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Reading Material

ONE YEAR ADVANCED DIPLOMA IN DRAFTING, NEGOTIATION AND ENFORCEMENT OF CONTRACTS

1.3 DRAFTING AND NEGOTIATING CONTRACTS

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MODULE I: INTRODUCTION TO CONTRACT DRAFTING

It is often said that no contract is better than a poorly drafted contract. Whenever parties agree to do business, execute a transaction, or enter into legally binding obligations, they usually tell their lawyer, "*we are just writing this down for the heck of it, we completely trust each other.*" However, it is exactly this trust which proves to be a recipe for dispute later. Therefore, the first task of a person drafting a legal contract is to ensure that she can foresee the possible disputes that may arise from the legal relationship, especially those which are common in the industry or business. It logically follows that such foresight can stem from a strong foundation of contract law.

REVISITING BASICS OF CONTRACTS: A SNAPSHOT

Therefore, it would be prudent first to revisit the basics of contracts and its most important concepts quickly. Generally, a contract may be defined as an exchange of relationships created by oral or written agreements between two or more persons, containing at least one promise, which is recognized in law as enforceable.[1] In a way, this definition highlights the essential elements of a contract, viz. an oral or written agreement, the involvement of two or more persons, an exchange of relationship, at least one promise, and enforceability. These essential ingredients form the major components of the contract, which warrants a detailed explanation for the sake of conceptual understanding and developing a strong base to appreciate the nuances of contract drafting.

An Oral or Written Agreement

A contract comes into existence to record the mutual agreement on certain essential terms in a relationship between the parties. While such records can be made orally and are valid,[2] parties prefer to record such understandings through a written document because it creates obligations. This is done because if either of the party chooses to backtrack their mutually agreed obligations, or fails to perform their respective obligations, there will be recourse available to the other party to enforce performance of the obligations or adequate compensation in the event of any breach. This is where the drafting of contracts come into the picture to ensure that there are no gaps or scope of error in recording such obligations, the remedies associated with it, or the way out on that mutually agreed and binding contract.[3]

Two or More Parties

A contract is an agreement between two or more persons so naturally a single individual or an entity cannot enter into a contract with themselves. There must be two or more than two persons or entity for a valid contract.[4]

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[1] Chris Goddard, *Basic Principles of Contract Drafting*, *available at*, https://fdocuments.in/document/basic-principles-of-contract-drafting.html (Last accessed on August 15, 2020).

[2] Nanak Builders and Investors Pvt. Ltd. v. Vinod Kumar Alag, AIR 1991 Del 315.

[3] J. Beatson, A. Burrows, and J. Cartwright, ANSON'S LAW OF CONTRACT (29th edn, 2010).

[4] J. Beatson, A. Burrows, and J. Cartwright, ANSON'S LAW OF CONTRACT (29th edn, 2010).

An Exchange of Relationship

In a contract, parties bind themselves to each other for a common purpose of the contract. The very essence of a contract is a reciprocal relationship in which each party gives up something to get something. This is known as an exchange of relationship. For example, if a company is entering into a contract with local tailors to produce local and traditional ethnic wears, the company will give its design to the local tailors. In return, the tailors will give them the final products.

Promise

A contract cannot exist without a promise. A promise is an undertaking to act or refrain from acting in a specified way at some future time.

Legal Recognition of Enforceability

The fundamental role of contract law is to ensure that promises are upheld. Where promises are broken, the power of legal enforcement enables the disappointed party to sue. Once it is established that a contract was entered into and breached, courts can enforce the contract by providing a remedy for the breach. Legal enforceability, thus, serves to deter breaches of contract because a reluctant party knows that failure to perform can result in litigation with costly results.[5]

ROLE OF CONTRACTS AND WHY IT NEEDS TO BE DRAFTED?

It is clear from the above discussion that a contract creates a private body of law between its parties.[6] This private body of law generally includes:[7]

a) the statement of facts that each party made that induced the other party to enter the transaction;
b) each party's promises as to its future performance;
c) each party's rights and duties;
d) the events that must occur before each party is obligated to perform;
e) each party's discretionary authority;
f) how the contract will end, including the events that constitute a breach and the remedies for breach; and
g) the general policies that govern the parties' relationship.

A contract, therefore, sets out future rights and obligations of parties, and at the same time, record rights and obligations that are already conferred on the parties. Hence, it is necessary that such rights, benefits, duties, and liabilities are set out in a definitive form, preferably in writing.[8] Such definitive form is what a contract is.

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[5] Chris Goddard, *Basic Principles of Contract Drafting*, *available at*, https://fdocuments.in/document/basic-principles-of-contract-drafting.html (Last accessed on August 15, 2020).
[6] Charles M. Fox, WORKING WITH CONTRACTS, 1.2 (2nd edn., 2008).
[7] Tina Lynn Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO?, 1.2 (2nd edn., 2014).
[8] Elmar Doonan and Charles Foster, DRAFTING, 1 (2nd edn, 2001).

Contracts must be a full and accurate expression of parties' wishes and mutual understanding. It is more so important because a contract is meant to provide written evidence of parties' wishes and mutual understandings. If a contract records such wishes and mutual understandings accurately and is signed by the parties, the scope for fraud, forgetfulness, or inaccuracy is reduced. Moreover, such an explicit record helps prevent fraud. It is also required when there are intricate details involved, or when the subject matter is so complicated that it requires a careful record in writing to ensure that the contract is appropriately carried into effect.[9]

Therefore, a contract needs to be drafted to memorialize the mutually agreed understanding accurately, clearly, and unambiguously between the parties. It should be sufficiently specific that the parties know their rights and obligations, and at the same time, be flexible enough to cope with changed circumstances. It should advance parties' goals, reduce their risk to the maximum extent possible and ultimately prevent litigation.[10]

Clearly, drafting a contract is more than a mechanical process of recording the terms of a transaction in writing. If this were to be a simple exercise of merely writing what is agreed upon, lawyers would not have been needed to draft such contracts. However, the fact that almost all contracts are drafted by lawyers or people with a legal background, it makes it clear that drafting a contract indeed involves the application of a variety of skills and processes. The following section is an attempt to understand such process of contract drafting and how a lawyer goes about drafting a contract.

UNDERSTANDING THE PROCESS OF CONTRACT DRAFTING

Drafting a contract is a step-by-step process where each step is necessary and crucial to the overall outcome of a contract.

CLIENT'S INSTRUCTIONS

The first step of drafting a contract, or any legal document, is the receipt of instructions from the client. Sometimes the instructions would be specific to draft a contract for example, where a client intends to buy a house, she will instruct her lawyer to draft a Sale Deed because it is certain that such transaction would need drafting of a Sale Deed which the client and the drafter both are aware.

However, sometimes, the client may not realize that if her wishes are to be adequately carried into effect, she may require a contract to that effect. In those cases, the client should be advised of the need for a contract along with the explanation of its purpose and contents followed by a green signal from the client. Needless to say, such instructions are confirmed and re-confirmed with the client before such a contract is drafted, especially if it comes through a third party.[11]

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[9] Elmar Doonan and Charles Foster, DRAFTING, 4 (2nd edn, 2001).
[10] Tina Lynn Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO?, 1.3 (2nd edn., 2014).
[11] Elmar Doonan and Charles Foster, DRAFTING, 8 (2nd edn, 2001).

Such instructions from the client may come up in the form of a telephone call, or something in writing such as a letter between the parties, or it may be a term sheet or a letter of intent. In any case, the first step is not sufficient, and most often than not, the drafter may seek additional and specific information from the client that will help her produce a credible first draft. For example, questions like are there any letters or other written communications between the parties relating to the transaction? Are there are any written materials relating to the subject matter of the transaction? These are some of the questions that are completely normal to ask before producing the first draft.[12] Apart from this, there will be much factual information that will be required to draft a contract effectively. Such information can be sought from the client who may be reluctant to share initially, but when appropriately explained, should be able to provide it to the drafters.

It goes without saying that a contract must always be drafted strictly in line with the client's instructions. Even if her instructions are not in her best interests, and an attempt has been made to explain and advise as to how her instructions may be detrimental or prejudicial to her, if she persists on the same, the contract should be drafted on her instructions only along with red flagging the concerns of the drafter.

PREPARATION AND PLANNING

Next step is to prepare and plan for the drafting exercise to be undertaken. Just like a sportsperson spends a significant chunk of their valuable time preparing for their main event, in contract drafting, preparing, and planning for a contract is critical and may take up more time than drafting. Such preparation and planning are important because the quality of a contract is heavily dependent on the thought put into its terms and structure. Since every client's instructions vary and have a specific demand or requirement, it takes ample amount of planning and thinking to understand and apply as to how the client's instructions can be best achieved. Each word is then handpicked to suit the needs of the transaction and the client. All angles are explored, what should, and should not be included in the contract are thought carefully.[13]

Since a majority of drafters rely on precedents, it becomes vital to screen and test whether all the clauses of that precedent should be included in the new contract. Some clauses need amendments, some are deliberately omitted, some are kept as it is, some are tweaked to ensure that the opposite party does not reject it when it goes for their approval. All of this requires proper preparation and planning and is one of the most fundamental steps that need to be taken before jumping into the exercise of drafting a contract.

USE OF PRECEDENTS

Coming to the precedents, it is an old age saying that in contract drafting, plagiarism is a virtue.[14] As a matter of practice, lawyers prefer working on a precedent or a contract that has already been drafted for a similar transaction or subject matter. It is always preferable that a person drafting a contract should first start with a template or a form already

[12] Charles M. Fox, WORKING WITH CONTRACTS, 3.4.1 (2nd edn., 2008).
[13] Elmar Doonan and Charles Foster, DRAFTING, 10 (2nd edn, 2001).
[14] Charles M. Fox, WORKING WITH CONTRACTS, 3.4.3 (2nd edn., 2008).

designed for the kind of transaction involved, or a similar set of client's instructions or from a contract previously drafted in a similar nature of work.

The rationale for using a set precedent instead of drafting a contract right from scratch every time is that the latter is time-consuming and also, the key clauses are not omitted. Usually, a well-drafted contract which is being used as a precedent will contain provisions that are generally accepted and appreciated in the legal and business world. It is easier to tailor them to suit the needs of the current requirement than to write it from scratch every time. For example, a contract for the sale of a house is likely to contain a large number of standard provisions which will not need change at all, or only in minor aspects. Of course, there is no harm in writing a contract entirely from scratch. However, for the sake of convenience and finishing drafting assignments on time, reliance on pre-drafted provisions is generally preferred. It is only when the client requires something out of the ordinary that a substantial original drafting exercise will be necessary.

Moreover, boilerplate provisions (as explained in Module 2) have been adopted and accepted without much changes in previously drafted contracts. They are generally less likely to undergo changes in a majority of contracts. Hence, it is easier to adopt them than to write it from scratch. Nonetheless, the drafter will be required to go through them properly again and tailor it to the needs of their current requirements.

Therefore, a crucial initial step is to find a good precedent that closely matches the nature of work or client's instructions at hand. The closer the match is, the less redrafting and tailoring it will need. Careful scrutiny, however, is needed to identify the provisions that may not be required in the current draft or the provisions that are essential to it and are missing from the precedent. In latter cases, a drafter can either draft that missing provision from scratch or find a similar proper provision in other precedents.

However, if one finds it difficult to find a precedent or find it inconvenient or futile to work around a precedent, it is absolutely fine to draft from scratch as a skilful draftsperson may be able to draft a better provision in less time than one found in a precedent after a lengthy search. This works best where the contract being drafted is a unique one or not a frequently recurring one.[15] To sum up, a precedent provides a good starting point for drafting, but the same may be used carefully and effectively.

PREPARING THE FIRST DRAFT

The next obvious step is to prepare the first draft of the contract, which should be sent to the client for her consideration. Most often, the client requests a meeting to understand the contents of the contract and their possible ramifications. The drafter always must explain to her clients each clause of the contract and alter it accordingly to the wishes of the client. Sometimes the clients may not want too much detail, and sometimes they would want to have more details, whatever the case may be, a drafter should always be ready to tweak the draft to the requirements of the client subject to consistency and applicable law.

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[15] Charles M. Fox, WORKING WITH CONTRACTS, 3.4.3 (2nd edn., 2008).

It is quite possible that during the drafting process, additional issues and factual questions will arise. These may include fundamental structuring points that will broadly affect how the contract is to be drafted or issues that may affect the viability of the entire transaction or deal related to the contract. Some may be important or wide-ranging that an answer must be obtained from the client before a draft can be completed. Such concerns warrant immediate communication with the client. There are multiple ways to address these concerns. First and the one which should not be preferred is to contact the client every time a drafter face such issues. While a rare breed of clients may appreciate that, majority of clients will find it inefficient, and it will come at the cost of the client's patience and goodwill.

Therefore, the other approaches and the most preferred one are as follows: a) Succinctly put the issues or questions in the draft itself, highlighting it to ensure that they are seen by the client. It is convenient to put them through comments to make them easier to find and delete as the contract is revised; (b) prepare a separate list of issues and questions to be sent to the client with the first draft of the contract; (c) raise all the issues and questions when the draft is first discussed with the client. However, one should keep in mind that such discussions should not be kept until the last moment or on the day of the finalizing of the contract and must be clarified at the earliest. One may also combine these approaches depending on the nature of transactions, client, method, and drafter's patience.[16]

ANTICIPATING PROBLEMS

A significant difference between a layman drafting a contract and a lawyer or a professional drafting a contract is the ability of a lawyer to anticipate the problems in the contract and the foresight to protect them. Sometimes there are inherent legal and practical problems in the client's instructions itself which require ironing out before drafting. It is important to anticipate potential problems which could arise from the transaction and to draft the contract in a way which will address them. For example, if parties have negotiated and agreed on a formula that will decide the payment of a receiving party, it is unlikely that the parties will agree to alter the language or change the provision. In such cases, there may be a potential of disputes arising between the parties in future; hence a detailed arbitration clause is a necessity to ensure that disputes are settled expeditiously and cheaply.[17]

However, it is easier said than done. Anticipating problems in a contract or client's instructions require efforts, knowledge and experience. A draftsperson will have to review drafts to ensure that they pick potential problems thoroughly. Even then, some problems may not be anticipated at the time of drafting contracts or some problems may not look like a problem *per se.* Therefore, the skill of anticipating problem will come with more practice and drafting. The key takeaway is that one should always anticipate the problems related to the client's instructions or the nature of the contract being drafted and try to address them while drafting the contract.

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[16] Charles M. Fox, WORKING WITH CONTRACTS, 3.4.1 (2nd edn., 2008).
[17] Elmar Doonan and Charles Foster, DRAFTING, 11 (2nd edn, 2001).

PRODUCING A FINAL DRAFT

After a first draft is completed and sent to the client for its review and comments, the client will get back with her comments and suggestions. The draftsperson will then revise the draft to incorporate the input obtained from the client. Depending on the nature of input obtained from the client, draftsperson may have to refine or rearrange, review, or amend the draft.

It is not unusual for contracts to require several drafts before a final version is produced. Sometimes a contract may require only two or three drafts, and sometimes it may require more than seven drafts all depending on the nature of client's instructions and the subject of drafting. It may also be possible that after a first draft is made, parties have changed their understandings materially and hence there is no further need for drafting an elaborated or detailed contract. In such cases, a second draft may be produced to cut down the length and improve the clarity of the first draft. In case, there are further instructions from the client even after a second or third draft, the drafter must incorporate the same and produce several drafts if required. This process of refinement and rearrangement is an integral step of a drafting process and must be done effortlessly to produce a desirous high-quality outcome.[18]

Further, there may be instances where the time between the drafting of a contract and its execution is significant. Another instance could be when a contract has been executed, and its term is getting over wherein parties have decided to extend their relationship, albeit with a new contract. Alternatively, while using a relatively old precedent, a new contract has been made without altering much. In such scenarios, the draft must reflect the latest developments in the understandings between the parties, business practices, technological advances, and the latest position of law. Therefore, changing the existing draft and updating it to its latest position is an essential step in a contract drafting process. To give an example, an agreement for the sale of a business must take account of changes in company law, taxation, and employment law.

The final step for a drafter to give final shape to its draft is to go through a mini checklist. A drafter should check the substantive provisions, clarity, effectiveness, consistency, each section or division, references and cross-references, punctuation, spellings, and grammar, among other things. This step gives an opportunity to polish the draft finally.

After a thorough execution of all these steps, the final draft takes its shape and is sent to the client for its final reading, approval and execution. What happens after a final draft is made and approved by the client is discussed in detail in Module 2. For now, have a look at the most common terms that are used in a contract for better conceptual understanding as we proceed ahead and dive into the intricacies of contract drafting.

GLOSSARY OF IMPORTANT TERMS USED IN A CONTRACT

The following is a list of common terms that a typical contract usually consists of. The definitions of these terms are strictly not legal as the same depends on different legal

[18] Elmar Doonan and Charles Foster, DRAFTING, 14 (2nd edn, 2001).

systems and are, therefore, the general descriptions of these terms in the context of contract drafting.[19]

Agreement: A generic term for a legally-binding undertaking between the parties, in terms of the obligations, relationships, and responsibilities between them.

Assignment: The transfer of rights or duties by the assignor to the assignee. This may occur only by agreement or by operation of law, for example, when someone dies or when a company is bankrupt.

Battle of Forms: A common situation where parties establish their relationship by sending standardized forms to each other. Often, the terms of the forms do not agree, and it can be difficult to tell if the parties have concluded a contract, and if so, what the terms of that contract are.

Bid: A bid is an offer to pay a particular amount of money for something that is being sold, especially at an auction.

Boilerplate: Certain standard clauses that are often interchanged with miscellaneous or general clauses that usually appears at the end of a contract. These concern general provisions relating to non-negotiable or general one-size-fits all clauses like the choice of law, entire agreement clauses, notice, dispute resolution clauses, etc. that find places in almost all contracts.

Choice of Law: This clause is used to specify the rules or laws that will be used to resolve any dispute between the parties.

Collateral: Collateral is anything of economic value, such as an immovable property, pledged by a borrower to secure a loan or other credit which is subject to seizure in the event of default.

Condition Precedent: An event that must happen before a contract or a contractual obligation goes into effect or which triggers the performance of a contractual obligation.

Condition Subsequent: An event or a happening which terminates the duty of a party to perform or do their respective part.

Consideration: It is a promise of something of value given by a promisor in exchange for something of value given by a promisee. Anything of value promised by one party to the other when making a contract can be treated as consideration.

Copyright: Copyright is a legal term used to describe the exclusive legal rights that creators have over their literary and artistic works to reproduce, publish, sell or distribute.

Covenant: A promise to do or not to do something. A covenant establishes a duty, also called an obligation to perform. There are two types of covenants, positive covenant (the

[19] See generally, Chris Goddard, *Basic Principles of Contract Drafting*, *available at*, https://fdocuments.in/document/basic-principles-of-contract-drafting.html (Last accessed on August 15, 2020).

things the promisor agrees to do) and negative covenant (the things the promisor agrees not to do).

Default: The circumstances where an obligor (one who is obligated under the contract) is considered to be in breach of the contract.

Entire Agreement: Entire Agreement clauses express the parties' intention that the agreement is final and integrates all previous negotiations, representations, and warranties. It is also known as a merger or integration clause.

Estoppel: An equitable concept that prevents a party from raising an argument when the party has acted unfairly, fraudulently, or otherwise inappropriately.

Execution: An act of signing; the parties execute the contract by signing it; performance, the parties may execute a contract by carrying out their obligations and duties; execution of a judgement, order, or writ.

Force Majeure: An "Act of God" which prevents one party from performing the obligations owing under a contract. Such cases include war, riots, earthquakes, floods, strikes, etc.

Franchise: Franchise is a type of license that a party (franchisee) acquires to allow them to have access to a business's (franchisor) proprietary knowledge, processes, and trademarks in order to allow the party to sell a product or provide a service under the business's name.

