

THE ESSENTIALS OF DRAFTING CONTRACTS

Drafting a contract is a critical process that establishes a legally binding agreement between parties, outlining their rights and obligations. By understanding these essentials, parties can craft contracts that are comprehensive, legally sound, and capable of mitigating risks, ultimately fostering trust and professionalism in their agreements.

The following are the foundational elements necessary for creating clear, enforceable contracts.

UNDERSTANDING THE OBJECTIVE

The objective of the contract refers to the clear and specific goal or purpose that the agreement aims to achieve, outlining the intended actions, deliverables, and responsibilities of each party involved, essentially defining what each party is expected to gain or provide through the contract; it's the core reason why the parties are entering into the agreement.

Why is understanding the objective important when drafting a contract?

- **Structure and focus:** Knowing the objective helps guide the drafting process, ensuring all necessary clauses and details are included to achieve the desired outcome.
- **Risk mitigation:** A clearly defined objective can help identify potential risks and allows for appropriate provisions to be included to manage those risks.
- **Dispute resolution:** In case of disagreements, a clear objective can serve as a reference point for interpretation and resolution.

Key points about the objective of a contract:

Clarity is crucial: The objective should be stated explicitly and unambiguously within the contract to avoid misunderstandings and potential disputes.

Alignment with terms: All terms and conditions within the contract should directly relate back to achieving the stated objective.

Legal enforceability: The objective must be legal and achievable to ensure the contract can be enforced in court if necessary.

Example:

Contract for a service: If a company is hiring a freelancer to design a website, the objective of

the contract would be clearly stated as "**to deliver a fully functional website with specified features and functionalities by a set deadline.**"

KNOWLEDGE OF THE COUNTER-PARTY

Knowledge of the counterparty" in contract drafting refers to having a thorough understanding of the other party involved in the agreement, including their business practices, financial stability, legal structure, and potential risks, which is crucial for drafting a contract that effectively protects your interests and mitigates potential issues.

Key aspects of knowing your counterparty in contract drafting:

Business operations: Understanding the nature of their business, their products or services, market position, and any relevant industry regulations.

Financial health: Assessing their creditworthiness, financial statements, and potential for insolvency.

Legal structure: Identifying the correct legal entity (corporation, partnership, LLC) and understanding its implications for liability.

Past interactions: Reviewing any prior contracts or business dealings with the counterparty to identify potential concerns or areas for negotiation.

Reputation and litigation history: Researching their reputation in the industry and any past legal disputes they may have been involved in.

WHY IS KNOWING YOUR COUNTERPARTY IMPORTANT?

Risk mitigation: By understanding potential risks associated with the counterparty, you can draft contract terms that protect your interests and minimize exposure to liability.

Negotiation leverage: In-depth knowledge of the other party's situation can inform your negotiation strategy and help you achieve favorable terms.

How to gather information about the counterparty:

Due diligence process:

Conducting thorough research through financial databases, credit reports, and legal filings.

Direct inquiries: Asking the counterparty for relevant information and documentation during

contract negotiations.

Legal advice: Consulting with a lawyer to assess the counterparty's legal standing and potential risks.

THE ECO-SYSTEM

When drafting an "ecosystem" in a contract, it's crucial to clearly define the roles, responsibilities, and interactions between all participating parties within the ecosystem, outlining how they will collaborate to achieve shared goals while addressing potential conflicts and ensuring fair treatment for all involved.

Key Elements to Include When Drafting an Ecosystem in a Contract:

1) Participant Identification and Roles/ Relationship between parties

- **Define Parties:** Clearly list all entities involved in the ecosystem, including primary providers, secondary partners, users, and any relevant intermediaries.
- **Role Descriptions:** Specify the unique role each participant plays within the ecosystem, such as "platform operator," "content creator," "service provider," or "consumer."

2) Governance Structure:

- **Decision-Making Process:** Explain how decisions will be made within the ecosystem, including voting rights, majority requirements, and dispute resolution mechanisms.
- **Governing Body:** If applicable, establish a governing body with representatives from key participants to oversee the ecosystem's operation and evolution.

3) Commercial Terms:

Pricing Model: Outline the pricing structure for services within the ecosystem, including fees, commissions, tiered pricing based on usage, and payment terms for each participant.

Revenue Sharing: If applicable, define how revenue generated within the ecosystem will be shared among participating parties.

4) Compliance and Legal Considerations:

Applicable Laws: Clearly state which jurisdictions' laws will govern the ecosystem and the contracts within it.

