1.4
Remedies for Enforcement, Breach & Performance of Contracts

Session 1

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Topics for 1st Session

1. Introduction to Commercial Law
   - Commercial vs Non-Commercial Contracts?
   - Understanding a Complex Project Cycle – Case Study
2. What is Equity?
3. Economic Analysis of Contract Law
4. Remedies at a Glance
5. Injunctions
   - Meaning and Types of Injunctions
   - Principles governing Interlocutory Injunctions
   - Factors for grant of Injunctions
   - Injunctions and Special Statutes
   - Freezing Injunctions
   - Injunctions against invoking Bank Guarantees

1 Introduction to Commercial Law

Are there categories of Contracts?

Commercial Contracts

Non Commercial ?

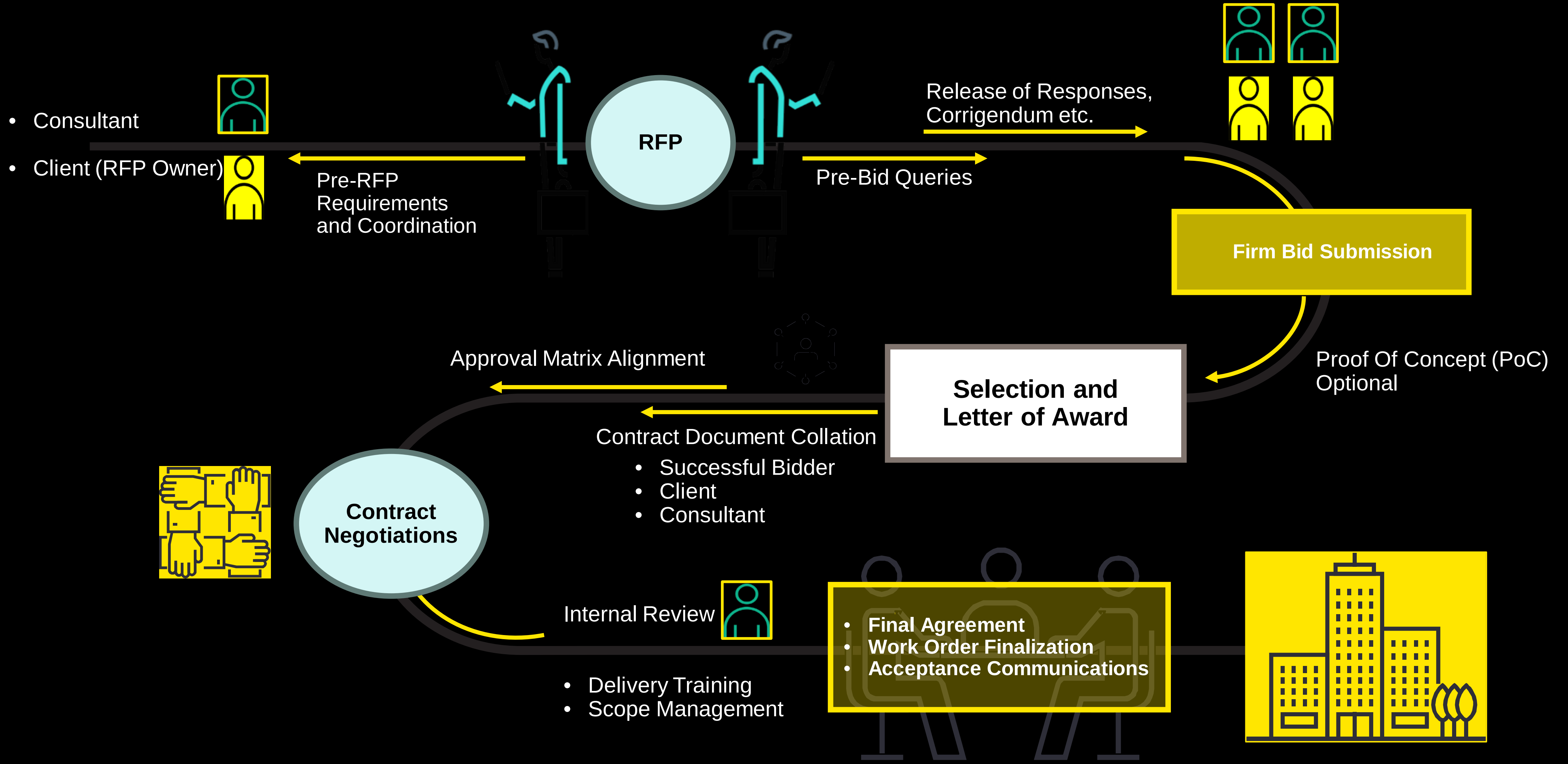
1. **Employment Contracts?**
2. **Non Disclosure Agreements?**
3. **Bank Guarantees?**
4. **Contract of Indemnity (Stand Alone)?**