Governing Law: Governing law establishes the law that governs a dispute arising from an agreement.

Indemnity: An agreement in which one party agrees to reimburse another party if it is held liable. An indemnity is in the nature of a guaranty but typically is used when the party offering indemnity has some interest in, involvement with, or control over the events leading to liability.

Intellectual Property Rights: A legal right given by law to a person in connection with intellectual, industrial, or artistic work including inventions, designs, processes, techniques, drawings, specification, technical information and know-how. Some of the IPRs are patents, designs, trademarks, and copyrights.

Joint Venture: Joint Venture may be described as an association between a group of persons (natural or legal entities) who enter into an agreement to do business together or to undertake a particular project, without losing their independent corporate structures.

Letter of Intent: Letter of Intent is a document outlining the understanding between two or more parties which they intend to formalize in a legally binding agreement.

License: Among various other meanings, in a general sense, it means the permission to use the property of the licensor.

Lien: An interest in property granted by the owner of that property, to another party (the lienholder), until the property owner fulfils a legal duty to the lienholder, such as the repayment of a loan or the payment of lawful charges for work done on the property.

Liquidated Damages: Liquidated Damages are an amount of money, agreed upon by the parties at the time of the contract signing, that establishes the damages that can be recovered in the event a party breaches the contract.

Recitals: It is a clause that explains who the parties are, and their purposes for entering into the contract (i.e. background of a contract).

Representation and Warranties: Statements made by a party in a contract which, if untrue, carry legal consequences. They can even be implied by law and must not necessarily be stated.

Severability: It is a characteristic of a contract that allows for the removal of duties or portions that are incorrectly or illegally drawn up. The parties may agree that incorrect, impractical, or illegal portions be severed from the agreement and replaced by language that best reflects the intent of the parties and comes closest to the business objective of those severed portions.

Sunset Clause: Sunset clause is a provision that sets a date or time from when the contract will cease to have effect unless otherwise re-authorized by the parties to the contract.

Tender: The formal offer to supply goods or services issued by a vendor, seller, supplier, manufacturer, agent, stockist, or other organization or person with the legal capacity to do so. It is usually received in response to the buyer’s invitation.

Term: Term is a fixed period of time for which a contract is decided upon by the parties to be in force, notwithstanding any discovery of illegality, or termination.

Trademark: A registered name or logo that is protected by law.

Underwriter: Underwriter is an individual or an institution who undertakes the risk associated with a venture, an investment, or a loan in lieu of a premium.

Void: Void means absolutely null, empty, having no legal force, and incapable of being ratified.

Voidable: Voidable is a term typically used with respect to a contract that is valid, and binding unless avoided or declared void by a party to the contract which is legitimately exercising a power to avoid the contractual obligations.

Fundamental Rules of Drafting a Contract

Drafting a contract is an exercise where one does not have to always follow a straight-jacket, and different drafters can have 100 ways to draft the same thing. It is also believed that no two drafters can draft the same way. However, there are few fundamental principles of contract drafting that need to be broadly kept in mind while drafting to ensure the most optimum output is achieved, which is also consistent with the standard contract drafting practices.

- Make an outline of the contract before starting to draft clearly knowing what parts the contract must include and what situations the contract must cover. Outlines help to break down the whole contract into a series of small points. It is easier to follow and to draft such small points during the drafting exercise.
- Understand that getting a contract ready in the first draft itself could potentially be a huge mistake. It is possible to miss some large points if a drafter tries to get all the details right in the first draft. Hence, a drafter must be ready to write as many drafts as required to get the contract right. The first draft could be creative, thorough, and imperfect. The subsequent drafts should be used for rewriting, revising, and polishing.
- Always use clear, plain, simple, and business-like language instead of pure legalese and heavy usage of archaic terms. Each point in a contract should be expressed as simply as possible.
- A golden rule of drafting is that each clause should do one thing/talk about one thing only and not more. Do not mix two clauses into one single clause. More importantly, sentences should be short, average 15 words. Anything beyond 30-40 runs the risk that the reader may have a problem to follow unless it is impossible to avoid lengthy sentences.
- Always use one term for one item or one person. Referring to the same person, item or concept by two different terms creates an ambiguity that invites misunderstandings later.
- Never use one term for several different items or persons. For example, sanction can be used as a term for approval and can also be used as a term for penalty.
- It is always preferred to have time references in a contract. A contract provision calling for one party to perform an action or to make a payment must be clear as to when such payment or performance is required.
- If possible, consult others. No one person can imagine all the pitfalls that the parties to any contract are hoping to avoid. No one person can imagine all the ways some reader can misconstrue a point.
- Once a drafter finishes writing a draft, revise it thoroughly concentrating on small scale organization, sentence structure, transitions, paragraphing, grammar, and punctuation.
- It is important to note that a well-written contract provision is one that provides no traction for either party or their counsel to argue that something else was intended. In order to fully understand this point, it is helpful to imagine the position of a litigator asked to review a contract. The litigator will look for every weakness in the contract language that can be raised for his client’s benefit. This exercise helps a lot in achieving precision in a contract.

ELEMENTS OF A CONTRACT

There are numerous types of contracts, depending on the transaction, subject, purpose, style of drafting, etc. Each type may have different length, different types of provisions, different kind of language, or a different format. However, one thing common in all contracts is that they are drafted on similar patterns. In other words, certain fundamental elements are present in all contracts. The idea is that no matter how radically different a contract is from another contract; it must have these fundamental elements in any form that makes it complete. The following is a brief overview of these fundamental elements of a contract and their importance in a contract.[20]

Preamble

The preamble is the first paragraph of the contract. It introduces and identifies the contract. It sets forth the most important detail of the contract viz., name of the contract, name of parties, place where the contract is being entered into, and date of the contract.

For example:

This NON-DISCLOSURE AGREEMENT is made on the 16th Day of January of 2020 at Hyderabad BETWEEN Rahul and Sachin.

Recitals

The recitals are meant to explain the background of the contract and explain the reason as to why the parties are entering into a contract. The recitals help to establish the 'meeting of the mind.' It is important to note that such recitals are only meant to provide the contextual background of the contract and do not provide rights and remedies. Hence, anything agreed upon in the recitals will not be binding and enforced on the parties. Such understanding if being recorded in the recitals should also be made as a part of a right or obligation under the main provisions of the contract.

For example:

Recitals of a typical Lease Deed

A. The Landlord is the absolute lawful owner in possession of a house called X, located at Y.
B. The Tenant is engaged in the business of homestays and has approached the Landlord to take on lease a portion of the Property X.
C. The Landlord has agreed to lease a portion of X in favour of the Tenant.
D. The Tenant intends to use X for a period of 11 months for the purpose of running a homestay from the Execution Date on such terms as enumerated in the following provisions:

The recitals above succinctly explain the background of the contract. However, since these recitals are not binding on the parties and are unenforceable, such understandings of the term of the lease should also come under the main provisions of the contract.

[20] Tina Lynn Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO?, 5.1 (2nd edn., 2014).

Definitions

Definitions tailor the meanings of certain terms known as defined terms. Defined terms are a shorthand way of referring to complex concepts and ensure that the same concept is referred to the same way throughout a contract. It may also help to ascribe meaning to a term that may be used differently in a different context. For example, compensation may have two different meanings in two different contexts. Similarly, damages may have different meaning depending on the context. Hence, it is prudent to define it once and for all so that it can be used uniformly throughout the contract.

For example:

Damages means and includes all losses, damages, claims, liabilities, deficiencies, actions, demands, suits, judgments, interest, awards, penalties, fines, cost, expenses, or other liabilities of whatever kind (including contingent liabilities, third party claims, reasonable advocate's fees and disbursement) and the cost of enforcing any right to indemnification hereunder.

Action Sections

These are the sections or the provisions where the action lies meaning where the parties agree to perform the main subject matter of the contract, agree to pay the financial consideration, agree to decide the term of the contract, agree to decide the deliveries, etc.

For example:

1. The Borrower grants a security interest in its assets to the Bank.
2. The Tenant shall pay the Landlord the rent of INR 20,000/- (Indian Rupees Twenty Thousand only) for each calendar month no later than the seventh day of that calendar month.
3. The Term of this Lease Deed is for three years, starting from X date till Y date.

Building Blocks (or substantive business provisions)

Building blocks or the sustentative business provisions are the core concepts that are the foundation of every contract, that when properly assembled, express the parties' business deal. Seven major building blocks are typically used in a contract. These are:

<u>Representation</u> – a statement of a past or present fact, made as of a moment in time to induce a party to act.

<u>Warranty</u> – a promise that if the statement in the representation is false, the maker of the statement will indemnify the other party for any damages suffered because of the false statement.

<u>Covenant</u> – is a promise to do or not to do something. It creates a duty to perform.

<u>Right</u> – is the flipside of a covenant. A right entitles a party to the other party's performance.

Condition to an obligation – is a state of facts that must exist before a party is obligated to perform.

Discretionary Authority – gives a party a choice or permission to act. Sometimes the exercise of discretionary authority is subject to the satisfaction of a condition.

Declaration – is a fact as to which both parties agree, generally a definition or a policy for the management of the contract. Sometimes a declaration is subject to the satisfaction of a condition.

Endgame provisions

As the name suggests, these provisions govern the end of the parties' contractual relationship. They require a drafter to determine the different ways that a contract can end and how the contract will deal with each of the scenarios.

For example:

After the Borrower has paid all the outstanding principal and accrued interest, the Bank shall sign any documents necessary to release the Collateral.

If the Author does not submit her manuscript before August 30, 2020, the Publisher may refuse to publish the Book.

Boilerplates

Generally referred to as miscellaneous clauses, these are the clauses that deal with general aspects of a contract that uniformly protects the parties. They are less likely to be negotiated and are adopted as a matter of standard practice. For example, clauses on governing law, choice of law, entire agreement, severability, assignment. These clauses have the same meaning throughout different contracts and are uniformly applicable to the parties.

For example:

Amendment: This Agreement may only be varied or amended in writing signed by each of the Parties.

Signature blocks

Before the beginning of the drafting exercise, consent of the parties is taken. Once a drafter has finished the drafting, again consent is taken ratifying the contents of the draft through signatures at the end of the contract. Such signatures are generally made on the designated area at the end of a contract called a signature block.

Schedules

A schedule is meant to include additional material in a contract which may not be a good fit within the body of a contract but are nonetheless part of a contract. It is used to disclose additional information that may not be required under the main body of the contract. For example, a complete description of the property may not be required in the main body of the contract, but the same can be made as a part of the Schedule so that there is no confusion regarding the details of the property and that the complete description of the property becomes a part of the contract. This is precisely why every sale deed has a schedule of the property, providing a complete description of the property.

It may also be used to provide additional information to supplement either representation and warranties or the details of a subject. For example, in a lease deed, a list of fixtures and furniture of a building can be made as a part of the contract through a schedule.

Annexures

Annexures are meant to make a document part of a contract which has otherwise nothing to do with the main body. For example, if a contract has a complex mathematical formula involved for the calculation of royalty, the explanation of such complex mathematical formula given by an authority can be made a part of the contract through an Annexure.

STRUCTURING A CONTRACT

Majority of contracts follow a standard structure where the elements of the contract, as explained above, are written in an order which maximizes the clarity of a contract and helps to understand the provisions with ease and convenience. Logically also, it makes sense to follow a standard format of the arrangement of clauses. For example, it will make no sense to write the details of the parties in the middle of the contract after expressing their obligations. Hence, such clauses are meant to be written first. Therefore, a model arrangement of clauses is as follows:

A typical contract would start with a preamble for introducing the contract and identifying the parties to it. This is usually followed by the recitals which provide a background to that contract. Following this is the definitions section which sets out how certain words are to be interpreted within the contract. After this, the main body of the contract follows, which includes the action sections or the operative provisions of the contract. This is where the building blocks of the contracts viz., representation and warranties, covenants, rights, conditions, discretionary authorities, and declarations feature.

Endgame provisions follow thereafter and deal with the closing of the contract. It is followed by the general yet important boilerplates or the miscellaneous provisions such as *force majeure* clauses, confidentiality clauses, entire agreement clauses, dispute resolution clauses, etc. If there is a schedule of the property or a description of an asset or any material information that needs to be a part of the contract and warrants more detailed explanation, it comes right before the signature block. The contract is finally ended through signature blocks and any other document being annexed to the contract be it a schedule or an annexure is attached with the contract after the signature block.

It is pertinent to note that such model framework could be altered depending on the type of contract. For instance, a share purchase agreement if often structured as follows: conditions precedent; general sale and transfer provisions; purchase price provisions; covenants in relation to the sale and transfer; covenants covering the period to closing; the closing agenda; non-compete clauses, warranties, limitations of liability, specific indemnities, and miscellaneous provisions.

Lastly, for the sake of efficiency and unambiguity, the following considerations should be applied:[21]

- General provisions (e.g., defining scope, desired results, and principles) should precede specific provisions (e.g., liming provisions, procedures, exceptions and carve-outs).
- Important provisions should precede less important provisions.
- Clauses identifying causes of action or triggering events should precede their consequences.
- Substance should be distinguished from form.
- Content should be distinguished from the procedure.
- Chronological order (if applicable)
- Provisions with certain permanency should precede temporary or *ad hoc* provisions.
- Boilerplates should come at the end and must not be blindly copy-pasted.

DRAFTING TECHNIQUES

The previous section explored the fundamental principles of good drafting, elements of a contract, and how to structure it. This section would dig a little deeper by examining a number of the most commonly used concepts, techniques, and phrases that are unique to contracts. The first tool is a subjective standard which necessarily introduces a grey area into the provisions in which they are used.

Materiality/Material Adverse Effect – the concept of materiality is used to modify provisions that would otherwise be too absolute.

For example, – *Borrower will not violate any laws, rules, or regulations* is too absolute. Instead, a party would prefer this – *Borrower will not violate any laws, rules or regulations in a manner that could reasonably be expected to have a material adverse effect on Borrower's business or financial condition.*

Reasonableness – It is used to soften the hard edges of contract provisions. It turns an absolute requirement into one that is subject to the test of what a 'reasonable person' might do or require.

For example – The Company shall reimburse the Agent for all of its reasonable out of pocket expenses arising in connection with its activities hereunder.

Without the term reasonable in this sentence, there would be no limit on reimbursable out-of-pocket expenses. For instance, what if the Agent decides to fly a charter for a distance where normal flights are extremely cheap and convenient.

To the best of its knowledge – it is used to denote a party's awareness of a fact.

[21] *See*, https://weagree.com/drafting-principles/3-main-contract-outline/3-1-setting-up-an-agreement/

For example – Seller is not in violation of any Environmental Law – *is a fact.*

To the best of its knowledge, the seller is not in violation of any Environmental Law – *is an awareness of a fact*.

The second one is preferred because what if a pre-existing violation of environmental law relating to the transaction is discovered after the execution of the contract.

In the ordinary course of business – This phrase is used in the restrictive provisions to permit activities that are customary and typical for the restricted party. This standard is used to prevent flexibility granted to one of the parties from being used by it in an unusual or unanticipated way.

For example – The issuer may not incur any contingent liability in respect of surety bonds, except for those obtained in the ordinary course of business.

Provisos – A proviso is a clause that begins with either "provided" or "provided, however". The purpose of a proviso is to override the concept that immediately precedes it or to create a condition.

For example – Seller shall deliver the goods on the last business day of each week, provided, however, that such delivery may be made on the first day of the following week if the number of business days in the week covered by the report is less than five.

Notwithstanding anything to the contrary – is a phrase which is used to trump the immediately preceding concept.

For example – Notwithstanding anything in this section to the contrary, X will be permitted to enter into a Joint Venture.

Except as otherwise provided – this phrase is used to indicate that other provisions in the agreement trump the provision in which it is included.

For example – Except as provided in Section 4, the Shareholder may not transfer any of the Preferred Shares.

Floors and Ceilings – there are many circumstances in which a contract must set a floor or a ceiling – that is, a minimum or maximum amount. This device is used to create a maximum amount.

For example – On the tenth Business Day of each month Licensee will pay to Licensor an amount equal to the lesser of (a) INR 10,000 and (b) 30% of the gross sales of the Licensed Products during the prior month.

Here, a maximum amount to be paid is set to INR 10,000/-. Even if 30% of gross sales is higher than INR 10,000/-, only INR 10,000/- is to be paid. The same can be the minimum amount of INR 10,000 if amount equal to the *lesser of* is written as if amount equal to the *greater of.*

ROLE OF LANGUAGE

In the context of contract drafting, there is a famous saying that *if the language is not correct, then what is said is not what is meant; if what is said is not what is meant, then what ought to be done remains undone.*[22] It is a major challenge for a draftsperson to choose a language that expresses the concept to be communicated in a way that its understanding by a reader cannot be different from what the lawyer meant while drafting.

The words chosen to express the concepts involved in a contract need to be chosen with care so that they express the intentions behind the contract clearly and accurately. Their effect must be considered both in isolation and in the context in which they are used, to ensure that they do not give rise to ambiguity. For example, if in a Lease Agreement, while writing an obligation which says that *he/she shall perform/do…* without making express or implied reference to anyone who could be identified as he/she, can create a massive confusion as to who he/she is, a landlord or the tenant.

Another important thing to keep in mind for the draftsperson is that they will have to use the words and terms which may be clear not only to them but also be clear to the audience of the contract. It is the duty of the draftsperson to use language which seeks to convey technical concepts in non-technical, but precise, language wherever possible. Similarly, the archaic language should be avoided.[23]

One of the side effects, as perceived by common people, for using clear, simple, and plain English language is that dumbing down a contract language may be seen as a disrespect to the knowledge of the common people. It is important to note that using standard English or plain English has nothing to do with dumbing down contract language to make it as accessible as a contract is intended to be read by consumers – a misconceived notion, given that a contract is necessarily as complex as the transaction it embodies. Instead, by using standard English, a drafter can articulate a transaction without recourse to usages that interfere gratuitously with the ability of any reader – lawyer or nonlawyer – to understand the contract.[24]

Lastly, the contract language should employ usages consistently. Such usages should be consistent, to avoid having unintended meaning attributed to inconsistent usages. Within a contract, avoid using the same words or phrase that convey different meanings as it might create confusion as to which meaning the draftsperson intends in any one context. More importantly, drafting language should always be gender neutral. When drafting a contract that has parties who are individuals, make all pronouns referring to individuals' gender-specific. For one thing, such gender-specific language might offend, distract, or mislead some readers. Hence, always use gender-neutral terms. For example, the Chairman can be changed to Chairperson or chair.

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[22] Elmar Doonan and Charles Foster, DRAFTING, 91 (2nd edn, 2001).
[23] Kenneth A. Adams, A MANUAL OF STYLE FOR CONTRACT DRAFTING, 61 (3rd edn., 2013).
[24] Kenneth A. Adams, A MANUAL OF STYLE FOR CONTRACT DRAFTING, 67 (3rd edn., 2013).

PRE-DRAFTING CHECKLIST

The exercise of drafting a contract is about accomplishing objectives of the parties while protecting their interests. As discussed earlier, each contract is different depending on the concerns, subject, and context it addresses, however, all contracts involve standard requirements and considerations. With a thorough checklist of these requirements and considerations, a drafter need not reinvent the wheel every time and instead, use a pre-drafting checklist to ensure that the contracts are complete and effective.[25] The checklist is as follows, not necessarily in order of drafting:[26]

- Understanding the instructions of the client and the purpose of the contract properly.
- Learning all the previous negotiations between the parties, so far, they are relevant to the proposed contract.
- Whether parties think they have reached a meeting of the minds on all the terms of their agreement.
- Anything that requires further negotiation?
- Forecasting what may happen and then consider both the legal and practical consequences that will ensure if the unexpected does occur.
- Would the proposed contract be valid and legally enforceable?
- Is a question likely to arise as to the capacity of the parties and if so, how shall this be taken care of?
- If there are several parties, should their obligations be joint, or several, or joint and several?
- Deciding about the time of performance. When is delay to be excused? How much delay may be permitted? Will delay excuse non-performance by the other party?
- Collecting all the details and documents related to the contract.
- Going through all the documents and collecting all the missing information or details from the clients.
- Organizing the material.
- Finding a good precedent(s) to rely upon.
- Preparing the outline of the contract.
- Deciding the title that accurately expresses the nature of the contract.
- Identifying the parties and writing the introduction.
- Write essential information of the party names. For example, D/o, R/o etc.
- Deciding and writing the recitals. Would it be wise, practically and legally, to include a recital when all the terms and conditions of the agreement between the parties have been included in the main body of the contract.
- Deciding if interpretation clause is required.