Regulatory Compliance: Identify any relevant regulations that participants must comply with, such as data privacy laws or industry-specific

5. Industry norms and standards

Know the standard practices and legal requirements of the industry and align with market expectations to avoid potential issues

6. Market dynamics

Have information about the current market conditions, potential future trends that can impact the terms of the contract regarding pricing, delivery timelines, among others.

7. Stakeholder interests

STANDARD TERMS & CONDITIONS

When drafting standard terms and conditions, essential elements include: identifying the parties involved, clearly defining the services or goods provided, outlining payment terms, specifying delivery details, addressing limitations of liability, defining intellectual property rights, outlining dispute resolution mechanisms, and ensuring compliance with relevant laws and jurisdictions.

Every contract should contain essential clauses such as:

- a) Definitions
- b) Obligations & Responsibilities
- c) Payment Terms
- d) Confidentiality
- e) Liabilities & Indemnities

Important Considerations:

Clarity and Conciseness: Use simple language and avoid legal jargon where possible to ensure users understand the terms.

Compliance with Laws: Ensure your terms and conditions adhere to relevant consumer protection laws and data privacy regulations.

Regular Review: Periodically review and update your terms and conditions to reflect changes in business practices and legal landscape.

Accessibility: Make your terms and conditions easily accessible to users on your website

TENDER/BID DOCUMENTS

When drafting contracts, "tender documents" are used, as they encompass the full set of information including specifications, terms, and conditions that potential bidders need to respond to, essentially forming the basis for the final contract, while "bid documents" are typically a part of the tender and represent the specific proposal submitted by a bidder based on the outlined requirements in the tender document.

For agreements resulting from a tender or bid process, ensure that the contract aligns with the original bid terms. Include all relevant commitments and obligations.

Key points to remember:

Tender documents: More comprehensive, outlining the full scope of the project, evaluation criteria, and contract terms, essentially acting as the "invitation to bid."

Bid documents: A specific response from a potential contractor to a tender, including their proposed pricing and approach to fulfilling the project requirements.

INFLUENCE OF RELATIVE BARGAINING POWER

Relative bargaining power significantly impacts the terms of a contract, with the party holding greater leverage generally securing more favorable conditions, including price, liability allocation, and other key provisions, essentially shaping the contract to better suit their interests during the drafting process.

Stronger parties may dictate terms. Consider negotiation leverage when drafting, especially for payment, termination, and dispute resolution clauses.

Factors contributing to relative bargaining power:

- **Market Conditions:** A party with a unique product or service in high demand may have greater bargaining power.
- **Financial Strength:** A financially stable party can often negotiate more favorable terms
- **Legal Expertise:** Access to skilled legal counsel can significantly enhance a party's negotiating position.
- **Urgency or Need:** If one party has a more pressing need to complete the contract, their bargaining power may be reduced.

DRAFTING THE VARIOUS CLAUSES

Clauses are specific provisions or sections within a contract that address particular aspects of the agreement. They provide detailed rules and stipulations that govern the relationship between the parties. Each clause should be clear, enforceable, and unambiguous.

Common types of clauses include:

- **Payment Clause:** Specifies the amount to be paid, payment schedule, and payment method.
- **Confidentiality Clause:** Ensures that sensitive information shared between the parties remains confidential.
- **Termination Clause:** Outlines the conditions under which the contract can be terminated by either party.
- **Dispute Resolution Clause:** Specifies how disputes will be resolved, such as through mediation, arbitration, or litigation.
- **Force Majeure Clause:** Addresses what happens if unforeseen events (e.g., natural disasters, war) prevent parties from fulfilling their obligations.
- **Governing Law Clause:** States which jurisdiction's laws will govern the contract.
- **Indemnity Clause:** Details the compensation one party will provide to the other in case of losses or damages.

BINDING & NON-BINDING AGREEMENTS

A binding agreement is a legally enforceable contract where both parties are obligated to fulfill the terms outlined; meaning if one party breaches the agreement, the other can take legal action

While

A non-binding agreement is a statement of intent that does not create legal obligations, often used in early negotiation stages and not enforceable in court, like a Letter of Intent (LOI).

Key points about binding agreements:

- **Legally enforceable:** If a party fails to uphold their part of the agreement, the other party can sue for damages.

- **Clear terms:** Contains specific details about the obligations of each party.
- **Intention to be bound:** Both parties must demonstrate a clear intention to be legally bound by the agreement.