Commercial Courts Act 2015

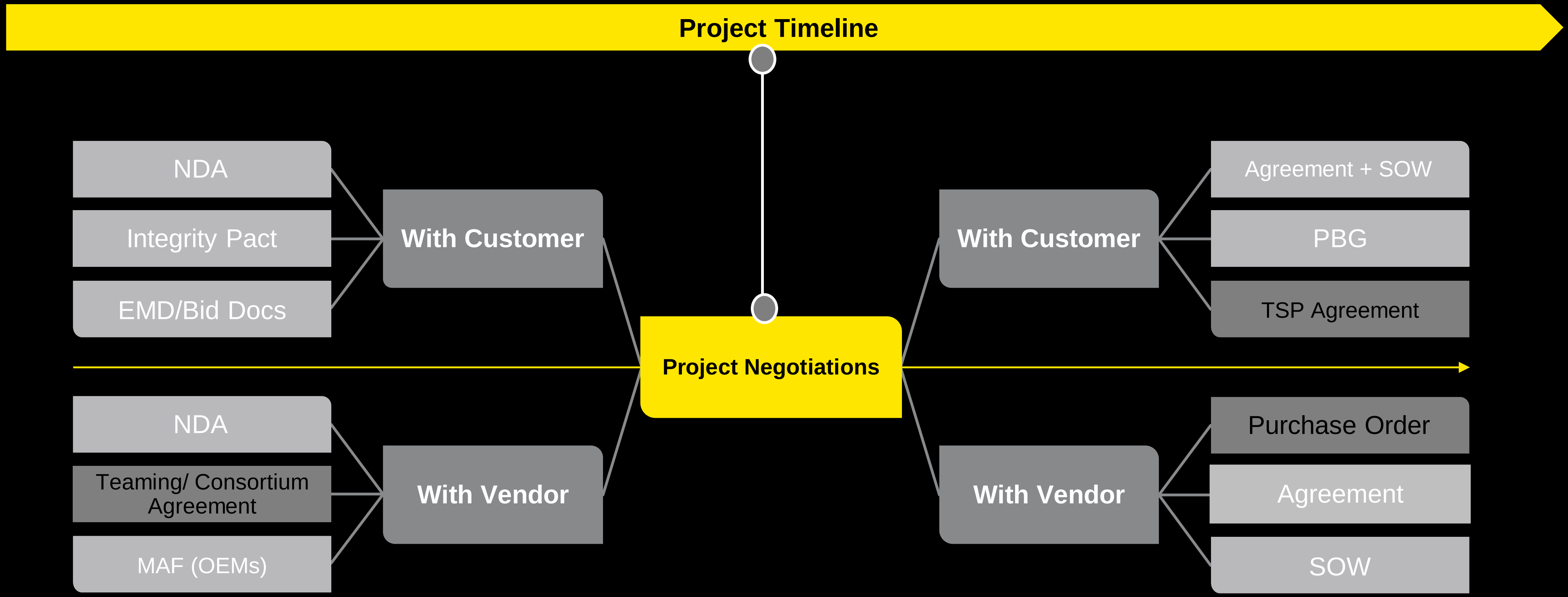
Section 2(c)

i. ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents;
ii. export or import of merchandise or services;
iii. issues relating to admiralty and maritime law;
iv. transactions relating to aircraft, aircraft engines, aircraft equipment and helicopters, including sales, leasing and financing of the same;
v. carriage of goods;
vi. construction and infrastructure contracts, including tenders;
vii. agreements relating to immovable property used exclusively in trade or commerce;
viii. franchising agreements;
ix. distribution and licensing agreements;
x. management and consultancy agreements;
xi. joint venture agreements;
xii. shareholders agreements;
xiii. subscription and investment agreements pertaining to the services industry including outsourcing services and financial services;
xiv. mercantile agency and mercantile usage;
xv. partnership agreements;
xvi. technology development agreements;
xvii. intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits;
xviii. agreements for sale of goods or provision of services;
xix. exploitation of oil and gas reserves or other natural resources including electromagnetic spectrum;
xx. insurance and re-insurance;
xxi. contracts of agency relating to any of the above; and
xxii. such other commercial disputes as may be notified by the Central Government.

Case Study – Public Sector Tendering Process in India



Web of Agreements involved in a Project



Documents during Contract Lifecycle

Amendments

- Change Orders
- Clause Variations
- Extension/Renewal
- Assignment/Novation/ Adoption

Operational

- Suspension/ Termination
- Settlement
- Exit Management and Step In Rights
- Operational Communications

2 What is Equity?

What is Equity?

Equity = Fairness

- ❖ The body of principles constituting what is fair and right.
- ❖ The principles of justice used to correct or supplement the law as applied to particular circumstances.

Maxims of Equity

- Equity will not suffer a wrong to be without a remedy
- Equity follows the law
- He who seeks equity must do equity
- He who comes to equity must come with clean hands
- Delay defeats equity
- Equality is Equity
- Equity looks to intent rather than the form
- Equity look on that as done which ought to have been done
- Equity imputes an intention to fulfil an obligation
- Equity acts in personam
- Where the equities are equal, the first in time prevails
- Where the equities are equal, the law prevails

Never an exhaustive list

Equity (Continued)

Preamble of Indian Contract Act

Whereas it is expedient to define and amend certain parts of law relating to Contracts.

Eg. Termination of Contract v. Discharge of obligations under the contract

Common Forms of Equitable Reliefs:

- Injunctions
- Anton Piller Orders
- Specific Performance
- Rescission

3 Economic Analysis of Contract Law

Economic Analysis

Penalizing Breach and Rewarding Performance

- *Confidentiality Breach with a liability cap*
    - Equitable relief
    - Protection of law
- *Intentionally backing off after signing an Agreement to Sell*
    - Contractually defined consequence
    - Equitable relief
- *External Factors resulting in economic hardship*
    - Equitable remedy
    - Contractual Requirement

Economics of decision to Terminate a Contract on account of breach

4 Remedies at a Glance

Learning Check

Illustrations:

- *Supply of 100 Servers (Electronic Goods)*
    - Possible Breaches?
    - Preferred Remedies?
- *Online Masters Course from University for benefit of employees*
    - Possible Breaches?
    - Preferred Remedies?
- *External Factors resulting in economic hardship*
    - Equitable remedy
    - Contractual Requirement

5 INJUNCTIONS

Introduction

A Court Order that compels a Party to act or refrain in relation to a specified conduct.