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[25] M.H. Sam Jacobson, *A Checklist for Drafting Good Contracts*, 5 Journal of the Association of Legal Writing Directors 80 (2008).

[26] Sourced from Frank E Cooper, *Effective Legal Writing* 169 (1953); M.H. Sam Jacobson, *A Checklist for Drafting Good Contracts*, 5 Journal of the Association of Legal Writing Directors 80 (2008).

- Deciding if a separate section of definitions is required. If not, include definitions where necessary.
- Does the contract need a subject matter provision?
- Does the contract need a provision clearly specifying the offer and acceptance of the contract?
- Does the contract need a provision reflecting consideration or mentioning about the payment obligation of the parties?
- Deciding the operative provisions that establish the obligations of the parties. Should it be conditional? Does it need condition precedent clause or condition subsequent clause, or both? Does it need any declaration provision?
- Does the contract need a provision that determines under what circumstances performance should be excused or late?
- Does the contract need appropriate remedies for a breach?
- Deciding whether the proposed contract needs any representations and warranties.
- Does the contract need provisions that define its effect on third parties?
- Deciding the term of the contract. Will it automatically renew? Is there going to be an option to terminate the contract in certain eventualities?
- Deciding on risk allocation clauses.
- Deciding an appropriate closing of the contract.
- Should a provision be made for liquidated damages? What legal and practical difficulties would be encountered if such a provision were included?
- Deciding the boilerplates be included in the contract as per the needs of the agreement.
- What law will govern, in case a dispute arises?
- Decide the dispute resolution clause paying close attention to its modalities.
- What will be the tax consequences of this contract?
- Who will register (if required) and bear the cost of stamp duty and other expenses of executing the proposed contract?
- Who will be the signatories to the contract?

This list is simply illustrative, and in no way, it is exhaustive of all the steps that are required to be followed before or while drafting a contract. Many lawyers develop their own checklists, and this is merely a model checklist.

MODULE II: INTRODUCTORY CLAUSES OF A CONTRACT

The introductory part of the contract provides a piece of useful information on who, what, when, and why of the transaction or the subject matter of the contract. It essentially tells the audience as to what the contract is about, where is it made, on what date it is made, the background of the contract and what the parties hope to accomplish by entering into the contract. An accurate and detailed introduction can educate anyone dealing with a contract as to who the parties are, why they entered the contract, and what their expectations were at the time the agreement was entered. The following section is an attempt to holistically understand such introductory clauses, its purpose, usage, and how they are drafted.

PREAMBLE

The preamble is the first paragraph of an agreement. It is an introductory paragraph. It identifies the agreement by stating its title, its date, place of execution, and the parties. For example:

This LEASE DEED is made on January 16, 2020, at Hyderabad between Shahrukh Rawat ("**SRK**") and Salman Sharma ("**Salman**").

Title

Typically, the preamble begins with the name of the agreement which forms the title. It is usually at the top of the Agreement in capital letters. The title should be centred and the letters in bold and a larger font than the letters in the body of the agreement. The combination of the two will make the title conspicuous and highlight it from the rest of the text.[27]

It is important that the title of the contract clearly spells out the type of business, the parties intend to undertake under the contract. It should indicate, at one glance, what the subject matter of the contract is. Merely writing "Agreement" may not be helpful. It seems to be too broad and generic. For example, if the contract is about supply agreement, it is advisable to write 'Supply Agreement' instead of just 'Agreement'. It is always wise to avoid a title that uses two sides of the same transaction; for example, Sale and Purchase Agreement could be Agreement for Sale. Moreover, some contracts have conventional titles such as Lease Deed or Indenture of Lease, Gift Deed, etc. It is wise to stick to the convention in such cases.

Date

A written contract is typically formed at the time it is executed. Such time is denoted through the date of the contract, which is a critical aspect since the parties are binding themselves to the obligations from that date onwards. A date can be drafted as X dated January 16, 2020, or X dated as of January 16, 2020. Drafters use the former when the

[27] Tina Lynn Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO?, 6.2.1 (2nd edn., 2014).

parties reach an agreement on the same day that they sign the agreement. In contrast, drafters use the latter when parties reach an agreement on the as of date, but do not sign their agreement until a later date.

For example, if a senior employee begins work on May 23, 2020, without a written contract, the parties will want the agreed-on business terms to be effective as of that date. Accordingly, the employment agreement will be dated as of May 23, 2020, even if it is not signed until July 1, 2020. However, as a caveat, when drafting a contract with an *as of* date in the preamble, one should also indicate its actual signing date somewhere in the contract as it might be important for particular provisions like tax or representation and warranties.[28]

Place of Execution

Immediately after mentioning the introductory statement and the date, place of execution is mentioned. The first question that always crops up is there even a need to mention the place of execution of a contract. If all the parties are located at one place at the time of signing off the contract, it may be prudent to right away mention the place in the first sentence.

In the current times, where a good chunk of transactions is happening online, it is quite possible that parties may sign the contract at different locations. In such scenarios, it makes sense to write the place at the signature block where the respective parties name are written. Their respective places can also be written there in that case. However, as a matter of standard practice, it is always advisable to write a place of execution in the first sentence itself as it may be considered as one of the jurisdictions where the cause of action arises unless the contract mentions an exclusive jurisdiction.

PARTIES

The next important part of the introductory clauses is the party names and descriptions. For example, This Settlement Agreement dated January 16, 2020, is between Kangana, D/o Mr Randeev, R/o 12 Carter Road, Mumbai and Karan Gohar, S/o Yash Gohar, R/o 14 Beach Road, Juhu, Mumbai. Here, the parties clause is clearly identifying the parties on whom the contract is binding by mentioning the full name, description, and addresses of the parties. If parties are a legal entity other than an individual, it should also indicate the nature of the legal entity of the parties, i.e. whether a sole proprietorship or limited liability partnership or company and so on.

Identifying the parties correctly is an utmost important task simply because, at a minimum, it may lead to a litigation to determine who the correct party to the contract is. For example, often, there is a confusion between whom to make a party if a company has multiple divisions, units, departments and only one specific entity is entering into a contract. It should be noted that business divisions, departments or units are not separate legal entities, but the company is. Hence, the company should be made the party. Similarly, if a subsidiary of the company is entering into a contract, that particular

[28] Tina Lynn Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO?, 6.2.2 (2nd edn., 2014).

subsidiary only should be made a party, unless otherwise warranted by a transaction because a subsidiary is a separate legal entity. It is advisable to define the parties suitably, to avoid writing its full name every time. One can either use their initials, shorter name, or conventional terms such as buyer, seller, etc. For example, if the party name is this Capital Stocks Private Limited, it can be defined as ("Capital") or ("CSPL"). The only thing to keep in mind is to not create two defined terms for a party, for example, CSPL and company, this will confuse the reader, only one defined term should be there and used consistently across the entire contract.

RECITALS

Recitals are the background of entering into the contract. It contains a description of what each party engage in as their business, what service or product they need or provide and an expression of interest in entering into an agreement to fulfil mutual needs. If there are no recitals, then the only title would give information as to the agreement's general-purpose, but not its specific purpose. By using recitals, the drafter explains to the reader the parties' relationship and why they have entered into that particular agreement.[29]

Recitals are particularly useful if the parties want to inform interested third parties about an agreement's purpose. It is also helpful to clarify the parties' intent. This can occur either because the parties explicitly state their intent in the recitals or because the courts use the recitals to interpret ambiguous operative provisions.

Recitals do not bind the parties. They cannot create enforceable, operative provisions of a contract, unless the parties explicitly incorporate them into the contract and make them so. Therefore, as a matter of standard practice, and for the reasons mentioned above, avoid putting representations and warranties, covenants, or conditions in the recitals because they probably will not be enforceable.

It is observed that WHEREAS is generally used as the introductory word to a recital in a formal document. It loosely translates to the term "because". While it is an archaic term and drafters across the world prefer a more contemporary style of drafting, it is fine in the Indian context, to use WHEREAS for recitals. Other considerations to keep in mind is that recitals should be short and simple sentences in each paragraph. It should not be overused. It should be used only if they add something to the contract.

In some specific instances, for example, in case of a deed relating to the transfer of immovable property, recitals are expansive. In such cases, they should tell a story. For instance, it is an industry practice to include a history of ownership to show how the seller has derived the title in a sale deed. Moreover, write it in a chronology as far as possible.

A simple example of a recital could be as follows:

WHEREAS

A. XYZ is a company engaged in [[●] insert a brief description of the company and

[29] Tina Lynn Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO? (2nd edn., 2014).

business [●]].

B. ABC is a company engaged in [[●] insert a brief description of the company

and business [●]].

C. XYZ wishes to engage ABC to provide management and administrative support services to XYZ on the terms set out herein.

INTERPRETATION CLAUSE

Contracts are majorly drafted in the English language, and since English is a highly subjective language where one word may have different meanings, it can often lead to a situation where the drafter who has used a term with a particular meaning may be interpreted differently by the reader who may understand it to be something different. Lawyers are known to take advantages of such loopholes so that they gain commercial or other advantages, at the expense of the other party to a contract.

In order to avoid such a scenario, it is advisable to the drafters to precisely interpret and create a clear understanding of the terms of the contract and the manner in which the parties seek to enforce them. For instance, a contract may mention that the reference to the pronoun 'he' may be used to refer to both males and females. It saves the contract from being devoid of liabilities or rights in case of adverse interpretation of the term 'he'.

An interpretation clause specifically mentions that terms and conditions that can easily be misinterpreted, for example, words like 'or', 'clause', 'herein', etc. Through such reference, the terms of the clauses are interpreted to utmost certainty. The purpose of such clauses is to explain the manner of interpretation of the words and the language of a particular term used in a contract. It supplements the contract by providing additional information. For instance, an interpretation clause may mention that the term 'includes' shall be deemed to be followed by the phrase 'without limitation'.

While it may appear that an interpretation clause may not be necessary in a contract, it is advisable to incorporate an interpretation clause wherever possible. The presence of this clause avoids complexity in a contract and enhances understanding through precise incorporation and interpretation of the general terms used in a contract. The presence of the interpretation clause serves towards resolving and reducing the internal inconsistencies. Incorporation of such a clause makes the contract watertight and gives no opportunity to any party to take advantage of the loopholes and misinterpret the terms of a contract in their favour.

An interpretation clause also avoids complexity and is also mean to understand that all the parties to the contract have had the reasonable opportunity to review the contract and have also consulted a legal advisor and understands the legal jargon used in the contract. Additionally, in order to interpret any term of the contract, the underlying circumstances at the time of drafting or executing the contract will have no effect, whatsoever.
A typical and elaborate interpretation clause would appear like this:

1. Except where the context requires otherwise, this Agreement will be construed as follows:
    1.1. The term “Clause” refers to the specified clause of this Agreement;
    1.2. The definition in clause 1.1 shall apply equally to both the singular and plural form of the terms defined.
    1.3. Whenever the context may require, any pronoun shall include the corresponding masculine, feminine and neuter form.
    1.4. The word “include”, “includes” and “including” shall be deemed to be followed by the phrase “without limitation”.
    1.5. Unless the context otherwise requires, (i) all references to articles, sections, paragraphs, annexes, clauses and appendixes to this Agreement; and (ii) the term “herein”, “hereof”, “hereto”, “hereunder” and words of similar import refer to this Agreement as a whole.
    1.6. The recitals contained herein form an integral part of this Agreement.
    1.7. Unless the context otherwise requires, references herein: (i) to an agreement, instrument or other document means such agreement, instrument or other document as amended, supplemented and modified from time to time to the extent permitted by the provision thereof and (ii) to a statute means such statute as amended from time to time and includes any successor legislation thereto and any regulation promulgated thereunder.
    1.8. For the purpose of this Agreement, the word “or” is not exclusive.
    1.9. The terms defined elsewhere in this Agreement shall, unless otherwise indicated, have the meaning so ascribed to them.
    1.10. Any reference in this Agreement, to consent or approval or similar connotation, unless expressly stated otherwise, shall be in writing, and shall include facsimile communications.
2. The heading and subheading in this Agreement are included for the convenience and identification only and are not intended to describe, interpret, define or limit the scope, extent or intent of this Agreement or any provision hereof in any manner whatsoever.
3. This Agreement shall be construed without regard to any presumption or rule requiring construction or interpretation against the Party drafting an instrument or causing any instrument to be drafted.

DEFINITIONS

The precision in contract drafting is one of the most acclaimed characteristics of a good drafter, especially when an unclear term or an ambiguous word can lead to multimillion-dollar or rupees dispute, litigation, and liability. This is where definitions come handy, which makes a contract more clear, consistent, and unambiguous. Definitions isolate a term or concept that is used repeatedly in the contract and ensure that it will be given the same meaning each time. It is also used if a word or a term is used frequently and is intended to have a specific meaning in the document which would not ordinarily be ascribed to it. In other words, the defined term makes a contract easier to read by allowing the drafter to use throughout the contract the shorter defined term instead of the longer definition. It also ensures that whatever is defined is expressed consistently throughout the contract.[30]

The use of defined terms also engenders consistency and reduces unnecessary repetition. For example, a sanction may have two meanings, and so maybe the case with the term compensation. Since there is a likelihood that confusion may arise as to which sanction or compensation is the drafter talking about, it is better to specifically define as to what sanction or compensation does the drafter mean. The process of defining important terms increases the likelihood not only that there has been a true meeting of the minds but that it was accurately reflected in the agreement. An example of defining a term could be said *Trademark: means a registered trademark or service mark or any trademark or service mark that is the subject of any application, registration, or renewal*[31].

Definitions are included in agreements in one of two ways. Either term is defined in a separate section (either at the beginning or end of the document), or they are placed in the text itself. The logic is that if there is a need for an elaborate definitions section, then it should be placed in the document where it can be found easily by anyone who reads it. Most contracts have definitions placed at the beginning of the contract itself because it is hard to skip from there. However, if there are shorter agreements or simple agreements where not many definitions will be required, the same can be placed within the body of the text rather than in a separate definitions section.

There are no hard and fast rules as to what defined terms to use or how to list them. Usually, the following considerations are kept in mind while drafting a definitions section. First, definitions, if being listed, should be listed in an alphabetical order to facilitate reference. This will be particularly important in a document with a long list of definitions, in order to avoid wasting the reader's time going through all the definitions to discover whether a word or term has a specific meaning in the contract or not.

Second, the first letter of definitions must be in capitals. The idea is to distinguish it from ordinary words and terms which are not so used, particularly those which are the same as the definitions. Third, avoid defining redundant words or terms that may not need to be defined if it is unambiguous in the context in which it is used as it serves no purpose. For example, *'Agreement' means a contract* is redundant in the context of an agreement. Moreover, avoid creating a defined term if it is not being used after defining it. Also, it is not worthwhile to create a defined term if it is to be used only once or twice unless a complex concept is being simplified through a definition. Ultimately, the overriding goal should be enhancing the user-friendliness of the agreement. [32]

Some of the examples of definitions and how they are defined are as follows:

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[30] Charles M. Fox, WORKING WITH CONTRACTS (2nd edn., 2008).
[31] Kenneth A. Adams, A MANUAL OF STYLE FOR CONTRACT DRAFTING (3rd edn., 2013).
[32] Elmar Doonan and Charles Foster, DRAFTING, 80 (2nd edn, 2001).

“Affiliate” in relation to a body corporate, means anybody corporate, partnership, association, foundation or other legal entity, which through ownership of voting stock or otherwise, directly or indirectly, is controlled by, or under common control with or in control of such body corporate;

“Intellectual Property Rights” means all patents (including originals, divisions, continuations, continuations-in-part, extensions, foreign applications, utility models and re-issues), patent applications, designs (including all registrations and applications), copyrights (including all registrations and applications), trade secrets, service marks, trademarks, trade names, trade dress, trademark applications and other proprietary and intellectual property rights, whether registered or capable of being registered;

“Person” shall mean any individual, partnership, joint venture, firm, company, corporation, association, trust or other entity or any government or a political subdivision or any agency, department or instrumentality thereof;

“***Transaction Costs***” means the aggregate of all the costs and expenses incurred, paid or payable, for or in connection with this Agreement, and includes:

(a) stamp duty, registration charges and other fees and costs payable to any Authority for this Agreement to ABC;

(b) any costs or premium to be paid for the square scarves (which are capable of being transferred under Applicable Law) to ABC; and

(c) goods and service tax, if any, which may be applicable in relation to design work of [design] to ABC;

SUBSTANTIVE CLAUSES OF A CONTRACT

After the introductory part of the contract is written, and the background of the contract is established, it is appropriate to move into the core section of the contract. Such core section set forth what the contract is about and are therefore known as substantive provisions or operative provisions of a contract. For instance, if a contract is being entered for the sale of a car, the substantive clauses of that contract would include a description of the car, the details about the purchase price, and the steps of transferring the car and the money. While such a short contract may be legally enforceable, it fails to address many important issues that the parties may care about. What if there is a material problem with the car that the buyer did not discover at the time of entering into the contract.

Similarly, what is the guarantee that the seller is the true owner of the car and that no other person can later claim that car to be his or her? These are the kind of issues that are addressed through various substantive clauses such as term, representation and warranties, covenants, conditions, declaration, and risk allocation clauses. The present chapter is an attempt to understand these clauses holistically and how they are drafted in a contract.

TERM

The term of the contract is the period of time during which the contract will govern the parties' relationship. It defines the period during which the agreement is effective, subject to the termination in accordance with its termination clause. It is usually specifically agreed that the contract will govern the parties' relationship for a specific number of years or months. For example, a lease agreement is usually made for 11 months though it can be made for any number of years. The point is that it is always specified as to how many years will the lease exist, which is written explicitly through a term clause.

The simplest example of a term clause could be:

This Agreement is from January 16, 2020, till January 15, 2021, unless terminated earlier.

It may not be necessary that all contracts will have terms. Some contracts could also be a one-time transaction or those contracts that terminate when the purpose of the contract is achieved; for example, a contract for the acquisition of a company.

The two important parts of a term clause are (a) the effective date or the start date; and (b) the end date. The effective date or the start date is the actual date the parties mutually agree to start the applicability of the terms of the contract on them. Usually, contracts come into force on the day all the parties have signed it, and unless this date is different from the date when the performance of the contract will begin, start date explicitly is not required. Therefore, the effective date of a contract would be the date on when all the parties sign it because a contract becomes a contract when it has been signed, not when performance starts. This is the date from when the term of the contract will start.[33]

If the term of the contract has begun, in some cases, it will likely end as well. Though there are contracts that do not have the end date, the most common contracts would contemplate an end date. The most straightforward way is to determine the end date of the contract and explicitly mention in the clause so that there is certainty on the term of the contract. For example, if the term clause says that the agreement is valid from January 16, 2020, to January 15, 2021, it is very clear that the start date of the contract is January 16, 2020, and the end date is January 15, 2021, and the length of the contract is one year.

However, the end date could also be the end of a particular time period, for example, at the end of 11 months or at the end of 5 years or when the purpose of the contract is achieved. For example, This Agreement will end when the Supplier supplies all the goods as mentioned in Clause 5. Here, the contract will come to an end when a pre-decided quantity of goods are supplied to the other party.