Key points about non-binding agreements:

- **No legal obligation:** Neither party is legally obligated to follow the terms outlined.
- **Preliminary discussions:** Often used to explore potential deals or express initial interest before finalizing a contract.
- **Explicit language:** Usually includes language stating that the agreement is "subject to contract" or "non-binding".

Examples of non-binding agreements

- **Memorandum of Understanding (MOU):** A document outlining key points of agreement but not legally binding.
- **Letter of Intent (LOI):** A preliminary document indicating interest in a potential deal

WARM-UP SESSION WITH SIMPLE DOCUMENTS

Before finalizing complex contracts, review simpler contracts to understand standard clauses, formatting, and common risks.

THE DIFFERENCE BETWEEN AN UNINCORPORATED AND INCORPORATED JV.

An "**unincorporated joint venture (JV)**" is a business arrangement where two or more parties collaborate on a project without creating a separate legal entity, essentially operating under a contract, **while**

An "**incorporated joint venture**" involves establishing a new company to conduct the joint venture activities, meaning there is a distinct legal entity separate from the individual partners involved; in an unincorporated JV, each partner has unlimited liability, whereas in an

incorporated JV, liability is typically limited to the individual's investment in the company.

Key differences:

- **Legal Structure:** Unincorporated JV operates solely under a contract between partners, while an incorporated JV is a separate legal entity registered as a company.
- **Liability:** In an unincorporated JV, each partner has unlimited liability for the joint venture's debts and actions, whereas in an incorporated JV, liability is limited to the individual's shares in the company.
- **Management:** An unincorporated JV is typically managed directly by the partners through their agreement, while an incorporated JV has a board of directors managing the company.
- **Public Visibility:** An incorporated JV is usually more visible to the public as it needs to file corporate documents, while an unincorporated JV has less public scrutiny.

When to choose which type:

- **Unincorporated JV:** May be suitable for smaller, short-term projects where partners have high trust and want a simple setup with minimal administrative overhead.
- **Incorporated JV:** Preferred for larger, complex projects where partners want limited liability protection, easier access to financing, and a more structured management framework.

UNDERSTANDING THE MEANING & PURPOSE OF CONSORTIUMS.

A consortium is a group made up of two or more individuals, companies, or governments that work together to achieving a common objective. A consortium is a temporary collaboration between parties to undertake a project. Entities that participate in a consortium pool resources but are otherwise only responsible for the obligations that are set out in the consortium's agreement

Consortium structure

Consortiums can be formal or informal, and may have their own officers, infrastructure, and funding

Purpose of Consortiums

The purpose of a consortium is to combine resources and expertise to achieve a common goal. Consortiums can be formed by companies, organizations, governments, or individuals.

Consortium purposes:

- **Create products or services:** Consortiums can work together to design, manufacture, and market products
- **Conduct research and development:** Consortiums can share resources to conduct research and **development**
- **Improve competitiveness:** Consortiums can help members improve their competitiveness in a specific field
- **Share knowledge:** Consortiums can share knowledge and expertise among members
- **Implement funds:** Consortiums can combine strengths to implement funds effectively
- **Advocate for needs:** Consortiums can advocate for the needs of members

DUE DILIGENCE

Due diligence refers to the thorough investigation and analysis a party undertakes before signing a contract, ensuring they fully understand the terms, potential risks such as the financial health of the counterparty, past legal disputes, regulatory compliance, contractual obligations in prior agreements., and legal implications involved, by carefully reviewing all relevant documents and information about the other party to identify potential issues before committing to the agreement.

Key aspects of due diligence in contract drafting:

Understanding the counterparty: Investigating the other party's financial stability, business history, legal compliance, and reputation to assess their ability to fulfill contractual obligations.

Reviewing all contract terms: Carefully examining each clause in the contract, including key aspects like; pricing, delivery timelines, payment terms, warranties, liabilities, termination clauses, and dispute resolution mechanisms.

Identifying potential risks: Analyzing potential legal, financial, and operational risks associated

with the contract and considering mitigation strategies.

Benefits of thorough due diligence in contract drafting:

Reduced risk: Helps identify and mitigate potential legal and financial risks before entering into a binding contract.

Informed decision-making: Provides a comprehensive understanding of the contract terms, allowing for a well-informed decision about whether to proceed.

Improved contract enforceability: Minimizes the likelihood of disputes arising from unclear or ambiguous language.