- *Means to protect legal rights of a Party where award of damages is not adequate.*
  - Discretion of Court
  - Threat or attempt to commit
  - Unjust and inequitable act injurious to plaintiff
  - Cannot be adequately redressed by an action at law (need for equitable relief)
- *Approach with Clean Hands*
  - No suppression of facts or attempt to mislead the Court
  - Case Study – Permanent Injunction against Termination of Employment
- *Remedy against Private v. State*
  - Higher threshold to demonstrate irreparable harm
  - Balance against benefit of larger public

Grant and Refusal of Injunctions

1. **Appropriate Relief**
2. **Damages are NOT adequate**
3. **Plaintiff has acted equitably**

Refusal

- **Injunction would be inequitable**
- **Grounds of refusal under Specific Relief Act**

Types of Injunctions

Injunctions

1 Temporary

- Interlocutory or Interim Injunctions
- Status Quo until final adjudication
- Prevent future or continued injury
- Plaintiff to have enforceable right

2 Permanent

- Perpetual Injunction
- Decree based on merits
- Final determination of suit
- S.38 of Specific Relief Act

3 Mandatory

- TO DO a Positive Act
- Court should be capable of enforcing such Act
- S.39 of Specific Relief Act
- Higher threshold than prima facie case
- Not sitting on rights

4 Qui Timet

- ‘*Because he fears or apprehends*’
- Precautionary justice
- Intention to act can be shown to exist
- Mars Case (Del HC)
- Fletcher *v.* Bealey

Cases

Mars Incorporated v Kumar Krishna Mukerjee, 2003 (26) PTC 60 Del

- *Principles for Quia Timet Injunctions:*

  i. Whether it is likely to cause confusion or to deceive the purchasers as to source or origin of the trade mark or the goods to be sold in future under the said mark irrespective of the fact whether goods intended to be sold are competitive goods or not;

  ii. ii. Whether the intention to use of infringed trade mark is to trade or cash upon the reputation and goodwill of the plaintiff earned over the years through extensive advertisement and huge expenses;

  iii. iii. Whether there is likelihood of real or tangible damage or injury to the plaintiff or reasonable probability if the same would take place. In other words whether use of the trademark by the defendant is likely to be associated with the plaintiff's trade mark or business;

  iv. iv. Whether the hardship suffered by the plaintiff would be greater than that of the defendants if injunction is not granted against the defendants.

Fletcher vs. Bealey (1885) 28 Ch D 688

- *Referred in Kuldip Singh vs. Subhash Chander Jain & Ors (2000) 4 SCC 50:*

  i. There must, if no actual damage is proved, be proof of imminent danger; and

  ii. There must also be proof that the apprehended damage will, if it comes, be very substantial.

Principles governing grant of Interlocutory Injunctions

01 Prima Facie Case

Evident at a first glance

- Serious Question to be tried
- Possibility of Plaintiff obtaining relief at the conclusion of trial
- Enough to show ‘non frivolous’

02 Irreparable Injury

Harm cannot be corrected

- Loss cannot be compensated by damages
- Immediate need for remedy is evident

03 Balance of Convenience

Comparative mischief

- Assess possible mischief created by grant of injunction; not just of defendant but of public good as well
- Consider efficacy of other possible remedies

Special Cases

- *Ex-Parte Orders*
  - Higher threshold of imminent irreparable injury
  - Examination of timelines – when did the plaintiff get notice of act
  - Plaintiff has not acquiesced to the act of defendant
  - Utmost Good Faith
  - Always for temporary/defined period
- *Freezing Injunctions (Mareva Injunctions)*
  - To prevent disposal of assets by the debtor
  - Same standard as for ‘attachment of property’ in a property
  - *Standard and requirements as per Order 39 of CPC*
- *Injunction Against Invoking Bank Guarantees*
  - Bi-Partite Agreement between Issuing Bank and Beneficiary
  - Usually kept independent of pending dispute
  - Conditional and Unconditional Bank Guarantees
  - Additional Standards:
    - Fraud
    - Special Equities
- *Undertaking in Damages*
  - Referred as Cross Undertaking
  - If Defendant is found to have suffered unusual loss pursuant to the grant of injunction in favour of the Plaintiff

Arbitration & Conciliation Act
Companies Act