINCTION BETWEEN WAGERING AGREEMENT AND CONTRACT OF INSURANCE

- A contract of insurance is legal and enforceable at law while wagering by agreement has no enforceability at all.
- The contract of insurance is a perfectly valid contract but the wagering agreement is void. Agreements collateral to both is also valid. But where a wagering agreement is made illegal by a statute, the agreement collateral to wager is void.
- In every insurance contract, there is a duty of utmost good faith. No such duty is observed in the wagering agreement.
- The principle of indemnity applies to Marine insurance, Fire insurance, etc. but not to Life insurance and a Wagering Agreement.
- In every insurance contract, there must exist an insurable interest. Parties to the wagering agreement have only interest in the possible winning amount.
- The object of an insurance contract is to provide protection. The object of a wagering agreement is to make some easy money.

CONCLUSION

Insurance contracts are contingent contracts and wager is also similar to contingent contracts. Even wagering agreements are void and regarded as opposed to public policy it is not forbidden. While entering into a contract of insurance or into wagering agreements those are allowed by law like commercial transactions we should abide by the law of the land.