When to conduct due diligence:

- Before signing any significant contract
- When entering into a new business relationship
- When considering a large or complex transaction

RISK

- Identify Risks: Recognize potential risks and include clauses to mitigate them.
- Indemnity and Liability: Address liability issues and include indemnity clauses to protect against losses

Identify, allocate, and mitigate risks related to:

- ✓ Performance failure.
- ✓ Force majeure events.
- ✓ Third-party liabilities.
- ✓ Compliance with laws.

RECITALS

In contract drafting, a "recital" is a statement at the beginning of a contract that provides background information, context, and the purpose of the agreement between the parties involved, essentially explaining why the contract is being created and the circumstances leading up to it; it acts as an introductory summary without containing any enforceable obligations.

Key points about recitals:

Function: They set the stage for the contract by outlining relevant facts and intentions of the

parties.

Placement: Recitals are usually located at the very beginning of a contract, following the preamble which identifies the parties involved.

Example:

"WHEREAS, Party A is interested in purchasing real property owned by Party B, and WHEREAS, Party B is willing to sell said property, NOW, THEREFORE, the parties agree as follows..."

FORMATION OF A JVC

What is a Joint Venture (JV)? A joint venture (JV) is a commercial enterprise in which two or more organizations combine their resources to gain a tactical and strategic edge in the market. Companies often enter into a joint venture to pursue specific projects

Purpose:

Joint ventures allow companies to collaborate on specific projects or enter new markets by pooling resources, expertise, and capital.

Legal Structures:

Joint ventures can be established through various legal structures, such as a Limited Liability Company (LLC), Limited Liability Partnership (LLP), a Partnership (or limited partnership), or a purely contractual cooperation agreement.

Features of Joint Venture Agreement

Duration: This venture is formed for a short duration and so, it is termed as a temporary partnership.

Parties: The parties or the individuals who join to form this venture are called the co-venturers.

Funds: The funds used for each business are brought to the joint venture account.

Formation of a JVC

A joint venture contract outlines the terms and conditions for two or more parties to collaborate on a specific project or business venture, sharing risks, resources, and profits, without forming a new legal entity.

Here's a more detailed breakdown of the formation of a joint venture in contract

1. **Defining the Objective:** The contract must clearly state the business goal or purpose of the joint venture, including the specific project or activity.

This includes defining the scope, target market, and expected outcomes.

2. **Identifying the Parties:** The contract must clearly identify all entities involved in the joint venture, including their names, addresses, and legal status.

This ensures clarity on who is responsible and liable for what.

3. **Determining Contributions:** The contract must specify what each partner will contribute to the venture, whether it's capital, property, expertise, technology, or services.

This includes defining the value of each contribution and how it will be used.

4. **Establishing Management Structure:** The contract must outline how decisions will be made and who will be responsible for managing the venture.

This can include establishing a joint management committee, assigning roles, and defining decision-making processes.

5. **Profit Sharing and Loss Allocation:** The contract must set terms for how profits and losses will be divided among the partners. This may involve a percentage-based allocation or other agreed-upon method.

6. **Dispute Resolution:** The contract should include a plan for resolving any disputes that may arise during the venture. This can include outlining mediation, arbitration, or other dispute resolution mechanisms.

7. **Terms and Termination:** The contract should outline the duration of the joint venture that is the start and end date of the venture and the process for dissolution or exit from the joint venture, including how assets will be distributed and liabilities settled. This ensures a smooth and orderly end to the venture.

8. **Operational aspect:** The contract should include the responsibilities of each party and reporting requirements such as regular reporting procedures for financial and operational updates.

CORPORATE GOVERNANCE – BOARD AND MANAGEMENT

Corporate governance refers to a set of processes, policies and laws affecting the way a company is administered or controlled.

Drafting a Corporate Governance Agreement

Corporate governance agreements are essential documents that outline the roles, responsibilities, and expectations of directors, officers, and other stakeholders within a company.

These agreements help ensure transparency, accountability, and fairness in decision-making processes.

A comprehensive corporate governance agreement should include the following key components

- **Introduction:** This section introduces the purpose and scope of the agreement.
- **Roles and Responsibilities:** It clearly defines the roles and responsibilities of directors, officers, employees, and other stakeholders.
- **Meetings and Quorum:** It outlines how meetings will be conducted, including quorum requirements for decision-making.
- **Conflict Resolution Mechanisms:** It provides procedures for resolving conflicts between different stakeholders.
- **Financial Reporting:** It specifies requirements for financial reporting including frequency and format.
- **Compliance with Laws and Regulations:** It ensures that all activities comply with relevant laws and regulations

To ensure that your corporate governance agreement is effective:

Use Clear Language: Avoid using jargon or overly complex terminology.