While drafting a term clause and in order to ensure a certain, simple and unambiguous language, it must be kept in mind that whenever a term clause is being drafted, the beginning and end dates of the term must be clear, specific, and unambiguous. The easiest way to achieve this is to simply state the term's start date and the end date. But in cases where determining the specific start date or the end date is not possible, a contract can

[33] *Contract Corner: Term (Part 1)* <https://www.jdsupra.com/legalnews/contract-corner-term-part-1-59562/>

provide a reference to the starting or ending of a future event. For example, the first day of the month or the last day of the month or say first Sunday of the month or last Saturday of the month.

The end of the term usually signifies that the contract is ended however, there may be situations when a party would want to extend the term or renew the term either automatically or at the parties' option, or with fresh negotiations, as the situation may be. For such clauses, it is necessary to cater to few demands of such clauses, for example, it should mention whether such term will automatically renew, unless terminated, for how long such renewal period be and how a party can manually renew it, if not automatically.

Following are the examples of term clauses and the various components it may consists:

A simple and straightforward example of a term clause describing only the start date and the end date is:

Term: The period for this Lease Deed shall commencing from 1st August 2020 to 30th June 2021.

The second type of example is when the term period is subject to the termination clause and when the start date is not explicitly written. In such cases, the signature date is defined in the definitions section which pinpoints the date on which the contract will be signed and will come into effect. It is usually written as:

This Agreement shall commence and become effective only on the Signature Date and shall, unless terminated in accordance with Section 12 of the Agreement, continue in accordance with the terms thereof.

Another example of the term clause is when the term clause is subject to multiple conditions. The following is the example of a term clause in an employment agreement:

1. Term

a) Your appointment takes effect from **1st February 2018** and would continue until **30th June 2020 ("Contract Period")**.

b) The first year of this contract shall constitute a probationary period. During the period of probation, your employment may be terminated either by the School or by you, with a three months' notice in writing or three month's salary in lieu of the notice, without assigning any reasons whatsoever.

c) At the expiry of the probation period, the School shall, in its sole and absolute discretion, send a written confirmation to you confirming your appointment as per the terms of this contract or rejecting your appointment. In the event you receive the said written confirmation, the contract may be prematurely terminated by either party, without penalty, by giving written notice, without assigning any reason whatsoever, by the first of December for the semester ending in June and by the first of June for the semester ending in December.

Another similar example where the parties put a condition not to end the term within a stipulated time period is as follows:

a. The total duration of the project will be 24 (twenty-four) months from the date of approval of the Sanctioned Plans, subject to be increased by written mutual consent.
b. If Developer fails to complete the Project within the stipulated 24 (twenty-four) months, the Developer shall be liable to compensate the Owner at the rate of INR 10,000 per day till the date of actual completion.
c. This Agreement cannot be terminated by either Party before the expiry of 2 years from the date of the Sanctioned Plan.

There may also be term clauses which are mixed with condition precedents. It essentially means that unless the condition precedent is triggered, the term will not start. An example of such a scenario is as follows:

1.1. This Agreement shall become effective from [●] ("**Effective Date**") upon which:

(a) this Agreement has been executed and delivered (in person, by electronic mail or otherwise) by both of the Parties hereto; and

(b) each Party confirms to the other in writing that all necessary approvals have been obtained with respect to the transactions contemplated by this Agreement.

Another example of term clause that incorporates the possibility of renewal is as follows:

2. TERM

2.1. The term of this Agreement is [●] months ("**Term**") from the Execution Date unless terminated earlier.

2.2. Before the expiry of the Term, the Parties may renew this Agreement for such further periods, and on such terms and conditions, as may be mutually agreed to between them in writing.

Lastly, a complicated term clause with all the conditions, qualifications, restrictions, and cross-referencing, often found in complex transactions is given below:

Term of the Lease

a. Without prejudice to the mandatory nature of this Agreement from the day of its signing, the lease of the Premises shall enter into force and take effect from the handing over of the Premises to the Sub Lessee under the conditions set forth herein, without the need for confirmation by any of the Parties, which have already set forth the conditions that shall govern the lease.
b. This Agreement is valid from the date of signing (date of this Agreement) and will remain in effect till the end of the Lease Term (hereinafter defined). The

lease granted herein by the Sub Lessor shall be a limited lease for a term of 25 (Twenty Five) Years. This term of 25 Years (Twenty Five) shall commence from the "Handover Date of the Premises" as defined in Clause **Error! Reference source not found.** and expire on the date that shall fall 25 Years (Twenty Five) from the Handover Date ("Lease Term") and on the terms, conditions and covenants detailed hereinafter.

c. Subject to the terms agreed herein, the Sub Lessee and Sub Lessor agree not to terminate this Agreement during the first 36 (Thirty-Six) months from the Opening Date ("Lock-in Period") of the Premises except as mentioned under Clause 10.4, 10.5, 15.3 and 15.4. After the expiry of the Lock-in Period, the Sub Lessee at any time at its sole discretion with 6 (six) months' prior written notice to the Sub Lessor, terminate this Agreement and the Sub Lessee shall have no obligations or liabilities towards the Sub Lessor if the Agreement is so terminated except for the payment of dues as stipulated under this Agreement up to the date of termination. For the avoidance of doubt, this right of early termination only applies to the Sub Lessee, and the Sub Lessor does not have such right to early termination except as set forth in Clause 15.4. It is further agreed to between the Parties that in case the Sub Lessee terminates this Agreement during the first 36 months other than as mentioned in Clause 10.4, 15.3 and 10.5, the Sub Lessee shall give 6 (six) months' prior written notice to the Sub Lessor prior to such termination, and the Sub Lessee shall pay to the Sub Lessor Advance Rent for the unexpired period of the Lock-in Period and return the Premises in accordance with Clause 7.4

PAYMENT

Payment clause sets out the financial consideration of the contract.[34] Consideration is required for each party benefiting from and bound by, a contract. It could either be purchase price, salary, royalties, or professional fees. Through this clause, one party promises to pay the other in exchange for whatever that party has promised to do. For example, in an agreement for lease, the tenant promises to pay the landlord the rent in exchange for the use of leased premises. This is done through payment or consideration clause.

Every party that enters into and benefits from a contract must be given consideration. The best way to understand a consideration is an exchange. For example, an employee provides her services to a company, she receives a salary in return. In real estate transactions, a property is exchanged with its purchase price, i.e. lots of money.

Every payment clause must state the amount of the payment and include a promise to pay it. It should explicitly state who will pay whom, why will it be paid, what triggers its payment, how is it going to be paid. Most importantly, it should prescribe a timeline or a particular time as to when such payment is to be made. In essence, a payment clause

[34] Tina Lynn Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO? (2nd edn., 2014).

should answer the questions of who is paying what to whom, when, why, and how along with the amount payable incorrect currency and written explicitly in digits and words both.

Sometimes, the amount to be paid as consideration may not be fixed and may be dependent on a formula or a condition or if it requires a calculation. In such cases, it is advisable to calculate any amounts that can be calculated before signing rather including a mathematic formula to the extent possible because it ensures certainty of payment and gives less scope for ambiguity. It will also reduce the likelihood of a dispute because the parties will check the calculations before signing the agreement.

If a party insists on more than one form of payment to more than one party or is considering to pay in multiple tranches, it is advisable to create a table or a chart specifying the type and amount of payment payable in each type or explicitly mentioning the amount to be paid in each tranche. The idea is to trace and follow the money to be flowed from one party to the other.[35]

Drafters would also want to pay special attention to the mode of payment and its implications on the parties. For instance, a party may insist on paying only through cash, but the same may have tax implications or may be restricted by applicable rules such as RBI Rules, hence it is advisable for drafters to caveat clients about such issues and draft the provision accordingly. Moreover, all the details of the mode of payment should be explicitly written. For example, if the party wishes to receive the payment through NEFT or RTGS, their correct bank account details along with all the necessary information such as the IFS Code or the Swift Code, or the MICR Code should be mentioned in the clause to leave no scope of ambiguity. This is because if the details are not present, the defaulting party may use the absence of details as an excuse for non-payment.

The following are the examples of payment clauses and its variations:

A typical and straightforward payment clause would look as follows:

Rent: The agreed monthly rent amount between the Parties for the Lease Premises is INR 15,000/- (Rupees Fifteen Thousand Only) per month for the Term. The payment shall be made in the form of advance cheque/NEFT/Cash payable to Mr. S or Mrs. A on or before the 5th of every subsequent month. The payment for the first month has duly been received by the Lessors.

An additional clause is also added sometimes, which deals with the scenario if the payment is not made on time. An example of such a clause in a royalty agreement is as follows:

Delay in Payment of Royalty and Non-Payment: In case of non-payment of royalty, ABC will be liable to pay simple interest @ 9%, without prejudice to any other right available to XYZ under applicable law.

[35] Tina Lynn Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO? (2nd edn., 2014).

Sometimes there may be clauses that will not explicitly mention the consideration part but refers to an annexure or a schedule describing it in detail. An example of such a clause is:

Compensation: You will be exclusively entitled to the compensation mentioned in Annexure A of this document which contains a detailed breakup of annual compensation, including an itemized description of cash and non-cash benefits.

A more detailed and specific payment clause describing various modes of payments and a requirement of a security deposit is as follows:

1. Rent**:** The monthly rent for the Lease Premises is INR 1,12,000/- (Rupees One Lakh Twelve Thousand Only) per month for the Term. The payment shall be made in the form of advance cheques with the following break up:

    1.1. INR 70,000/- (Rupees Seventy Thousand Only) as property rent;

    1.2. INR 42,000/- (Rupees Forty-Two Thousand Only) for rental of fixtures and fittings;

2. All payments are to be made in the name of 'XYZ' on or before the 5^{th} of every calendar month in advance. A rent receipt of INR 70,000/- (Rupees Seventy-Thousand Only) shall be provided to the Tenant, whereas the rental, which is INR 42,000/- (Rupees Forty-Two Thousand Only), for fixtures and fittings shall be paid to the Landlord in the form of physical cash.

3. The Tenant shall pay a non-interest-bearing security deposit of INR 2,24,000/- (Rupees Two Lakh Twenty-Four Thousand Only) and an advance deposit of INR 1,12,000 (Rupees One Lakh Twelve Thousand Only) to the Landlord. The said security deposit shall be forfeited in favour of the Tenant in case of any breach of the terms of this Agreement. The said security deposit shall be refunded by the Landlord to the Tenant at the end of the Term without any interest, subject to such deductions as enumerated in this Agreement, and the advance rent shall be adjusted against the rent outstanding in the last month at the expiry or termination of this Lease Deed, whichever is earlier.

Another detailed payment clause with declarations and negative covenants is as follows:

1. ASSIGNMENT FEE

1.1. In lieu of assignment of all rights, titles and interests in the Lease Deed, under this Agreement, delivery of all Materials related to ABC, truthfulness, validity and continued truthfulness and validity of all covenants, representations and warranties, and performance of all obligations mentioned herein this Agreement, XYZ shall pay to ABC, an Assignment Fee of an amount of INR 1,00,00,000/- (Rupees 1 Crore only) ("**Assignment Fee**"), immediately upon execution of this Agreement, subject to receipt of a valid invoice and delivery of all the Materials.

1.2. The Assignment Fee shall be exclusive of goods and services tax ("**GST**").

1.3. VEL confirms that the Assignment Fee is adequate and all-inclusive consideration for the assigning of all rights, titles and interests in the Lease Deed, the Materials, all representations, warranties and undertakings of XYZ, and any acts to be undertaken by XYZ in the future in relation to all rights, titles and interests including executing any additional documents, deeds, or agreements, and for grant of any consent, or approval, or any such other act required for XYZ in compliance with the terms and conditions of this Agreement, and that XYZ will not raise any objection, or claim regarding the insufficiency, or inadequacy of the consideration received, or cause any objections, or hindrances to XYZ's all rights, titles and interests in the Lease Deed under this Agreement.

A complicated and extremely detailed consideration clause dealing with every single aspect of it is given below to give a glimpse of how complex or detailed a payment clause can become in a high valued or complex transaction:

Rent

a. The rent of this lease is a variable amount based on the Sub Lessee's sales figure or volume at the Premises (the "**Rent**"). The Rent is the amount that results from applying a percentage of [7.10% including all charges such as, Common Area Maintenance, management, promotion and other utilities; to the verified sales figure or volume of the Premises in accordance with the Sales Figure (as defined in Clause 8.3). The Rent shall be appropriately settled by annual periods in the manner indicated hereunder. For the avoidance of doubt, the Sub Lessee shall not pay escalations or any other costs, charges, expenses, taxes or fees related to the Premises, save and except for the Rent and individual expenses as set out in Clause 9.9 below or as otherwise set out in this Agreement.

b. The Rent shall begin to accrue from the Opening Date of the Premises, provided that the Sub Lessor has complied with all the terms of this Agreement, including without limitation, the (i) Hand-Over Conditions; (ii) the Minimum Conditions of the Shopping Centre and co-tenancy; and. It is clarified that the Sub Lessee shall not be liable to pay Rent in the period between the date of execution of this Agreement and the Opening Date of the Premises. In the event that the Sub Lessor fails to comply with any of the obligations listed in the previous paragraph, the Rent shall only accrue once all the agreed terms and conditions have been fulfilled, at which point the Rent exclusion periods set forth in Clause **Error! Reference source not found.** due to non-compliance with these obligations shall be applied.

c. The Sub Lessee shall pay to the Sub Lessor as an advance rent (the "**Advance Rent**"), the monthly amount of Rupees 10,00,000[Rupees Ten Lacs Only] during the first financial year of the Term. From the second financial year of the lease to the last lease year of the Term, the Advance Rent shall be the average monthly Rent of the previous year (the "**Advance Rent**"). As an exception, the Advance

Rent of the first and last months shall be that which proportionally corresponds to the number of days that have elapsed in the month in question and respectively, from the Rent's accrual date or until the termination of this lease. If the Sub Lessee starts or ends its business within a financial year, such settlement period shall be added to the previous or subsequent calendar year as appropriate if the incomplete year is shorter than 6 (six) months. The delay in submitting the invoice by the Sub Lessor may tantamount/ result in the corresponding delay in payment by the Sub Lessee by the same period of time.

d. The Advance Rent shall accrue, monthly and in advance, as an advance of the Rent and must be paid within the first 10 (ten) calendar days of each month, provided that the Sub Lessee has received the respective invoice by the last day of the previous month. The payment of the Rent shall be made by bank transfer to the account designated by the Sub Lessor.

COVENANTS

The covenants memorialize the promises that are being made by the parties. They are ongoing promises by one party to do or not to do a particular thing. It creates a duty to perform if a contract has been formed.[36] This duty to perform is also known as an obligation. Covenants are designed to ensure that a party receives the benefits that it bargained for in the substantive clauses of the contract.

Covenants can be categorised into three parts:[37]

1. *Affirmative or positive covenants:* a promise to do a specified thing. It is a covenant that obligates a party to do some act.
2. *Negative or restrictive covenants:* a promise to not do a specified thing. It is a covenant that requires a party to refrain from doing something.
3. *Financial covenants:* a promise to maintain a certain level of financial condition or a promise not to take specific actions unless certain levels of financial condition or performance exist at that time.

Detailed examples of all the above-mentioned covenants are given at the end of this section.

Covenants are paid attention to because a party that is entitled to performance of a covenant may also seek a judicial order of specific performance forcing the party obligated by a covenant to perform. It is very important to pay special attention to the language of the covenant while drafting it because it can make its performance harder or easier, depending on how it is drafted. Whenever a covenant is drafted, its substance is determined first. To determine the substance of a covenant, the evergreen *who, what, when, where, why, how, and how much* questions should be answered.

A good covenant clause would include the specific details of who is obligated to whom? What is the obligation? By when must the obligation be performed? Where will the

[36] Tina Lynn Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO? (2nd edn., 2014).
[37] Charles M. Fox, WORKING WITH CONTRACTS (2nd edn., 2008).

performance take place? Why must a party perform? How is the obligation performed? If performance involves money, how much is it?

A major caveat is that while drafting the substance covenant, a drafter should avoid writing anything which is not in control of the performing party. This is because an outside event or a third-party control may not give the guarantee that the covenant will be performed which can eventually lead to a breach. For example, it would be risky to draft a covenant saying that X shall ensure that Katrina Kaif will perform in the Event. While it may entirely be possible for X to ensure that Katrina Kaif will perform, but if she doesn't, X may be in serious risk of breaching of this covenant.

The other important thing to be kept in mind while drafting a covenant clause is that the clause should use the word 'shall' to obligate a party to perform. The term 'shall' translate to 'has an obligation' in the realm of contract drafting. Moreover, as a general rule, it is preferable to state what the other party's obligation is then to state what a party has a right to.[38] For example, instead of writing that "*Employee has a right to be provided with meals twice a day*" it should be written as "*Employer shall provide meals twice a day to the Employee*".

Lastly, avoid writing the phrase 'the parties agree' because the purpose of the agreement or a contract is that parties have agreed to enter into respective terms and conditions. Therefore, the parties agree to agree on something that may not make sense. Hence, instead of writing that "Parties agree to do X" it should be written as "Both the Parties shall do X". Similarly, it is not advisable to write the phrase "is responsible to" and instead "shall" is used directly. For example, "X is responsible for providing meals twice a day to Y" should be written as "X shall provide meals twice a day to Y".

An example of a positive covenant is as follows:

8.1 Financial Records

The Company shall allow each Party and its authorized representatives the right during normal business hours to inspect its books and accounting records to make extracts and copies there from at its own expense and to have full access to all of the Company's property and assets including but not limited to the working papers and documents of the statutory auditors of the Company.

8.2 Books and Records

The Company shall keep proper, complete and accurate books of account in INR and in accordance with the Laws, rules and regulations as may be applicable to the Company from time to time.

8.3 Reports

The Company shall provide to each Shareholder (i) within 60 (sixty) Business Days after the end of each Financial Year, the annual audited consolidated financial statements of

[38] Tina Lynn Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO? (2nd edn., 2014).

the Company for such Financial Year, (ii) within 30 (thirty) Business Days after the end of each quarter, quarterly unaudited consolidated financial statements of the Company for such quarter, (iii) within 30 (thirty) Business Days after the end of each quarter, quarterly unaudited consolidated management accounts of the Company for such quarter; (iv) such other reports as the Board may determine. The Company shall furnish to the Parties, and their auditors such financial and other information relating to the business of the Company as any of them may reasonably require.

8.5 Insurance

To the extent permissible under the applicable law, the Company shall, and the Parties shall procure that the Company shall, maintain appropriate insurance coverage in a sufficient amount as are generally maintained by responsible companies in the same industry. Such insurance policies must be sufficient to cover liabilities to which the Directors and officers of the Company may reasonably be considered at risk in relation to the discharge of their duties.

8.6 Intellectual Property Protection

The Company, its Directors and the Shareholders shall take all steps promptly to protect its Intellectual Property rights, including registering all its trademarks, brand names and copyrights. Any Intellectual Property developed, procured during the term of this Agreement shall be the sole and exclusive property of the Company.

8.7 Dividend Distributions

The profits of the Company shall be distributed among the Shareholders in proportion to their respective shareholding percentage in accordance with applicable law.

Two different examples of the negative covenant are as follows:

1.4. Covenant not to sue XYZ

1.4.1. ABC will not institute any action, or suit at law, or in equity against XYZ, nor institute, prosecute, or in any way aid in the institution, or prosecution of any claim, demand, action, or cause of action arising out of terms and conditions of this Agreement.

1.4.2. ABC ("**Indemnifying Party**") shall indemnify and keep indemnified, save, defend and hold harmless XYZ and its directors, officers, representatives, advisors, consultants, employees, agents and lawful successors and assigns (each an "**Indemnified Party**"), from and against, any and all losses, liabilities, claims, damages, actions, costs and expenses (including reasonable legal fees) (collectively "**Loss**") incurred, or suffered by any Indemnified Party, which arise out of, result from, or maybe payable by virtue of:

(a) a breach of any representation, warranty, covenant, obligation, or undertaking of XYZ contained in any document; or

(b) any misrepresentation, fraud, or willful misconduct by XYZ under any document.

1.4.3. The Indemnified Party shall be entitled, in its absolute discretion, to take such action as it may deem necessary to avoid, dispute, deny, resist, appeal, compromise, contest, or settle any claim, or proceeding (including without limitation, making claims, proceedings, or counterclaims against persons)

OR

3. RESTRICTIONS

3.1. Except for the express written consent of ABC, [Company] agrees:

3.1.1. Not to use or disclose to Third Party or any another person or entity any Confidential Information relating to [Design] of ABC;

3.1.2. Not to make, or cause to be made, any copies, facsimiles or other reproductions including data files of any documents containing the Confidential Information of ABC;

3.1.3. To use all other reasonable means to maintain the secrecy and confidentiality of the Confidential Information of ABC; and

3.1.4. To not to claim or represent ownership over [Design] before any Third Party.

An example of a financial covenant typically found in term loan agreement or facility is:

1. Each of the Obligors shall:
   1.1. ensure that the Cash Flow Cover Ratio does not fall below 2:1 ("Minimum Cash Flow Cover Ratio") at any time until the Final Settlement Date;
   1.2. ensure that the Security Cover Ratio does not fall below 1.75:1 ("Minimum Security Cover Ratio") at any time until the Final Settlement Date; and
   1.3. not sell any Units forming part of the Projects at a price less than the Minimum Selling Price for the Projects.

REPRESENTATIONS AND WARRANTIES

Representations and warranties identify the assumed facts underlying the agreement. These sections represent the real heart of the deal and tend to be heavily negotiated. Representations and warranties are statements of fact made in the contract by one party to the other party as of a particular point in time. Their purpose is to create a snapshot of facts that are important to a party to consider entering into a contract. The failure of a party's representations to be true will result in the other party having rights and remedies under the contract.

Representations are facts that are made to encourage a party to enter a contract. Representations are assurances from a party to another to induce him to enter into the contract. It is a fact that precedes a contract. Representation contains information that is reassuring and helps a buyer to go ahead and enter into the contract with confidence. Representation is a part of the past or the existing fact that is deemed necessary to be communicated to the party so that he can make a fair assessment of the risk involved in the contract. Representations are very important for the purpose of a contract getting completed as they bridge the gap of information between the parties. A party must ensure that representations he is giving are true and correct to his knowledge so that, he is not found guilty of misrepresentation later on.

The representation must be a past, or present fact intended to induce the reliance of the person receiving the statement. Negotiating on representations and warranties actually forces the party to disclose the facts that might not otherwise be disclosed. This is because parties are under no legal obligation to make any disclosure. A party counteracts this principle by requiring disclosure of facts that may be relevant to its decision to entire into the contract. This is accomplished through the other party's representations.[39]

While representations and warranties could be found in almost all suitable contracts, some drafters may deliberately omit to include representations in contracts or agreements because using representations puts a party at risk of being sued for fraud or misrepresentation. Hence, if a party is not coming with clean hands and wishes to cover its liability, it may often ask the drafters to omit such representations and warranties if the drafter is drafting for the client making representation. On the other hand, if the opposite party get a sniff of such deliberate hiding, it will force the other party to represent, warrant, and indemnify them before entering into the contract. In such contracts, the negotiations become heavy and quite often do not end up being into a contract.

However, including representations and warranties in a contract helps to allocate risk between parties.[40] If one of the representations made is inaccurate, the warranty included outlines the action that the one-party can take against the other. In most cases, when a representation is false, the warranty allows the other person involved in the contract to terminate or decline the transaction.

Representations can be broadly categorised into three basic categories:[41]

Representations as to the contract per se – the purpose is to provide assurance that the other party making them has the contractual capacity and authority to enter into the agreement and that the contract is legally enforceable and does not result in a violation of the law. The idea is that the other party does not have any technical defences available to it if the contract ever becomes the subject of litigation.

Representations relating to the subject matter of the contract – the purpose is to ensure that a party is getting what it bargained for and are tailored to the specific context of the contract in which they are contained. For example, an agreement to sell includes representation by the seller that the property to be transferred is not subject to any lien.

Representation about the parties – the purpose is to ensure the ability of the parties to perform its contractual obligations. A typical representation of this kind is to confirm the

[39] Charles M. Fox, WORKING WITH CONTRACTS, 2.2.2 (2nd edn., 2008).
[40] Tina Lynn Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO? (2nd edn., 2014).
[41] Charles M. Fox, WORKING WITH CONTRACTS, 2.2.4 (2nd edn., 2008).

financial condition of the party or in an employment contract that the employment history on the candidate's resume is accurate.

As discussed earlier, representations are a statement of fact as of a particular point in time. What if the transaction is delayed or the execution of the agreement is to be done on a future date? Does the representations made at the time of entering into a contract still stand the ground on the date when the transaction will actually take place, i.e. a later date? Naturally, in such cases, there is a need to make such representations again on a later date. This practice of making representations at a later date is known as bringing down of representations.[42]

Although a party can make representations with respect to the present, and past facts, it generally cannot do so with respect to future facts. Those are mere statements of opinion. When drafting a representation, remember that it allocates risk by establishing a standard of liability. That standard is the statement of fact. If it is false, the maker of the representation is liable.

The approach of drafting representation and warranties will differ and depend on the party for which you are drafting such representations. If the representations are being drafted for the party making the representations, the number of representations should be minimized and qualified as much as possible. This results in the reduction of the client's potential liability. But if the representations are being drafted for the party receiving the representations, the representations should be as broad and unqualified as possible. This is simply because the representations increase the risk that the maker will misstate a fact, thereby making it easier for the recipient to claim a misrepresentation.

Warranties

A warranty is a promise by the maker of a statement that the statement is true. A warranty requires the statement's maker to pay damages to the statement's recipient if the statement was false and the recipient damaged.[43] It is a kind of indemnity. When a warranty is coupled with a representation, one party promises to indemnify the other with respect to a state of facts currently existing or that existed in the past.

Warranties are, for the most part, promises concerning the future quality or performance of goods to be sold or leased, of real property to be sold or leased, of intellectual property to be sold or licensed, or of services to be rendered. A breach of warranty results if the quality or performance falls short of the promise made in the contract. Some warranties are statements of facts. A breach of warranty would result if the fact warranted is untrue. However, whether the warranty is based on promise or statement of fact, breach of warranty has the same consequences as the breach of any other promise.

[42] Charles M. Fox, WORKING WITH CONTRACTS, 2.2.5 (2nd edn., 2008).

[43] Tina Lynn Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO?, 3.2 (2nd edn., 2014).

A simple example of a Warranty could be:

The Manufacturer warrants to the Retailer that the Product as packaged and shipped from the Manufacturer's plant *will be free* from defects in material and workmanship and *will function and perform* in accordance with Manufacturer's specifications for a period of one year from the date of retail purchase.

The point is that the retailer is not relying on the truthfulness of the underlying statements but instead is relying on the Manufacturer's promise that it will pay damages if the state of facts does not exist in the future.

When a contract uses the terms "representations" and "warranties" together, they blend the past, present, and future together with in terms of the contract. Every contract is different, but the language is the same. Representations and warranties are assurances that one party gives to another party in a contract. These assurances are statements that the purchasing party can rely on as factual.

Unlike a representation, which is made to induce a party to enter into a contract, a warranty is a core term of the contract during the performance. Further, unlike a representation, a non-breaching party does not need to believe a warranty is true or not. By making a statement/promise of condition, the non-breaching party is relying on the condition to remain the same during the warranty period, instead of relying on whether it was true when made and requires strict compliance by the party making the warranty. Additionally, unlike representations, some warranties can be implied into a contract by law, such as the implied warranty of merchantability or fitness for a particular purpose.

In the event of a breach of warranty, the non-breaching party may be entitled to damages resulting from the breach to put them in the position they would have been in had the breach not occurred. In some cases, a contract will provide for specific remedies in connection with a breach of warranty.

To understand better with the help of an example, consider that X decided to go to an auto dealership to buy a car, X would enter this transaction with several representations, such as the car is actually what the seller represents it to be, in terms of model and make, the dealership is legally authorized to sell cars to consumers, and the car will actually work when appropriately used, among others.

The warranty made by the dealership is that all these concepts are valid. If it turns out that one or all these representations are not true, the contract to buy the car may be cancelled. Another warranty made by the seller might be to repair any defect that arose because of the misrepresentation. But the warranty may not last forever. In this example, the seller or manufacturer of the car might offer a period that the unit will work without any defects. Beyond that period, the warranty is no longer in effect. However, some warranties do last for the life of the product. In this case, the buyer in the agreement can expect the seller to repair or replace the product any time it malfunctions.

While drafting a representation and warranty clause, it must be kept in mind that instead of using the term “party represent and warrant as to statements of fact”, it is better to confine only to “the party represents that”. Further, while putting a separate clause named ‘Representations and Warranties’ another issue arises, if the seller thinks that all the warranties in a given agreement are to be found in the section with the heading “Represents and Warranties”. But sometimes the court may hold that a statement of fact or obligation located elsewhere in the contract constitutes a warranty supporting action for breach of warranty, even though the contract does not refer it as a warranty.

A simple example of a representation and warranty clause is as follows:

1. Representation and Warranties

1.1. XYZ represents and warrants (“**XYZ’s Warranties**”) to ABC, as on the Execution Date, as follows:

1.1.1. it is validly existing under the laws of India;
1.1.2. it has the power and authority to execute and deliver this Agreement. The execution and delivery of this Agreement has been duly authorized and approved and does not require any further Authorization;
1.1.3. upon execution, this Agreement will be a legal, valid and binding obligation of ABC, enforceable in accordance with its terms and conditions;
1.1.4. it has not taken any action, and no other steps have been taken, or legal proceedings started by, or against it for declaring it as insolvent or the appointment of a receiver, trustee, or similar officer of any, or all of its assets.

Another simple version of representation and warranties often found in lease deeds is as follows:

1. Representations and Warranties:

1.1. The Tenant confirms that all the bathroom fittings and fixtures, electrical and other fittings and fixtures are in perfect working order and nothing is broken or missing. The Tenant shall be responsible to restore them to the same original condition at the time of vacating the Lease Premises, subject to reasonable wear and tear.

1.2. Alternatively, the Tenant shall deduct the amount for damages at the time of refund of the security deposit.

1.3. The Tenant has taken the Lease Premises for the purpose of home stay of guests, duly approved by the appropriate authority under applicable law, and the Tenant, hereby represents and warrants, that the Tenant possesses, and shall at all times, during the Term, continue to possess all licenses, approvals, permissions, no objection certificates, etc. as may be required under applicable law. The possession of the licences, etc, required under all applicable laws for running

XYZ Retreat shall be with Tenant, however, the ownership and signatory name on the said licences shall be of the Landlord.

1.4. The Tenant shall not use the Lease Premises for any other purpose except the one for which the Lease Premises have been given on lease and shall ensure compliance with all applicable law during the Term, including but not limited to, compliances with respect to fire safety, insure, etc.

An example of a detailed representation and warranties is as follows:

1. The Sub Lessor and Confirming Parties have represented, warranted and undertaken to the Sub Lessee that:
   1.1. The Sub Lessor is fully solvent and is not sick or under the supervision of the NCLT.
   1.2. The Sub Lessor and Confirming Party, as applicable, has paid all the charges, dues and taxes, including unearned increase, payable in respect of the Plot, Shopping Centre and Premises. There are no pending dues or claims of whatsoever nature to or from the concerned authorities relating to the Plot, Shopping Centre or Premises including but not limited to towards water, electricity, operation, maintenance, taxes and car parking prior to the date of execution of this Agreement. Further, all taxes, levies, cess and dues levied by the Central or the State Government/any local body/all other authorities with respect to the Plot, Shopping Centre and Premises have been duly paid, and no such amount is outstanding as on the date of execution of the Agreement. On this date hereof, the Sub Lessor does not have any liability for any taxes, or any interest or penalty in respect hereof, of any nature that has been assessed against the Sub Lessor or becomes a lien against the Plot, Shopping Centre or the Premises
   1.3. The Sub Lessor and Confirming Party has obtained all government permits and approvals required for leasing the Shopping Centre, including but not limited to those set forth in this Agreement;
   1.4. The Shopping Centre is in a good and a tenable condition and is fully and adequately covered by a comprehensive risk insurance coverage including fire and earthquake of adequate value in respect of the Shopping Centre and the Premises.
   1.5. There exists no pending, perceived, threatened or anticipated legal proceedings, suits, attachments, claims, actions, litigations, arbitrations, land acquisition proceedings, tax notices, garnishee or other proceedings relating to the Plot, Shopping Centre or Premises or claims of any nature whatsoever which may affect the Sub Lessor's absolute rights and title to the Shopping Centre and Premises which affects the Sub Lessee or its Affiliate to undertake its Permitted Business activities from the Premises.
   1.6. The Sub Lessor has not parted with the possession of the Premises to any person or persons and the Sub Lessor is in exclusive use, occupation and vacant possession of the Premises.

1.7. The Person signing this Agreement on behalf of the Sub Lessor is duly authorized to sign this Agreement.

1.8. The Sub Lessor/Confirming Parties have not entered into a similar agreement in respect of the Premises with any other third party.

A representation and warranty, along with a declaration, are as follows:

The Sub Lessor and the Sub Lessee further represent, warrant and declare as under that:

The Sub Lessors, Confirming Parties and the Sub Lessee are duly empowered and have the full, clean, absolute and unrestricted right to give and take the Premises on lease and execute the Agreement as per the terms and conditions contained herein.
The execution of the Agreement does not violate any statute, regulation, rule, order, decree, injunction or other restriction of any governmental entity, court or tribunal to which the Sub Lessor and the Sub Lessee are subject to or any of the provisions of their Memorandum of Association or similar clause or agreement/constitutional documents, or the provisions of any agreement or document to which they are party to.

Some drafters would specifically want to incorporate a clause which states the obvious that the parties have relied on the representations and warranties and have entered the agreement on the basis of it. Hence, any breach in such representations will lead to termination of this agreement:

The Sub Lessors and Confirming Parties agree that basis the aforesaid representations and warranties of the Sub Lessor contained herein, the Sub Lessee has entered into this Agreement and that the compliance of all such representation and warranties are critical. The Sub Lessor is aware and fully understands that if the Sub Lessor is in breach of any of the covenants of this Agreement or if any representation and warranties of the Sub Lessor is found false or there arises any third party claim which threatens the business interests of the Sub Lessee, the Sub Lessee may, at its sole option opt for termination of the Agreement under Clause **Error! Reference source not found.Error! Reference source not found.**.

The following is an example where both the parties are making representations and warranties to each other in a single clause:

1.1. The Owners hereby represent and warrant that:

1.1.1. They are the sole and exclusive owners, and in the enjoyment of the Land and except the Owners, no other person(s) has any right, title, or interest, whatsoever, in the Land;

1.1.2. The Land is a clear and clean title in all aspects and is free from all types of encumbrances, such as mortgages disputes, loans, liens prior agreements of sales, development, court orders, attachments, litigations etc. and any such encumbrance or defect in title is found, the Owners shall make good the loss or losses to the Developer, that may be incurred due to, or in connection with, such encumbrances or losses.

1.1.3. The Owners shall not sell, deal with, dispose of or alienate or otherwise enter into an agreement in respect of the Land, or the Developer Apartments, with or to, any person or persons, or act in any manner inconsistent with, or prejudicial to, or in contravention of this Agreement.

1.1.4. Neither the Owners, nor their predecessors-in-title, nor anybody claiming from/or under them, or any of them, have or have granted, any right of way or easement or other rights, to any person over the Land.

1.2. The Developer represents and warrants that:

1.2.1. The Developer shall at all times, obtain and maintain all Approvals.

1.2.2. The Developer is duly organized, validly existing and in good standing to undertake the Project.

1.2.3. The Developer shall undertake the Project in accordance with Schedule A to this Agreement.

DECLARATIONS

A declaration is a fact as to which both parties agree, generally a definition or a policy for the management of the contract. It could also be a piece of basic information related to the contract. For instance, listing the contact information of the company or the policyholder in an insurance contract is a declaration.

Logically, all definitions are declarations. These declarations have no substantive contractual effect on their own. For example, if a contract has a definition which says that the License fee means INR 50,000/-The parties have indeed declared a legal result by including the definition in the contract, but the definition of License Fee has no substantive consequences within the contract. It cannot be breached because, in the definition, neither party has made a representation and warranty or promised to do anything.

Declarations are generally not meant to induce the other party to act. A party cannot sue on a declaration to obtain damages. No rights or remedies are associated with it. The purpose is to create definitions, give out information, and establish policies. However, if a declaration is mixed with a covenant or is presented in the form of representation, there may be rights of remedies associated with it, as the case may be.

One example of declaration could be the Governing Law clause (discussed in detail in the later chapters). For example, if the governing law clauses state "*The laws of the Republic of India govern all matters arising under or relating to this Agreement*". This is a declaration that will govern all the parties equally.

CONDITIONS

A condition is a state of facts that must exist before a party is obligated to perform. If that state of facts does not exist, the obligation to perform is not triggered. Conditions are often hotly negotiated because they potentially give one or both parties the ability to get out of the transaction. Each party will want to minimize the number of conditions that it must satisfy, and at the same time will want to impose conditions on the other party that satisfy its own purpose.

An event that conditions performance may be either a "condition precedent" or a "condition subsequent". A condition precedent is an event that must occur before the performance of an obligation becomes due. Thus, the occurrence of the condition precedent triggers the obligation in the contract. In contract, a condition subsequent is an event whose occurrence discharges an obligation. The use of conditions precedent is more common in contract drafting.[44]

Conditions Precedent

The provisions specifying the requirements that must be satisfied before a party is obligated to perform under a contract or before closing occurs are known as *conditions precedent*.[45] For example, the seller is not required to transfer the assets unless the buyer pays the purchase price, and the buyer is not obligated to pay the purchase price unless the seller transfers the assets. It defines certain conditions that must either occur or be met by either party to ensure progress or execution of a contract.

In a contract, a condition precedent is an event that must occur before the parties are obligated to perform. For example, an insurance contract may require the insurer to pay to rebuild the customer's home if it is destroyed by fire during the policy period. The fire is a condition precedent. The fire must occur before the insurer is obligated to pay.

To decide whether a condition is required or appropriate, the drafter must determine if a relationship exists between two events and whether one must precede the other temporally. If it can be fitted into *If/then* formulation, i.e. *If* this happens, *then* and only then is a party obligated to perform, a condition could be drafted.

Once the parties have decided that a condition is appropriate, they must decide on the state of facts – the standard- that must exist before a party is obligated to perform. For example, if in a lease agreement, the tenant puts a condition that the landlord will repair the house before handing over the possession and then only the tenant will shift. If this condition is accepted, then the tenant would decide as to what repairs is she seeking from the landlord following which the condition clause will be drafted into the lease.

A good amount of attention should be paid while drafting condition precedents. It is because the effect of a condition can be particularly important to the parties since potentially the entire agreement is at stake, it is strongly recommended to formulate and present each condition clearly and unequivocally. For example, a drafter should prevent

[44] Chris Goddard, *Basic Principles of Contract Drafting*, 26, *available at*, https://fdocuments.in/document/basic-principles-of-contract-drafting.html (Last accessed on August 15, 2020).
[45] Charles M. Fox, WORKING WITH CONTRACTS, 2.4 (2nd edn., 2008).

two conditions becoming confused and interpreted as one consisting of two sub-conditions (each of which must be met). Hence, it is must to divide conditions clearly, subject by subject and consider enumerating them.