Be Specific: Clearly define roles, responsibilities, and expectations.

Include Provisions for Amendments: Specify how amendments can be made.

Provide Training Programs: Offer training programs for directors and officers on their roles under this agreement.

DEAD LOCK RESOLUTION.

In drafting contracts, a deadlock resolution clause, is a contractual clause or series of clauses in a shareholders' agreement or other form of joint venture agreement which determines how disagreements on key issues are to be resolved in relation to the management of the enterprise.

What is a Deadlock?

A deadlock occurs when parties, often with equal power, cannot agree on crucial decisions, leading to a stalemate. This is common in closely-held companies or 50/50 ownership structures.

Examples include failing to reach unanimity on matters requiring special resolutions after multiple attempts or failing to achieve a quorum.

Why are Deadlock Resolution Clauses Important?

- They prevent disputes from paralyzing the business and ensure a mechanism for resolving disagreements.
- They provide a framework for how the company will be managed when disagreements arise.

Define mechanisms to resolve disputes in case of a decision-making deadlock, such as:

- ✓ Mediation
- ✓ Arbitration
- ✓ Buy-out provisions, this is a clause within a contract that allows one party to purchase ownership interest or stock of another party under conditions such as termination, death and disability.
- ✓ Casting vote mechanisms

GOLDEN SHARE

In contract drafting, a **"golden share"** refers to a special share class that grants its holder significant control over the company, such as veto power over certain decisions or the right to appoint directors, often used to retain influence after privatization or investment.

Definition:

A golden share is a share that gives the holder the right to control the composition of the board of

directors of the company that created the golden share.

Purpose:

It's designed to allow a specific party (e.g., the government after privatization, a strategic investor) to retain a degree of control over a company's operations, even if they don't own a majority stake.

Rights:

The rights attached to a golden share can vary, but typically include the power to:

- Appoint or veto the appointment of directors.
- Veto certain decisions, such as mergers, acquisitions, or changes to the company's articles of association.
- Have a more direct say over content issues.

VETO RIGHTS

In contract drafting, **veto rights** empower a party to block specific actions or decisions unless they consent, often used to protect minority shareholders or ensure certain conditions are met.

Purpose:

Veto rights are crucial for protecting the interests of parties who might otherwise be at a disadvantage, such as minority shareholders in a company or a party with a specific concern about a potential outcome.

Examples

Shareholder Agreements: Veto rights can be included in shareholder agreements to prevent the majority shareholders from making decisions that could harm the interests of minority shareholders, such as issuing new shares without their consent or making significant capital expenditures without their approval.

Other Contracts: Veto rights can be used in other types of contracts to protect the interests of one party, such as a lender who wants to ensure that the borrower does not take actions that could jeopardize the loan.

How veto rights work,

- ✓ Shareholders can use their veto rights to block a majority decision

- ✓ To impose their own criteria on the rest of the shareholders
- ✓ To vote in favor of certain decisions or abstain from.

TRANSFER RESTRICTIONS

When drafting contracts, **transfer restrictions**, which limit the ability to transfer ownership or rights, are common and can involve clauses like pre-emption rights, approval requirements, or periods of inalienability, ensuring the interests of parties are protected.

Here's a more detailed explanation of transfer restrictions in contract drafting:

Types of Transfer Restrictions:

Pre-emptive Rights: These clauses require a party intending to transfer their interest (e.g., shares in a company) to first offer it to other designated parties (often other shareholders) before offering it to outsiders.

Board Approval requirement: These require the transfer of ownership or rights to be approved by specific parties (e.g., other shareholders, a board of directors) before it can be completed.

Lock in period/Inalienability/Non-Transferability: These clauses prevent the transfer of ownership or rights during a specified period or under certain conditions.

The duration varies depending on the company needs and agreement between parties.

DISPUTE RESOLUTION

When drafting contracts, including a clear and comprehensive dispute resolution clause is crucial for efficient and amicable conflict resolution. These clauses should outline the process for resolving disputes, including negotiation, mediation, arbitration, or litigation, and ensure fair and timely resolutions

There are various ways of resolving commercial disputes and these include;

Negotiation

Negotiation is a process that occurs when parties are trying to find a mutually acceptable solution to a complex conflict. This is the most common form of dispute resolution where the parties themselves attempt to resolve the dispute.

Negotiation is by far the most common form of dispute resolution. The objective of sensible dispute management should be to negotiate a settlement as soon as possible. Negotiation can be, and usually is, the most efficient form of dispute resolution in terms of management time, costs and preservation of relationships. It should be seen as the preferred route in most disputes.

Its advantages are:

- Speed
- Cost saving

Confidentiality

- Preservation of relationships
- Range of possible solutions
- Control of process and outcome

If you are unable to achieve a settlement through negotiation, you will need to consider what other method or methods of dispute resolution would be suitable. But remember it will still be possible or may be necessary to continue negotiating as part of or alongside other forms of dispute resolution.

Mediation

Mediation – a private and structured form of negotiation assisted by a third party that is initially non-binding. If settlement is reached, it can become a legally binding contract.

Mediation is negotiation with the assistance of a neutral third party. It is often referred to as ‘structured negotiation’. It has all the advantages of conventional negotiation as set out above but the involvement of the neutral party can make the negotiation more effective. It should be seen as the preferred dispute resolution route in most disputes where conventional negotiation has failed or is making slow progress. Mediation is now being used extensively for commercial cases (including cases involving government departments), and frequently for multi-party and high value disputes. Over 75% of commercial mediation result in a settlement either at the time of the mediation or within a short time thereafter.

Arbitration

Arbitration is another alternative method to raising court proceedings or litigation. It is quite usual in commercial contracts for the parties to agree to submit disputes arising out of the contract to an arbitrator. It is a process for resolving disputes in which both sides agree to be bound by the decision of a third party, the arbitrator. The arbitrator may be a lawyer but not necessarily so. The arbitrator is usually someone with specialist knowledge of the subject matter of the contract for example, a surveyor in a construction dispute.

Arbitration proceedings are different from court proceedings in two ways;

- Arbitration proceedings are held in private.

- The arbitrator will have special experience of the particular business of trade.

Like litigation and adjudication, arbitration is an adversarial process. The grounds for appeal are limited.

Its advantages are:

- Some control of process – parties/arbitrator can tailor procedures
- Possible cost saving over litigation
- Confidentiality
- Parties can choose an arbitrator who is an expert in the relevant field
- Resolution is guaranteed
- Decisions are legally binding and enforceable

Litigation

If the use of a consensual process is not provided for in the contract and cannot otherwise be agreed, the only alternative is litigation. Litigation will involve preparation for trial before a judge, and may well be a lengthy, drawn-out and costly process. Parties often agree a settlement before the case comes to court, but in some cases not before months or even years of effort have been spent on expensive preparatory work.

Its advantages are:

- Possible to bring an unwilling party into the procedure
- Solution will be enforceable without further agreement

Its disadvantages are:

- It is expensive and slow
- It can give advantage to a wealthier party
- It is not suited to disputes involving technical issues
- It is adversarial
- It can destroy harmony between the parties, personal and business relationships while the case is in progress and afterwards.
- Outcome is in the hands of a third party, the judge

How it works;

- ✓ Parties agree to use arbitration
- ✓ Parties present their case to arbitration
- ✓ The arbitrator listens to arguments from both sides
- ✓ The arbitrator makes a decision based on evidence
- ✓ The arbitrator issues an arbitration award.

Remember, the court can now refer parties to mediation or another form of alternative dispute resolution, if appropriate.

Adjudication

Adjudication is the legal process by which an arbiter or judge reviews evidence and argumentation including legal reasoning set forth by opposing parties or litigants to come to a decision which determines rights and obligations between the parties involved.

It is the legal process of resolving a dispute. The formal giving or pronouncing of a judgment or decree in a court proceeding; also the judgment or decision given. The entry of a decree by a court in respect to the parties in a case. It implies a hearing by a court, after notice, of legal evidence on the factual issue(s) involved. It indicates that the claims of all the parties thereto have been considered and set at rest.

Three types of disputes are resolved through adjudication: disputes between private parties, such as individuals or corporations; disputes between private parties and public officials; and disputes between public officials or public bodies. The requirements of full adjudication include notice to all interested parties (all parties with a legal interest in, or legal right affected by, the dispute) and an opportunity for all parties to present evidence and arguments.

Expert determination

An expert determination is a confidential and binding process with the procedure dictated by the terms of the contract incorporating the expert's terms of reference. It can offer an effective way of settling a technical issue of dispute. It is impartial as the expert must act fairly and give each party a reasonable opportunity to be heard and respond to each other. The expert is an independent person with expertise relevant to the dispute. It is also a flexible procedure as the expert can adopt procedures suitable to the particular circumstances of the dispute. This process is appropriate when a fast solution is needed as it is often the quickest and most inexpensive way of resolving disputes especially where the facts are agreed.