As far as its location in the contract is concerned, a condition precedent clause can either become an entire schedule as a part of the agreement where all the conditions can be listed conveniently or if a condition is to be engrossed in a section, it can be written in those sections using the *If/then* formulae.

It should be drafted in a manner that each condition and each conditional clause should be formulated such that it is capable of being either satisfied (or fulfilled) or not. Conditions and triggering events are important components of a contract. Especially where a condition contains a subjective element, the trigger as to whether it is satisfied or not becomes fluid.

Mixing up conditions and obligations is a source of ambiguity. This is particularly sensitive if you explore the dividing line between a condition, on the one hand, and an obligation depending on the performance of another obligation on the other hand. A condition is a hard and fast statement. By including an obligation, warranty or other operative provision in a condition, the condition (and its strong effect) may easily become ambiguous or even lose its character of conditionality. A drafter should distinguish the obligation from the condition by clear conditional wording (e.g. *provided that*, *unless*, *if*) or by inserting the condition in a separate sentence. If there are more than two conditions or if a condition is rather wordy, it is recommended to bring all obligations (and warranties or other operative clauses) that relate to the satisfaction of a condition into a separate section of the contract. **The end line is that do not phrase the key obligation of an agreement as a condition.**[46]

Further, exceptions need to be distinguished from conditions. 'Exceptions' pertain to a 'rule' (or, equally, a right or an obligation) and might be governed by their proper rules (or not be governed by any particular principle). 'Conditions' trigger the application or the applicability of a rule, a right or an obligation. The difference has to be laid with respect to remedies. For example, in case of an *exception* to a licence grant (e.g. a licence under a patent or copyrighted work) the granted right does exist but using the right as exempted would result in a breach of contract; whereas in case of a *condition* to a granted right remaining unsatisfied, the granted right itself has not come into existence, which entitles the owner of the right to start an action for infringement.

Include a deadline before which all conditions must be satisfied. A deadline is a relatively strong incentive for a party to have the conditions satisfied as soon as reasonably practicable. Obviously, a deadline provides certainty about the rights and obligations of both parties. Such deadline is usually called a 'long stop date' or 'drop-dead date'.

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[46] Tina Lynn Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO? (2nd edn., 2014).

Specify the effects of non-fulfilment of a condition. If one or more of the conditions will not be satisfied, the disappointed party may want to claim the pre-contractual liability of the other party. Also, several actions might have been taken in anticipation of the completion of the agreement or the satisfaction of the condition and such actions may have an irreversible aspect or may require efforts or costs to achieve reversal.

A typical example of a detailed condition precedent clause in a loan agreement is as follows:

1. The Borrower shall not deliver a Utilisation Request with respect to Tranche I unless the Security Trustee has received all of the documents and other evidence listed in Part A of Schedule 2 ("Conditions Precedent to Tranche I") in a form and substance satisfactory to the Secured Parties or has waived the compliance of conditions as per Clause 5.3 below.
2. The Borrower shall not deliver a Utilisation Request with respect to Tranche II (or any part thereof) unless the Security Trustee has received all of the documents and other evidence listed in Part B of Schedule 2 ("Conditions Precedent to Tranche II") in a form and substance satisfactory to the Secured Parties or has waived the compliance of conditions as per Clause 5.3 below.

Provided however that, in respect of the end-use of the Facility specified in Clause 3.1(iii) and Clause 3.1(iv), the Lender shall be entitled to disburse the aforesaid amounts at its sole discretion without the need for any action by the Borrower, including delivery of a Utilisation Request and the Conditions Precedent to Tranche III shall not apply in respect of the same.

3. Further conditions precedent: The Lender shall not be required to fund a Utilisation in accordance with this Agreement unless on the date of the Utilisation Request and the proposed Utilisation Date:
   3.1. no Default is continuing or would result from availing the Facility (or any part thereof); and
   3.2. each of the representations and warranties made by the Borrower and each of the other Obligors in this Agreement and the other Finance Documents is true in all respects.
4. Waiver of Conditions: The fulfilment or satisfaction of any of the Conditions Precedent may be waived by the Secured Parties, in writing, at their sole discretion, following a written request from the Borrower setting out: (i) the Conditions Precedent in respect of which the Borrower seeks a waiver; and (ii) the reasons for seeking such waiver.

Condition Subsequent

Condition subsequent is a condition in a contract that triggers the termination of the agreement and eliminates rights, responsibilities, and obligations for both parties.[47] Conditions subsequent may take the form of events that occur while both parties are bound to the contract. These conditions can also involve the failure of events to occur, or the cessation of an ongoing occurrence. When a condition subsequent occurs, it terminates any duty to perform and can also terminate rights and interests that were present under the terms of the contract.

Condition subsequent is kind of an exit clause from an existing contract. The agreement between parties includes language that frees one of them from the binding relationship. This happens when a conditional outcome occurs. A condition subsequent relieves a party of all obligations.

An example is a property purchase agreement. One party agrees to buy the property from the other. What happens if the buyer goes bankrupt? The buyer does not have the money to honour their promise. A divorce or relocation to a different area could also cause problems. So, the party asks for a condition subsequent that relieves them of an obligation in case such predicted events arise. A party can exit the contract the condition subsequent triggers. It frees one party from the contract. It is an escape clause for bad events. The party mentioned in the condition subsequent will ordinarily no longer has any requirements in the contract.

A good condition subsequent clause will describe what the condition is, properly defines which party has to meet the condition, which party pays for the process, what is the time limit for a party to meet the condition, and identifying how parties obligations are managed once the condition is met. The idea is that a good condition subsequent clause is specific. It leaves no room for interpretation. All parties should know exactly what is expected of them and all the conditions that could trigger the condition subsequent event.

A typical example of a condition subsequent clause is as follows:

1. Within 1 (one) day of the first Utilisation Date of Tranche I, the Borrower shall pay/ repay the entire outstanding in respect of the Identified Debt mentioned in serial no. [] and [] of Section [] of Part [] of Schedule [] hereto and deliver to the Lender a no-dues certificate from the relevant Identified Lender certifying that there are no amounts due and/ or payable by the Borrower to them in respect of the aforesaid Identified Debt and evidence of the release of the Security Interest created in respect of the aforesaid Identified Debt.

2. Within 1 (one) day of the first Utilisation Date of Tranche I, the Borrower shall pay/ repay an amount of INR 16,00,00,000 (Indian Rupees sixteen crore) out of the entire

[47] *Condition Subsequent: Everything You Need to Know* <https://www.upcounsel.com/condition-subsequent>

outstanding in respect of the Identified Debt mentioned in serial no. [] and [] of Section [] of Part [] of Schedule [] hereto and deliver to the Lender a letter from the relevant Identified Lender confirming receipt of the aforesaid amount and evidence of the release of the Security Interest created over the XYZ Mortgaged Property in respect of the aforesaid Identified Debt.

3. Within 3 (three) Business Days of the first Utilisation Date of Tranche I, the Indenture of Mortgage shall have been registered with the relevant Sub-Registrar of Assurances.

4. Within 3 (three) Business Days of the first Utilization Date of Tranche I, the Borrower and the relevant Identified Lenders/ their security trustees shall have duly executed and registered the deeds of reconveyance/ release with respect to the properties mortgaged in favour of the relevant Identified Lenders/ their security trustees.

5. The Borrower shall, within 30 (thirty) days of the relevant Utilization Date, provide a certificate from an independent practising-chartered accountant setting out the details of the purposes for which the proceeds of the relevant Utilization was applied.

RISK ALLOCATION CLAUSES

As the name suggests, risk allocation clauses ascertain the quantum of risk allocated to each party in case of occurrence of a certain event. A risk allocation clause establishes standards of liability.[48] It places an obligation on a party to fulfil the purpose of a contract and the scenarios in which it is not fulfilled, grants recourse. It associates a degree of risk, high or low, that is associated with each party. This association is dependent on the nature of the statements drafted in the contract.[49]

Drafters need to understand the impact of risk allocation and the language of the statements drafted in a contract. The manner of language ascertains the potential liability of the parties to a contract in case anything may go south. The allocation of risks also ascertains the absoluteness in the promises made by a party. It is for this reason that in any contract, the parties attempt to minimise their risks and maximise their profits. Hence, a party differs in the manner of establishing its obligations, these obligations are termed as ‘degrees of obligation’.[50] These degrees of obligations are negotiated between the parties, and mutually acceptable terms are set.

The analysis of risk allocation is relatively straightforward. If the party adversely affected by the event had expressly or impliedly assumed the risk of its occurrence, the non-performance could not be excused even if all other elements of defence or excuse are satisfied. The first place to look in determining risk allocation is the contract itself. If the parties realized that a particular future event could affect performance, the contract might include express and specific term assigning risk.

[48] Tina Lynn Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO?, 60 (2nd edn., 2014).
[49] Tina Lynn Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO?, 60 (2nd edn., 2014).
[50] Tina Lynn Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO?, 64 (2nd edn., 2014).

The parties conduct a risk assessment before entering into a contract to note to the nearest degrees of risks that may come in the future. Mentioning abstract risks is not the solution or the road that contract drafters should take. On recognizing the possibility of a future event, parties may include a specific clause within the contract that could allocate the risk. Inadequate inclusion of these requisite clauses would only lead to numerous disputes and cases which could be avoided otherwise. In order to avoid ambiguity, the bifurcation is made in the contracts in order to allocate risks in a certain manner. The general practice has been to include risk allocation in the form of clauses for representation and warranties, indemnity, limitation of liability, *force majeure*, and express contractual remedies.

Every risk allocation clause has its own specifications, demands, nuances. In order to understand all such clauses better, they have been discussed separately in the module.

ENDGAME CLAUSES

William Shakespeare once said all's well that ends well. It is important for a contract to end well. The ending could be due to multiple reasons. A contract could end if its purpose is achieved, it could end if its term is over, it could end if there is a breach of an agreement, it could end if the subject matter no longer exists. Technically, such clauses should have known as termination clauses, but the term endgame covers more than termination. Of course, it does cover termination clauses significantly, but it also covers penalty clauses, indemnity clauses, liability clauses, force majeure, and dispute resolution clauses. The present chapter is an attempt to understand these clauses with the help of different examples.

EXIT CLAUSES

It is akin to a termination clause where the parties can get out of the contract legally, and without penalty due to certain circumstances agreed by the parties. These are mostly found in an agreement of lease which permits the lessee or lessor of the commercial property legally, and without penalty, to get out of a lease, as mutually decided by the parties prior to entering of the lease agreement.

The idea behind such clauses is that since a contract law is a private law between the two parties, parties are free to enter into a contract that binds them into a legal relationship. Similarly, parties should also have the freedom to move out of the contract or exit the contract in some situations as already pre-decided by the parties while entering into a contract. This freedom to exit the contract without attracting any penalty or breach of provision is achieved through exit clauses.

The main components of an exit clause are as follows:[51]

- how to provide notice of intent to "exit" the contract to the other party

[51] *What is an Exit Clause and What Should it Contain?* < https://www.realestatelawyers.com/legal-advice/real-estate/commercial-real-estate/what-exit-clause-should-contain >

- the amount of time required to legally "exit" the contract when exercising the exit clause provision
- the responsibilities of each party when exercising the exit clause provision
- any monies owed to the other party upon one's "exit" from the contract
- the circumstances when one is in breach of the "exit clause."

TERMINATION

Broadly, a termination clause identifies under what circumstances the parties can terminate the agreement and the procedures for termination. Termination, in general parlance, a means to an end something. In contracts, termination clauses are used to end the contract, which results in parties not performing their obligations under the contract anymore. It provides details of the circumstances under which parties can end their legal relationship and discontinue the fulfilment of their obligations. Such termination could be invoked due to various reasons such as mutual consent, breach of failure of the covenant, etc.[52]

It is usually used as a remedy when there is a breach of any provision of the contract unless explicitly waived. Such breach should ideally be before the performance of the obligations of the contract, or else it will be futile. For example, if a buyer is purchasing a property and discovers after the purchase that the seller breached its representations in the contract, it will be practically useless for her to terminate the contract. However, if she finds out about the breach of representations before the purchase, such a termination clause would be very useful and safeguards the buyer from situations like these.[53] Termination clause may not necessarily terminate the entire contract but can also restrict itself only to terminate certain obligations without terminating the entire contract.

Terminations could be of multiple types. It could be either Neutral Terminations, Friendly Terminations, or Unfriendly Terminations.[54]

Neutral termination could be when the parties have the ability to discontinue a relationship, absent fault of either party. It can also be termed as a termination for convenience. For example, a shop owner has the ability to discontinue a relationship with one of her supplier even if no party is at fault. For example:

The Shopkeeper may terminate this Agreement at any time by notifying the Supplier of termination and by payment of all outstanding accounts.

or

The Parties may terminate this Agreement at any time by a written agreement.

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[52] *Termination of Agreement Clause: Everything You Need to Know* <https://www.upcounsel.com/termination-of-agreement-clause>

[53] Charles M. Fox, WORKING WITH CONTRACTS, 2.5.2 (2nd edn., 2008).

[54] Tina Lynn Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO?, 15.4 (2nd edn., 2014).

Friendly termination would probably be when the transaction *per se* is consummated, completed, concluded, or and the purpose of the contract is achieved. Sometimes the friendly termination happens automatically, sometimes there is a need to send a notice for termination. For example, in a lease agreement, the contract will terminate automatically once the term is over.

Unfriendly terminations are when the parties terminate the agreement due to the fault of the other party or specifically if there is a breach of the party's representations and warranties, covenants, and other substantial rights-based provisions. It is usually termed as a termination for cause. It allows one of the parties to end the contract, as well as collect damages from the other party in the event that they failed to fulfil their contractual obligations.

The following are some of the typical usages of the termination clause used in different contracts. The first example is the simplest form of a termination clause:

Either party can terminate this Agreement by written one-month notice to the other party, or at the expiry of the Term of this Agreement, or by breach of this Agreement unless waived by either party in writing.

The second example of a termination clause is the kind typically used in a shareholder's agreement.

1. In the event that either of the Shareholders ("**Defaulting Party**") is in breach or fails to observe or comply with any material term, covenant or obligation contained in this Agreement, which breach or failure, if capable of cure or remedy, has not been cured or remedied within 30 (thirty) Business Days of the receipt of written notice of such breach or failure from the other (the "**Non-Defaulting Party**") or Defaulting Party is: (a) adjudged insolvent or commences voluntary winding up or liquidation; or (b) any similar proceedings are commenced by a creditor which proceedings are not disposed of within 60 (sixty) days from the date of commencement of such proceedings, the Non-Defaulting Party shall, without prejudice to other rights and remedies available in terms of this Agreement or under law, have the right to terminate this Agreement forthwith.

2. Upon exercising its right of termination, the Non-Defaulting Party shall, at its discretion, exercise any one of the following available options:

   2.1. Require the Defaulting Party to sell its shareholding in the Company at the Discounted Value; or

   2.2. Require the Defaulting Party to buy its shareholding in the Company at the Fair Value.

3. The Fair Market Value of the Shares for the purpose of Section 12 shall be determined by the Independent Valuer appointed by the Non-Defaulting Party as per the valuation formula mentioned in **Schedule V,** and the same shall be final and binding on the Parties, in the absence of manifest errors.

4. This Agreement may also be terminated by mutual written consent of the Parties upon terms, and conditions mutually agreed between the Parties.

5. Upon termination, the Company shall not be entitled to use the name of the exiting Shareholder(s) or the Shareholder whose shareholding has fallen below 50% unless such use is expressly authorized in writing by the exiting Shareholder or the Shareholder whose shareholding has fallen below 50% through another name license or authorization.

6. After the termination of this Agreement in accordance with the provisions hereof, the Shareholders agree that they shall be free to carry on any business in or outside India whether on their own or in a joint venture with another party.

In this particular example, it is worth noting how the drafter has made an obligation to inform about the termination cause to the other party, and if it stems from any breach, a party must provide an opportunity to the other party to provide a cure period to rectify the breach. If the breach is still not cured in the cure period, the termination proceedings will commence.

Another simple example of a termination enumerating the potential reasons for termination is as follows:

3.1. Notwithstanding anything to the contrary contained in this Agreement and prior to the Term of this Agreement, this Agreement may be terminated in any of the following ways:

3.1.1. By the Mutual written consent of the Parties; or

3.1.2. By the Parties, without giving cause, by giving 30 (thirty) days written notice to each other; or

3.1.3. By ABC, if there has been a breach, or failure to perform terms and conditions or breach of any undertaking made [Company] under this Agreement; or

3.1.4. By ABC, if [Company] has committed a material breach of any Document, which breach if capable of remedy (in the opinion of Renfro), remains un-remedied (in the opinion of ABC) for a period of 30 (Thirty) days from the date ABC first gives a written notice to [Company] specifying such breach and requiring a remedy thereof.

3.2. Effects of termination – Upon termination of this Agreement, the Parties shall be relieved and discharged from all obligations, liabilities or claims under this Agreement except for rights and liabilities accrued under this Agreement prior to the termination thereof or which expressly survive termination of this Agreement.

This clause mentions the effects of termination explicitly. Although, it is not necessary to explicitly mention the effects of termination because it is implied that once a contract is terminated, parties will be relived from discharging all obligations, but some drafters *prefer it to safeguard the interests of their client completely. For example, the phrase "discharged from all obligations, liabilities, or claims under this Agreement except for rights and liabilities accrued under this Agreement prior to the termination" adds an additional layer of protection.*

There may also be instances where the termination clause bars the termination of the agreement for a specific period. Such termination clauses are usually mixed with term clauses. For example:

1. The total duration of the project will be 24 (twenty-four) months from the date of approval of the Sanctioned Plans, subject to be increased by written mutual consent.
2. If Developer fails to complete the Project within the stipulated 24 (twenty-four) months, the Developer shall be liable to compensate the Owner at the rate of INR [•] per day till the date of actual completion.
3. This Agreement cannot be terminated by either Party before the expiry of 2 years from the date of the Sanctioned Plan.

Lastly, the most common termination clause is similar to the below clause:

1. This Agreement may be terminated at any time:
   1.1. By the Mutual written consent of ABC and XYZ; or
   1.2. By ABC, without giving cause, by giving 30 (thirty) days written notice to XYZ Foods; or
   1.3. By XYZ, after the expiry of Lock-In Period, without giving cause, by giving 30 (thirty) days written notice to the ABC;
2. By ABC, if there has been a breach, inaccuracy in or failure to perform any representation or warranty or undertaking made by XYZ pursuant to this Agreement and XYZ fails to cure such breach within 7 (seven) days after the receipt of a written notice thereof.

PENALTY

Penalty clauses are clauses intended as a punishment to frighten a party into completing a contract. It can be defined as a clause that stipulates the payment of money in the event of non-performance of a contractual obligation, with a purpose either of pure indemnification or deterrence. This clause works as a deterrent effect to the potentially violating party, which may deter it from even thinking not to perform the agreement or otherwise, they will attract handsome penalties.[55]

Such clauses ensure that the agreement is performed as per the terms and conditions laid down with a threat of attracting penalties if not performed. Obviously, it is subject to

[55] Marcel Fontaine and Filip Dely, DRAFTING INTERNATIONAL CONTRACTS: AN ANALYSIS OF CONTRACT CLAUSES, 321 (2006).

other clauses which may allow the non-performance for example, termination or breach of covenants, but if everything is fine and still party does not want to perform, penalty clauses come handy. It obligates the defaulting party to provide some form of compensation to the innocent party in the event of a breach of contract.