International arbitration

International arbitration is the method used for resolving disputes between parties to international commercial agreements. International companies insert an arbitration clause into their agreements with trading partners, opting to have disputes arising out of contracts decided by private tribunals rather than by litigation in the national courts. The reasons for opting for arbitration;

- The arbitration award is easier to enforce internationally.
- Neither party is willing to have the dispute decided by the other party's national courts.
- The parties are eager to have their dispute resolved privately.

Indemnity clause

A provision in a contract under which one party (or both parties) commit to compensate the other (or each other) for any harm, liability of loss arising out of the contract. The formula to compute the compensation is usually included in the contract.

Key Elements of a Dispute Resolution Clause

Clear Definitions: Define what constitutes a "dispute" and the scope of the clause.

Process and Procedure: Outline the specific steps parties must follow to resolve a dispute, including timelines and required documentation.

Choice of Forum: Specify the jurisdiction or court where disputes will be resolved, especially important in international contracts: If arbitration or mediation is chosen, include provisions for selecting the arbitrator or mediator and their qualifications.

Governing Law: Specify the governing law for the contract and any disputes arising from it.

Enforcement: Outline how any agreement reached through the dispute resolution process will be enforced, typically through courts or tribunals.

Survival of the Clause: Determine whether the dispute resolution clause and any agreement reached will remain in effect after the contract is terminated.

Ongoing Performance: Address whether contract obligations must continue during the dispute resolution process.

Consequences of Non-Compliance: Specify what happens if parties fail to follow the dispute resolution process.

BOILER PLATE CLAUSES

Boilerplate clauses are standardized, pre-written clauses that address common legal issues found in many contracts. They are often located towards the end of a contract, and while not as commercially sensitive as other terms, they are crucial for clarifying the relationship between parties and ensuring a legally sound agreement.

Purpose

These clauses provide a framework for addressing potential issues and defining the relationship between parties in a contract, such as termination, indemnification, limitation of liability, warranties, disclaimers, and dispute resolution.

Examples of Boilerplate Clauses:

Assignment Clause: This clause specifies whether and under what conditions a party can transfer their rights and obligations under the contract to another party.

Survival Clause: This clause clarifies which terms of the contract will remain in effect even after the contract's termination or expiration.

Indemnification Clause: This clause protects one party from liability for certain losses or damages caused by the other party.

Limitation of Liability Clause: This clause restricts the amount of damages a party can recover in case of a breach of contract.

Dispute Resolution Clause: This clause outlines how disputes arising under the contract will be resolved, such as through arbitration or mediation.

Force Majeure Clause: This clause addresses events beyond the control of the parties that may prevent them from performing their obligations under the contract.

Notice Requirements: This clause specifies how and to whom notices related to the contract must be sent.

Importance

Boilerplate clauses are important because they provide a framework for addressing potential issues and defining the relationship between parties in a contract, which can help to avoid disputes and ensure a legally sound agreement.

SCHEDULES & ANNEXURES

Schedules and annexures are crucial in contract drafting, serving as attachments that provide detailed information or specific terms that are too lengthy or complex to include directly in the main contract document, ensuring clarity and organization.

This involves attaching supporting documents such as:

- Technical specifications
- Payment schedules
- Project timelines
- List of authorized representatives

Purpose: Schedules and annexures allow for a more organized and readable contract by separating detailed information or specific clauses from the main body of the agreement.

Incorporation: It is important to explicitly state that the schedules and annexures are considered an integral part of the contract and have the same legal effect as if they were written directly into the main agreement.

Examples

Schedules: Can contain detailed pricing structures, project scope, payment terms, or specific deliverables.

Annexures: Can include legal documents, technical specifications, or other relevant information that needs to be referenced in the contract.

TERMINATION

Contract termination is the process of ending a contract before the obligations within it have been fulfilled by all parties.

When drafting termination clauses in contracts, ensure clarity and specificity regarding the reasons for termination, the process for delivering notice, and any associated obligations or consequences, such as severance pay.

During termination its important to define the Conditions for termination (breach, insolvency, force majeure), notice period and process, consequences including compensation or penalties.

Termination or discharge of contract

There are many ways in which a contract can be discharged, including by performance (this includes specific performance, substantial, part and staged contracts) agreement, frustration and where there is a breach. Discharge of a contract in general means that parties are freed from their mutual obligations. A contract can be discharged in four ways;

Performance

This is the most obvious way in which a contract comes to an end. This is when the contracting parties complete their obligations that is, what they undertook to do under the contract. For the contract to be discharged or terminated, the performance must be complete and unconditional.

Agreement

A contract can be terminated by agreement between the two contracting parties.

Frustration

This occurs where a contract, which was feasible to perform when it was made, becomes impossible to perform due to changes in circumstances beyond the control of the contracting parties. This may arise in case of changes in laws, outbreak of wars, destruction of subject matter, interference from government, unexpected delays.

Breach of contract

This is where one party fails to fulfill or intimates that they do not intend to fulfill their obligations under the contract.

Breach of contract and its remedies

A breach of contract, no matter what form it may take, always entitles the innocent party to maintain an action for damages. The normal remedy for breach of contract is damages and in certain circumstances the courts will order specific performance.

Damages

The major remedy available at common law for breach of contract is an award of damages. This is a monetary sum fixed by the court to compensate the injured party.

In order to recover substantial damages the innocent party must show that he has suffered actual loss; if there is no actual loss he will only be entitled to nominal damages in recognition of the fact that he has a valid cause of action.

Damages may be liquidated or unliquidated

Liquidated damages is where the parties insert a clause into the contract which states an agreed sum which is payable in the event of a breach of contract. Whereas

Unliquidated damages is where there is no agreed figure for damages payable in the event of a breach.

Specific performance

An extraordinary equitable remedy that compels a party to execute a contract according to the precise terms agreed upon or to execute it substantially so that, under the circumstances, justice will be done between the parties.

Specific performance grants the plaintiff what he actually bargained for in the contract rather than damages (pecuniary compensation for loss or injury incurred through the unlawful conduct of another) for not receiving it; thus specific performance is an equitable rather than legal remedy. By compelling the parties to perform exactly what they had agreed to perform, more complete and perfect justice is achieved than by awarding damages for a breach of contract.

The court will order specific performance where;

- Damages are an inadequate remedy.
- The party seeking this remedy must not have brought the problem on themselves.
- Supervision of the order must be possible

Injunctions

An injunction is a court order requiring an individual to do or omit doing a specific action. It is an extraordinary remedy that courts utilize in special cases where preservation of the status quo or taking some specific action is required in order to prevent possible injustice.

These are granted to prevent a breach that is anticipated or to prevent a person acting on breach.

An injunction is an order of the court requiring a person to perform a negative obligation.

For example, a landlord might bring an action against a tenant for waste, in which the right to protect the land-lord's interest in the ownership of the premises is at issue. The landlord might apply to the court for an injunction against the tenant's continuing harmful use of the property.

The injunction is an ancillary remedy in the action against the tenant.

Injunctions fall into two broad categories:

- Prohibitory injunction, which is an order that something, must not be done.
- Mandatory injunction, which is an order that something must be done, for example to pull down a wall which has been erected in breach of contract.

Key elements to consider

1. Reasons for Termination:

Specify grounds: Clearly outline the circumstances under which a party can terminate the contract, such as breach of contract, failure to meet performance standards, or for convenience.

Be precise: Avoid vague language. For example, instead of "material breach," specify what constitutes a material breach.

Consider different scenarios: Outline termination procedures for various situations, including those where the termination is the fault of one party or due to unforeseen circumstances.

2. Notice Requirements:

Specify notice period: Define the timeframe within which a party must provide notice of termination.

Method of delivery: Indicate how notice should be delivered (e.g., written notice, email, certified mail).

Timing: Specify when the termination becomes effective after notice is given.

3. Obligations Upon Termination:

Severance Pay: If applicable, detail the terms of any severance pay or other compensation due to the terminated party.

Return of Property: Outline any property or materials that must be returned to the other party upon termination.

Non-Compete/Confidentiality: Address any non-compete clauses or confidentiality obligations that may continue after termination.

Outstanding Obligations: Clarify how outstanding obligations or debts are to be handled after termination.

Understanding ROFR/ROFO/DRAG/TAG/PUT/CALL (research)

1. **ROFR** (Right of First Refusal): Existing shareholders get priority in purchasing shares before external parties.

2. **ROFO** (Right of First Offer): The seller must first offer shares to existing shareholders before seeking external buyers.

3. **Drag-Along Rights:** Majority shareholders can force minority shareholders to sell in an exit.

4. **Tag-Along Rights:** Minority shareholders can sell their shares alongside majority

shareholders in an exit.

5. **Put Option:** Allows a shareholder to sell their stake at a pre-determined price.

6. **Call Option:** Gives a shareholder the right to buy another shareholder's stake.