Sometimes the parties to a contract are aware of the potential hazards and breaches they face. They may therefore choose to estimate the damages and likely losses before the breach and incorporate such figures into the contract. Hence, if a breach occurs, the receiving party would be compensated adequately through these penalty clauses. The penalty usually consists of the payment of a certain sum or a percentage of the price, per period of late performance. The penalty may increase if the delay persists.[56]

A penalty clause can be unenforceable if it does not meet certain requirements. Therefore, the following are the drafting tips that must be considered while drafting a penalty clause:[57]

- Consider whether compensation or damages to be paid to the innocent party for a contract breach.
- If there are damages, ensure that there is a legitimate interest that is proportionate to the enforcement of the main obligation by the innocent party.
- Consider whether the penalty clause has an actual pre-estimation of loss. If it does, it will be considered valid without the need to show anything else.
- Avoid making penalty extravagant or unconscionable.
- The bottom line is that penalties should be a reasonable compensation and not a profit-making mechanism.

A simple example is as follows:

If the Employee fails to commence work or terminates work for the Company prematurely and is in breach of the employment contract as a result of this, if she is dismissed without notice or if she violates the confidentiality obligation, the Employee is liable to pay a contractual penalty of one month's basic salary for each of the violations.

A typical example is as follows:

In the event of any breach of the obligations of this Agreement, ABC shall pay the penalty in an amount equivalent to the Basic Salary, received during the twelve calendar months preceding the breach or, if the breach is committed after termination, preceding termination of the employment. In the event of a continuing breach, such penalty shall be due for each month in which the breach occurs.

Another example of an elaborated penalty clause is typically found in a loan agreement is as follows:

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[56] Marcel Fontaine and Filip Dely, DRAFTING INTERNATIONAL CONTRACTS: AN ANALYSIS OF CONTRACT CLAUSES, 325 (2006).

[57] *What is a Penalty Clause in Contract?* <https://www.upcounsel.com/penalty-clause-in-contract>

Any exercise by the Bank of its right to request from the Client the payment of a contractual penalty in accordance with the Loan Agreement or with the General Loan Terms and Conditions shall not in any manner affect or limit any of the other rights or remedies available to the Bank under the Loan Agreement, the General Loan Terms and Conditions, any agreements establishing the Collateral or any other arrangement between the Bank and the Client and applicable law. Any circumstances excluding the liability or lack of fault on the part of the Client shall not affect the right of the Bank to claim a contractual penalty. The right of the Bank to request a contractual penalty shall to no extent affect the claim of the Bank to receive damages for the breach of contractual obligations. The Client shall perform any of its obligations, the performance of which is secured by such contractual penalty regardless of whether such contractual penalty was paid or not.

The above example shows how a penalty clause not only comprises the details of the penalty but all the other things associated with it.

INDEMNITY

Indemnification, in a way, is dealing with the allocation of liability in the event if things do not go according to the plan. It addresses the question of who will be liable for what and to what extent. Simply, when A promises to pay for the loss for which B is financially responsible, A indemnifies B.

Indemnification clauses are used to shift liability between parties, indemnify, or not hold accountable, a party for certain acts for which they might otherwise be held accountable. Such clauses may allow for mutual indemnification, wherein both parties will compensate the other if losses occur due to one party's negligence, as well as one-way indemnification, wherein only one party will be indemnified from negligence.[58]

It is natural and obvious to have a provision that guarantees one party to indemnify the other party for all costs, damages, and losses incurred as a result of the breach of any representation or covenants of the contract. Yet, at the same time, the scope of the indemnity clause should be considered carefully. Indemnity clauses can often be drafted too broadly, seeking to protect against scenarios that are highly unlikely to occur. The danger in doing so is that in using broad terms out of the desire to cover the largest possible swath of events, the clause will be judged to be too ambiguous to apply to an event that does occur. In the case of indemnity, precision and specificity are to be preferred.

Indemnity clauses may take different shape and size. Following are some examples:[59]

- ***Bare Indemnities*** **-** In these clauses, one party will indemnify the other party for all loss or liability related to specific circumstances or events, without limitation.

[58] *Indemnification Clause: Everything You Need to Know* < https://www.upcounsel.com/indemnification-clause>
[59] *Indemnification Clause: Everything You Need to Know* < https://www.upcounsel.com/indemnification-clause>

This, in effect, makes bare indemnities blanket protection from liability in certain circumstances.

- ***Reflexive or Reverse Indemnities* -** In these clauses, one party will indemnify the other for losses due to the negligent party's acts.
- ***Limited or Proportional Indemnities* -** This is the opposite of reverse indemnities. In these, one party will indemnify the other for losses except for those that arise from that party's negligence.
- ***Third-Party Indemnities* -** In these clauses, one party will indemnify another party for claims by or liabilities to a third party.
- ***Financing Indemnities* -** In these clauses, one party will indemnify another party if a third party fails to meet a financial obligation to one of the contracting parties.
- ***Party/Party Indemnities* -** In these, indemnification goes both ways, with each party agreeing to indemnify the other if a contract breach occurs and losses are incurred thereby.

No matter what kind of indemnification clause is to be drafted, great care should be taken in the drafting, as a failure of specificity in the terms can lead to a clause that in the eyes of the law may be interpreted much differently from what the concerned parties believed they were in agreement on. Therefore, there are multiple issues to be considered while drafting an indemnity clause as given below:[60]

- What triggers the indemnity?
- Who is on the hook for the indemnity? Is it just one particular party or multiple parties or its subsidiaries, parent companies, etc.?
- Is there a requirement to provide a notice to invoke indemnification? Is notice a condition to the obligation to indemnify or merely a contractual promise to provide notice?
- What kinds of losses are indemnified against – is it expectation damages, consequential damages, incidental damages?
- For how long is the indemnity available?
- Is the indemnity capped?
- Is there a minimum loss requirement or a threshold before the Indemnitor has an obligation to indemnify?

For example:[61]

Let us assume that you are a software developer and you need to guarantee that your program is not infringing on the IP rights of a third-party. You should make sure that the language of the warranty states you are only guaranteeing you have not infringed on known IP rights. If you are not the indemnified party, you should make sure that the clause includes a cap on the number of losses that you will be required to cover. Should

[60] Tina Lynn Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO?, 15.6.2.2.6 (2nd edn., 2014).

[61] *Indemnification Clause: Everything You Need to Know* <https://www.upcounsel.com/indemnification-clause>

the other party request a larger cap, you should only give it to them in exchange for a higher price.

You should also consider investing in professional indemnity insurance. If you have one of these insurance policies, damages and legal costs will be covered if you breach a contract. If you are having trouble understanding the language in the indemnification clause, or the contract as a whole, you should consult an attorney before signing the contract.

If the word "defend" is included in an indemnification clause, it means that the contracted party that caused the harm is responsible for defending the indemnified party from lawsuits. However, many indemnified parties request that this word is left out so that they retain the right to defend themselves.

The following are a few examples of indemnification clauses:

5.8 Indemnification

5.8.1 Subject to the provisions of the Act, the Company shall indemnify the Directors against any liability which the Director may incur or become liable for by reason of any contract entered into or act or deed done by him as such Director or in any way in the discharge of his duties towards the Company.

5.8.2 Provided however if any such liability is caused due to the negligence of any of the Director, the Shareholder who has nominated such Director on the Board shall indemnify and hold harmless the Company against all losses, damages, expenses (including reasonable legal expenses) arising out of or in relation to such negligence.

OR

ABC shall indemnify, defend and hold XYZ and its agents, authorized representatives, harmless from all losses, liabilities, actions, suits, judgments, obligations, fines, penalties, claims, costs and expenses, including reasonable attorneys' fees and costs, arising out of, or in connection with all acts and omissions related to the performance and execution of this Agreement.

OR

Lessee shall indemnify Lessor against, and hold Lessor harmless from, any and all claims, actions, suits, proceedings, costs, expenses, damages and liabilities, including reasonable attorney's fees and costs, arising out of, connected with, or resulting from Lessee's use of the Equipment, including without limitation the manufacture, selection, delivery, possession, use, operation, or return of the Equipment

LIABILITY

Liability clause also referred to as limitation of liability clause is meant to limit the exposure of the parties in case the parties suffer a loss because of the contract between them. It limits the amount one party has to pay the other party if they suffer loss. Such clauses are used to manage the risks attached to a contract. In the absence of a liability clause, there is no limit to the extent of damages claimed. Therefore, parties wishing to reduce exposure to the risks of a contract should include an express liability clause.[62]

To draft a limitation clause properly, it is important to identify precisely the risks attached to the contract and the subsequent losses that may arise from such risks. Consider asking the following questions:

- What could possibly go wrong with this transaction?
- How likely is a breach of contract to happen?
- How much might it cost? Could the party afford it?
- Are there any economic risks attached to this contract and/or to that particular industry?

Once the level of risk has been assessed, it must be ensured that the liability clause is drafted in clear and unambiguous wording. In particular, the liability clause should set out:[63]

- The losses each party accepts to compensate without limit, e.g. fraud, death, and personal injury.
- The losses each party accepts to cap and the amount of damages a party will be liable for.
- The clause should list precisely which losses will be capped and what the cap should be (the cap can be different for different types of loss). The cap may be determined according to the parties' level of insurance, the value of the contract or the potential amount of damage a breach of contract may cause.
- The losses each party excludes totally, i.e. specific losses that a party will not be liable for, such as a loss of profit or revenue. However, remember that death and personal injury caused by negligence can never be excluded from liability. If these are excluded, any such clause will be unenforceable.
- As a general rule, the liability should always be capped to a reasonable amount, and it should be ensured that a meaningful remedy is still available for the recovering party.

An important thing to understand while drafting such a limitation of liability clause is that the penalty is to be determined keeping into account a fair estimation of damages which would amount from the breach. The money stipulated cannot reach exorbitant levels such that the penalty would exceed the damage caused.

The following are two different examples of the liability clause:

Example 1

[62] *What are Limitation of Liability Clauses in a Contract?* <https://www.upcounsel.com/limitation-of-liability-clauses-in-contracts>
[63] *Limitation of Liability Clauses* <https://www.rocketlawyer.com/gb/en/quick-guides/limitation-of-liability-clauses>

1.1. The Developer shall be liable to indemnify any workmen or outsider in the event of the possible loss or damage to any property, personal injury and death or otherwise, any claim arising from the construction of the Project by the Developer.

1.2. The Owner will not be responsible or liable for any such loss or claim whatsoever.

1.3. The Developer shall be liable for any sort of theft, loss or damage of the works during construction the Owners will not be liable for the same.

Example 2

1. LIABILITIES OF THE XYZ

1.1. Notwithstanding anything contrary in this Agreement, XYZ shall solely be liable and responsible for any kind of activity in connection with, arising out of, or resulting from any breach of any obligation, warranty representation by XYZ or any other person claiming through or under it, or breach or non-performance of any terms, condition, covenant or obligation to be performed by XYZ under this Agreement.

1.2. XYZ shall be solely liable for all work contracts, dealing and activities in relation to the Services and all compliances with labour requirements, including the payments of its employees, workers, staff etc.

1.3. XYZ must not, during the terms of this agreement enter into any agreement/ contract/ MOU in respect of bottling with any entity/ person who is engaged in or Controls/ is controlled by any entity/ person/ engaged in any business similar to or in the same field as the business is conducted by ABC **("Competitor").**

1.4. XYZ shall be responsible for the payment of its own Taxes any taxes/levies/cess/GST/ applicable on the services, and shall indemnify and hold harmless, the ABC, for any liability in this regard.

DISPUTE RESOLUTION

While a major attempt while drafting a contract is to avoid any contractual disputes or litigation, unfortunately, some disputes do crop up for which a dispute resolution clause is necessary. Such dispute resolution clauses govern the procedural and substantive aspects of how a dispute will be resolved in case it arises.

Usually, it begins with the parties deciding whether they want to adjudicate or arbitrate their disputes or rely on some other dispute resolution mechanism such as mediation. The parties could also mutually agree on the negotiation process between high-level officers of their entities.[64] A properly drafted dispute resolution clause can provide assurance to

[64] Tina Lynn Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO?, 15.7 (2nd edn., 2014).

the parties that their disputes will be resolved through the less expensive and speedier processes of arbitration or mediation rather than by conventional litigation.

Usually, parties agree to adjudicate their disputes through arbitration, and sometimes mediation or a mix-match of both, known as multi-tier dispute resolution clauses. In such clauses, parties first try to settle their disputes through mediation and if it fails, resort to arbitration to adjudicate their disputes. But in most cases, an arbitration clause is most common, which should specify the following things while being drafted:[65]

- The disputes to be arbitrated.
- The rules that will govern the arbitration
- The location of the arbitration
- The governing law
- The qualifications of the arbitrators.
- The method of choosing the arbitrators.
- The payments of expenses relating to the arbitration.
- The language of the arbitration.
- The finality of arbitration.
- The explicit mention of interim protection powers to be accorded to the tribunal if mutually acceptable.

Some of the typical arbitration clauses are as follows:

Example 1

1.1. That if any dispute arises between the Parties hereto during the subsistence of this Agreement or thereafter, in connection with the validity, existence, interpretation, implementation, or alleged breach of any provision of this Agreement ("**Dispute**"), the Party raising the Dispute shall issue a written notice for settlement of the Dispute to the other Parties through amicable discussions between ABC and XYZ.

1.2. That if the Dispute is not resolved by an amicable settlement within 15 (fifteen) days from the date on which the written notice for settlement of such Dispute has been served by one Party on the others, then any of the Parties may within 15 (fifteen) days after the first 15 (fifteen) days referred to above, by written notice to the other Parties refer the Dispute to arbitration, to be conducted in accordance with the Arbitration and Conciliation Act, 1996.

1.3. That the arbitral tribunal will comprise of a single arbitrator to be appointed by mutual consent by the Parties within 7 (seven) days of the request of the notice to start arbitration proceedings. If either party does not respond to the request for mutual appointment of an arbitrator within the aforesaid 7 days, the party issuing such a request shall be at liberty to nominate such an arbitrator, subject such

[65] Tina Lynn Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO?, 15.7 (2nd edn., 2014).

nomination not being in contravention of Schedule 5 and 7 of the Arbitration and Conciliation Act, 1996.

1.4. That the arbitration proceedings will be conducted in English, at [●].

1.5. That the arbitration award will be final and binding on the Parties. The award rendered by the arbitrators will be in writing and will set out the reasons for the decision.

1.6. The seat of arbitration will be [●], and the venue will be [●]

1.7. The courts at [●] shall have exclusive jurisdiction.

Example 2

Dispute Resolution:

1.1. If any dispute arises between the Parties hereto during the subsistence of this Agreement or thereafter, in connection with the validity, existence, interpretation, implementation or alleged breach of any provision of this Agreement ("**Dispute**"), the Party raising the Dispute shall issue a written notice for settlement of the Dispute to the other Parties through amicable discussions between the Parties.

1.2. If the Dispute is not resolved by an amicable settlement within 15 (fifteen) days from the date on which the written notice for settlement of such Dispute has been served by one Party on the others, then any of the Parties may within 15 (fifteen) days after the first 15 (fifteen) days referred to above, by written notice to the other Parties refer the Dispute to arbitration, to be conducted in accordance with the Arbitration and Conciliation Act, 1996.

1.3. The arbitral tribunal will comprise of a single arbitrator to be appointed by the mutual consent of the Parties within 7 (seven) days of the request of the notice to start arbitration proceedings. In the event either party does not consent to such appointment within 7 days, the party raising the dispute may unilaterally appoint such sole arbitrator, and the opposite party hereby waives its right to challenge or contest such appointment, except as provided for in Schedule 5 and 7 of the Arbitration and Conciliation Act, 1996.

1.4. The arbitration proceedings will be conducted in Dehradun. The language of the arbitration will be English. The arbitral tribunal will be entitled to award costs as may be deemed appropriate considering all relevant circumstances.

1.5. The arbitration award will be final and binding on the Parties. The award rendered by the arbitrators will be in writing and must set out the reasons for the decision.

1.6. The arbitrator may issue interim awards and order any provisional measures which should be taken to preserve the rights of the Parties. Subject to the other provisions of this Section 9, the Parties shall submit to the exclusive jurisdiction of competent courts in Dehradun for interim measures of protection or interlocutory orders in respect of all matters and/ or claims and/ or Disputes relating to or arising out of this Agreement and such submission shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

The difference in the second example is that it explicitly empowers the party to take recourse to interim protection if required.

Force Majeure

Force majeure literally translates to "superior force". It is a clause of a contract that relieves a party of their contractual obligations under circumstances deemed beyond their control. These clauses are intended to relieve a party of its contractual obligations in cases where the failure to perform could not have been avoided by taking better care or due diligence. For example, if a party has signed the documents to buy a house, which burned down before they could take ownership of it. If the fire were caused by a lightning strike, neither the seller nor the buyer would be held liable. In this case, the seller would not be able to hand over the property, and the buyer would not be responsible for paying the purchase price.[66]

It allocates the risk in cases where performance becomes impracticable or impossible. This applies in cases where the event is something that neither party could have anticipated or prevented. For force majeure to be applicable, the event must be outside the control of both parties in the contract, unavoidable, and unforeseeable. It does not cover general cases like software glitches, computer failure, conflicts with distributors, credit-related problems or internal management disputes.

The essential requirement of force majeure is that the invoking party's performance of a contractual obligation must be prevented by a supervening event that is unforeseen and not within the control of either party. There is no uniform set of events that constitute force majeure. Instead, force majeure remains a flexible concept that permits the parties to formulate an agreement that corresponds to their unique course of dealings and industry peculiarities. However, recent world events have increased the necessity of including additional unthinkable events, such as terrorism, risk of biological and chemical warfare, and most importantly pandemic, lockdowns, epidemic, radioactive contamination, etc.

There are two ways to incorporate a force majeure clause. One is to rely on a general clause, or a clause taken from a precedent. The other way is to draft exclusively keeping in mind the nature of the transaction and enumerate specific events which will constitute force majeure. For example, if the entity is based in Russia or the performance of the contract relates to Russia, it would be prudent to have radioactive contamination as a

[66] *A Force Majeure Clause: Everything You Need to Know* <https://www.upcounsel.com/a-force-majeure-clause>

force majeure event because of its likelihood there. Similarly, if the drafter is aware of the location of the subject matter of the contract and if its near a sea, then having a tsunami as a force majeure clause will make sense. A prudent force majeure clause specifically enumerates the events that will prevent performance and entitle a party to suspend or excuse an obligation.[67]

Some of the examples of a force majeure clause are as follows:

No Party shall be liable to the other if, and to the extent, that the performance of any of its obligations under this Agreement is delayed, prevented, restricted, prejudiced, or interfered with due to circumstances beyond the reasonable control of such Party including without limitation, legislations, fires, floods, explosions, epidemics, accidents, acts of God, wars, riots, strikes, lockouts, or other concerted acts of workmen, acts of government and/or shortages of materials. The Party claiming an event of force majeure shall promptly notify the other Parties in writing, and provide full particulars of the cause or event and the date of first occurrence thereof, as soon as possible after the event and also keep the other Parties informed of any further developments.

In the above example, the clause talks about specific incidents of force majeure and the procedure to invoke such a force majeure clause.

Neither Party shall be held responsible for any consequences or liabilities under this Agreement if it is prevented in performing its obligations under this Agreement due to reasons of Force Majeure. Upon happening of any such Force Majeure event, the affected Party shall inform the other Party of such event. Upon abatement of such event, either Party shall inform the other Party about the cessation of the same.

In the above example, the clause does not mention specific incidents of force majeure and keeps it vague. If the clause is to be invoked, it will be a burden on the party to invoking such clause to prove that the incident affecting the performance is a force majeure or falls under the general notions of force majeure. Hence, it is always a good practice to specifically mention what type of incidents are covered under force majeure events.

In the event the Premises or any part thereof is destroyed or damaged due to a Force Majeure event thereby rendering it impossible/unsafe/unfit/non-feasible to operate out of the Premises then, the Sub Lessee may temporarily vacate the whole or such portion of the Premises, as may be required, to enable the Sub Lessor to carry out repairs to restore the Premises to as good condition as it was in on the Opening Date of the Premises. In such an event, all payments specified under this Agreement for the affected area of the Premises or portion thereof shall abate till the time the Premises is repaired and restored to as good condition as it was on the Opening Date of the Premises. However, all payments specified under this Agreement during such period shall continue to be made by the Sub Lessee for the unaffected area of the Premises. Furthermore, if the above situation

[67] Chris Goddard, *Basic Principles of Contract Drafting*, 34, *available at*, https://fdocuments.in/document/basic-principles-of-contract-drafting.html (Last accessed on August 15, 2020).

continues for a period of more than 90 (ninety) calendar days, the Sub Lessee may terminate this Agreement by giving a prior written notice of 30 calendar days and the Sub Lessee paying to the Sub Lessor Rent and Individual Charges payable under this Agreement, subject to recovery/ adjustment of the outstanding dues, if any, in terms of this Agreement.

The above example elaborately explains the implications of force majeure, its effect on the contract, the procedure to invoke it, and how it can be used as a reason for termination.

BOILERPLATE CLAUSES

After the endgame provisions, there is a whole set of general provisions that concludes a contract which is known as the boilerplate provisions. These provisions supply a road map, telling the parties how to govern their relationship and administer the contract. Boilerplate clauses are sometimes ignored because they contain provisions that are neither operative provisions, representations, covenants, conditions, definitions, nor remedial provisions. These are general provisions relating to the enforcement and amendment, and provisions that are specific to the transactions but that do not fall neatly into any of the other sections.[68] The present chapter is an attempt to understand and examine the important and most commonly used boilerplate clauses.

ASSIGNMENT

It is not uncommon for a party to wish to assign certain rights to payment or performance to a third party. The assignment clause encapsulates whether and under what conditions the parties may assign their rights under the agreement. An assignment involves the act of transferring to another all or part of one's property, interest, or rights. To assign a right, the assigner must show an intention to make the present transfer without any further action required (by either party). Any written assignment should clearly identify the parties and rights being transferred. A written assignment should also define the consideration given by the assignee (if any) in return for the benefit of the assignment.[69]

However, the ability of a party to assign its interest in a contract may be limited by contract, or in some cases by law or public policy. Parties can protect themselves from assignments by adding a clause to the contract to either prohibit the assignment of any contract right or prohibit any such assignments by one party without the consent of the other party to the contract.

A typical example of Assignment and Subleasing is as follows:

17.4.1 The Sub Lessee may assign this Agreement and sublease the Premises, either wholly or partially, at any time during the life of the Agreement to any company of the

[68] Charles M. Fox, WORKING WITH CONTRACTS, 10.2 (2nd edn., 2008).
[69] Chris Goddard, *Basic Principles of Contract Drafting*, 38, *available at*, https://fdocuments.in/document/basic-principles-of-contract-drafting.html (Last accessed on August 15, 2020).

Sub Lessee's Group, without increasing the rent and without the need for approval from the Sub Lessor.

17.4.2 In these cases, the Sub Lessee shall be authorised to modify the use of the Premises referred to in Clause 12.1, provided this use is a use of the group of companies of the Sub Lessee's Group.

17.4.3 In case the Sub Lessee undergoes a transformation, merger or spin-off, it shall under no circumstance be considered assignment or subleasing and shall not be subject to any type of consent by the Sub Lessor or signify an increase in the Rent.

Another example:

Except as permitted or required by this Agreement or as otherwise agreed in writing between the Parties:

a) This Agreement must not be assigned, novated, or transferred:
b) Neither Party shall create or permit to subsist any encumbrance over all or any of its rights and benefits under this Agreement.

There could be instances where Assignment clause would become even more important and would be drafted with more care and precision, for example, in a design transfer agreement:

8.1. This clause will apply if [Company] has purchased [Design] and upon receipt of payment for [Design], XYZ hereby perpetually, irrevocably, and unconditionally assigns, transfers, and conveys to [Company] and assigns, all of XYZ's right, title, and interest in and to [Design].

8.2. XYZ further perpetually, irrevocably, and unconditionally assigns, transfers, and conveys to [Company] and assigns all claims for past, present and future infringement or misappropriation of the Intellectual Property Rights included in [Design], including all rights to sue for and to receive and recover all profits and damages accruing from an infringement misappropriation prior to the Effective Date.

8.3. XYZ hereby waives and agrees not to enforce all moral rights and all personality rights that XYZ may have in [Design].

CHOICE OF LAW

The Choice of Law (also known as governing law provision) provision states that the contract is to be interpreted and enforced under the law of a particular jurisdiction. It specifies the legal jurisdiction under which the agreement shall be governed and construed.

For example: This Agreement shall be governed by and construed in accordance with the laws of India, including all the amendments.

This is one of the important boilerplate clauses that must not be omitted from any contract, no matter how short or informal. Such clauses require careful research and negotiation as the laws of different jurisdictions may affect the parties differently.[70] It specifies that all substantive legal issues arising in connection with the enforcement or interpretation of the contract are to be resolved by looking to the law of the chosen jurisdiction. Without this provision, any dispute regarding a contract will most likely also involve a dispute over the law governing the contract.

What law should be selected to govern a contract depends on case to case basis. In some cases, it is self-evident. For example, a contract relating to a lease is almost always governed by the law of the place where the property is located. A contract between two individuals who are the residents of the Republic of India should probably be governed by the laws of the Republic of India. Of course, if the two individuals are from different jurisdictions, then a mutual choice of law will have to be decided. While it is not mandatory but have unpleasant consequences, it is preferable to have some connection with the jurisdiction of the law which is being chosen to govern the contract. For example, one or more parties should be incorporated or a resident in that jurisdiction, the contract involves a property located in that state, etc. The unpleasant consequence could be the rejection of the choice of law stating it to be invalid.[71]

Some of the different examples include:

This Agreement shall be subject to and must be interpreted in accordance with the laws of India.

Another way of drafting is:

All disputes in connection with, or arising out of this Agreement shall be governed by and interpreted in accordance with the laws of India.

CHOICE OF FORUM

A choice of forum clause will specify the place where lawsuits will be filed in the event a dispute arises between the parties to a contract. The purpose of such clause is to expressly agree to litigate all disputes arising from the contract in a specific jurisdiction and venue.

Such clauses offer obvious practical value, as selecting the forum in which a contract dispute is to be heard can help keep the litigation in a nearby forum, reduce future costs, and eliminate the need for challenges to jurisdiction in the event dispute arises.[72]

A specific example of a choice of forum is:

The Parties agree to submit themselves to the jurisdiction of the courts where the premises are located, waiving any other jurisdiction to which they may be entitled.

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[70] Chris Goddard, *Basic Principles of Contract Drafting*, 35, *available at*, https://fdocuments.in/document/basic-principles-of-contract-drafting.html (Last accessed on August 15, 2020).

[71] Charles M. Fox, WORKING WITH CONTRACTS, 10.2.1 (2nd edn., 2008).

[72] Chris Goddard, *Basic Principles of Contract Drafting*, 34, *available at*, https://fdocuments.in/document/basic-principles-of-contract-drafting.html (Last accessed on August 15, 2020).

Another example:

The courts at Patna, Bihar shall have exclusive jurisdiction.

A cumulative example of Choice of Law and Choice of Forum is:

This Agreement and the relationship between the Parties shall be governed by and interpreted in accordance with, the Laws of the Republic of India. The courts in Delhi shall have exclusive jurisdiction over any dispute arising out of this Agreement.

CONFIDENTIALITY

A confidentiality clause is one of the most vital clauses of the contract, which is usually present in most of the contracts and sometimes is implied even if absent from a contract. However, an explicitly written confidentiality clause is a basic requirement of a contract. This is because the presence of this clause ascertains that the parties entering into a contract will keep the terms and conditions of the information that shall be shared with them, private and confidential and hence bars the parties from sharing such information with other persons.

Confidential information can also take form as a non-disclosure clause. Such information is usually the type of information that must be of limited public availability and a specific character. It need not necessarily be original, novel or complex. It will largely be depended on case to case basis.

A confidentiality clause may adhere to two kinds of obligations - unilateral and mutual. If in a contract, only one party is disclosing the vital information, for instance, a trade secret or an investor in a new invention or an employer-employee contract, such contract is unilateral or one-sided. On the other hand, when the information is disclosed by both the parties to a contract, the obligation is termed a mutual or two-sided.[73]

The reason why such clauses are particularly emphasised in a contract is because there is a lot of sensitive information involved in a commercial transaction. This sensitive information could relate to the know-how of the subject matter, a secret ingredient, recipe, its manufacturing process, components, etc. which are usually not public knowledge and help an entity gain an edge over others.

Disclosure of such information may amount to a loss of commercial viability of the contract due to various competitors in the market. [74] For instance, the employees at the manufacturing factory of coca-cola sign a contract with the employer wherein they agree to keep the trade secret of the components used in making of the drink as confidential. Should such an agreement not be made with the employees, the employees would be free to communicate about the confidential information to the public and other competitors. Therefore, a confidential clause, here, would legally bound the parties into not sharing the

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[73] Gene Quinn, *What is a Confidentiality Agreement and Why are they so Important?*, *available at*, https://www.ipwatchdog.com/2017/12/16/confidentiality-agreement-important/id=91206/ (Last accessed on August 15, 2020).

[74] *Confidentiality Clauses* <https://weagree.com/drafting-principles/8-particular-types-of-clauses/8-5-confidentiality-clauses/>

information that is privy to them. If such a clause is not drafted in a contract, it only leaves a moral obligation on the parties to the contract which is unenforceable in a court of law.

Further, the clause may vary in different agreements due to different variable involved in a particular contract. For instance, it can be peculiar towards consumer list, private data, financial data, product development ideas, etc. To make a watertight confidential contract, the following things a confidentiality clause should consider to include[75]-

- The definition of 'confidential information' based on the type of information being protected.
- Specifications of any oral communication to be part of the confidential information.
- The manner in which the information that is being disclosed will be used, i.e. specifying the intended users of the information the purpose for which the information will be used and that such information cannot be used for any other purpose.
- The specific details with respect to the exclusions that are not a part of a confidentiality clause, for instance, the information in the public domain, information obligated to be disclosed pursuant to the applicable laws or regulations, rules of any stock exchange, or orders of the court or other government authorities, or information required to be disclosed by any party to its shareholders, investors, legal counsels or financial advisors regarding the transaction contemplated in the contract, prior knowledge, information received from a third party, or any other, depending on the peculiar facts and circumstances.
- The time limit of the existence of confidentiality of such an agreement. Since information disclosed is sensitive and vital to the disclosing party, usually, the contract mentions the existence of confidentiality even after the expiry of the term of the contract or specific performance, as the case may be.

The most important thing to be kept in mind is that while drafting a confidentiality agreement, no space should be left for ambiguity. The clause should not mention the particular information that has to be kept confidential, or that would vitiate the entire purpose of having a confidentiality clause in the first instance. Phrases like beta reviews, prototype, etc. should be used. Furthermore, a limitation on the use of information is essential. A worker of the coca-cola factory cannot take the ingredients to make the drink elsewhere - even though he may not be divulging information, yet it creates a potential threat to the disclosure of the information.

As discussed, a confidentiality clause will differ in its length and content based on the type of contract. The following is an example of a typical confidentiality clause used in a shareholders agreement:

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[75] *Confidentiality Clauses: Everything You Need to Know* <https://www.upcounsel.com/confidentiality-clause>

16.5.1 All communications between the Parties and/or any of them and all Confidential Information is given to or received by any of them from any other, and all information concerning the business transactions and the financial arrangements of any Party with any entity or person with whom any of them is in a confidential relationship with regard to the matter in question which comes to the knowledge of the recipient shall be kept confidential by the recipient unless or until the recipient can reasonably demonstrate that any such communication or Confidential Information is in the public domain through no fault of its own. If it is in the public domain, this obligation shall then cease in relation to the specific information concerned only.

16.5.2 The Parties shall use all reasonable endeavours to procure the observance of such restrictions by the Company and shall take all reasonable steps to minimise the risk of disclosure of Confidential Information by ensuring that only they and such of their employees and Directors whose duties will require them to possess any of such Confidential Information to have access thereto and by instructing such employees and Directors to treat such information as confidential.

16.5.3 The obligations contained in Section 16.5 shall survive the termination of this Agreement, for a period of 3 (three) years.

16.5.4 Notwithstanding the aforementioned provisions of Section 16.5, the information shall not be deemed to be Confidential Information, and the recipient thereof shall have no obligation with respect to such information if such information:

(a) Is or was already known to the recipient prior to the Signature Date; other than by virtue of such information having been given to the recipient by any Shareholder;

(b) Is received by the recipient from a third party who is not subject to similar confidentiality restrictions and without breach of this Agreement;

(c) Is independently developed by the recipient;

(d) Is required to be disclosed by law.

16.5.5 Notwithstanding Sections 16.5.1 to 16.5.2 inclusive, each Party may at any time disclose any Confidential Information:

(a) To its Affiliates;

(b) To its own professional advisers or those of any of its Affiliates;

(c) If required to do so by law or any applicable regulatory requirements or the rules of any stock exchange or by applicable generally accepted accounting principles;

(d) If requested to do so by any regulatory body to whose jurisdiction that Party is subject or with whose instructions, it is customary to comply; or provided that the Party required to make the disclosure has taken all reasonable steps to limit, as far as reasonably possible, the extent of such disclosure and has consulted with the other Parties before making the disclosure.

16.5.6 Notwithstanding the foregoing provisions of Section 16.5, a Shareholder may provide Confidential Information to a prospective purchaser of its Shares (not being a Competitor) if:

(a) The prospective purchaser has signed a non-disclosure agreement in customary form, agreeing to hold all such Confidential Information in the strictest confidence;

(b) Such Shareholder gives written notice to the Company and the other Shareholder of the identity of all persons so receiving any such Confidential Information.

While this was an elaborated confidentiality clause, a simple agreement of a lease or a sublease would have a simple and short confidentiality clause, which is as follows:

17.1.1 The Sub Lessor and the Sub Lessee shall refrain from disclosing the Confidential Information (as defined in Clause 0 below) to any individual, company or third party, except a) by operation of law or court order; b) if it is necessary for these Parties in order to comply with their contractual obligations; c) in the event of processing of licenses and permits by the Sub Lessee; d) if authorised by the Sub Lessor or the Sub Lessee, as the case may be; and e) prior assumption by them of the same duty of confidentiality to lawyers, accountants and/or other advisors that work with the Shopping Centre or the Premises, and their employees, partners, shareholders and similar parties.

17.1.2 For the purposes of this Agreement, "Confidential Information" is understood as all the information related to this Agreement (its existence and/or content), the Sub Lessee and/or the Sub Lessor, except information that is: a) in the public domain; or b) has been openly disclosed by the Sub Lessor or the Sub Lessee, as the case may be, to third parties. Specifically, but not limited, Confidential Information shall include any accounting information and any other detail, document or information provided by the Sub Lessee with regards to its Sales Figure.

Here, instead of defining the confidential information in the definition section separately, drafter has defined the term in the confidentiality clause itself. For the former, an example of defining confidential information in the definition section itself is as follows:

"Confidential Information" shall mean any information which parties may have or acquire (whether before or after the date of this Agreement) or any other information exchanged between the parties as a consequence of the execution of this Agreement and/

or the performance of this Agreement (including limitation, any information provided pursuant to any of the provisions of this Agreement).

Some agreements may want to focus more on the obligations of confidentiality when they suspect that their employees might spill out the information to the other competitors. Such cases are usually found in the employment agreement. Below is an example of an employment agreement of a renowned chain of hotels which has elaborately written the confidentiality clause into multiple provisions:

1.1. Confidential Information disclosed or shared with [Employee] includes information including compilation, program, method, process, or business practices that:

1.1.1. derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

1.1.2. is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

1.2. Confidential Information also includes, but is not limited to, files, letters, memoranda, reports, records, computer disks or other computer storage medium, data, models or any photographic or other tangible materials containing such information, Customer or Client's lists and names and other information, Customer or Client's contracts, other corporate contracts, computer programs, proprietary manufacturing practices and technical information, strategies, sales, promotional or marketing plans or strategies, programs, techniques, practices, any expansion plans (including existing and entry into new geographic and/or product markets), pricing information, product or service offering specifications or plans thereof, business plans, financial information and other financial plans, data pertaining to XYZ's operating performance, employee lists, salary information, all information XYZ receives from customers or clients or other third parties that is not generally known to the public or is subject to a confidentiality agreement, training manuals, and other materials and business information of a similar nature, including information about XYZ itself or any of its affiliated entity, which [Employee] acknowledges and agrees has been compiled by XYZ's expenditure of a great amount of time, money and effort, and that contains detailed information that could not be created independently from public sources.

1.3. Further, all data, spreadsheets, reports, records, know-how, verbal communication, proprietary and technical information and/or other confidential materials of similar kind transmitted by XYZ to [Employee] or developed by [Employee] on behalf of XYZ as part of XYZ.

1.4. Confidential Information will not include any information of any kind which:

1.4.1. is in the possession of [Employee] prior to the Effective date of [Employment Agreement], as shown by [Employee]'s files and records; or

1.4.2. prior or after the time of disclosure becomes part of the public knowledge not in violation of [Employment Agreement], any violation of any similar agreement with any other party or inaction or action of the receiving party; or

1.4.3. is rightfully received from a third party without any obligation of confidentiality; or

1.4.4. independently developed after termination without reference to the Confidential Information or materials based thereon; or

1.4.5. is disclosed pursuant to the order or requirement of a court, administrative agency, or other government body; or

1.4.6. is approved for release by the non-disclosing party.

NON-DISCLOSURE OF CONFIDENTIAL INFORMATION

2.1 All Confidential Information is considered highly sensitive and strictly confidential. After the termination of his/her employment from XYZ and for as long as such information remains non-public information, [Employee] shall:

2.1.1 hold in confidence and refrain from disclosing to any Third Party all Confidential Information, whether written or oral, tangible or intangible, concerning XYZ and its business and operations unless such disclosure is accompanied by a non-disclosure agreement executed by XYZ with the party to whom such Confidential Information is provided;

2.1.2 use the Confidential Information solely in connection with his or her employment with XYZ and for no other purpose;

2.1.3 take all reasonable precautions necessary to ensure that the Confidential Information shall not be, or be permitted to be, shown, copied or disclosed to third parties, without the prior written consent of XYZ;

2.1.4 observe all security policies implemented by XYZ from time to time with respect to the Confidential Information;

2.1.5 not to, directly or indirectly, in any way, reveal, report, publish, disclose, transfer or otherwise use any of the Confidential Information except as specifically authorized by the Disclosing Party in accordance with this Agreement; and

2.1.6 not use or disclose, directly or indirectly, as an individual or as a partner, joint venturer, employee, agent, salesman, contractor, officer, director or otherwise, for the benefit of himself or herself or any other person, partnership, firm, corporation, association or other legal entity, any Confidential Information, unless expressly permitted by this Agreement.

2.2 In the event that [Employee] is ordered to disclose any Confidential Information, whether in a legal or regulatory proceeding or otherwise, such disclosure will be limited to the narrowest disclosure, as practically as possible, so required and, except to the extent prohibited by law, [Employee] shall give XYZ at least [●] weeks' notice, if practicable, of the basis for any such compelled disclosure of

Confidential Information and shall reasonably cooperate with XYZ in limiting disclosure and obtaining suitable confidentiality protections.

2.3 [Employee] will not provide the Confidential Information of XYZ to any third party or its competitors which is not generally known to be the competitors of XYZ and is not intended by XYZ for general dissemination.

2.4 [Employee] will not use the Confidential Information which derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and is the subject of reasonable efforts to maintain its secrecy.

Lastly, there may be some agreements where confidentiality could be the most paramount obligation. For example, in an agreement of design usage, where a company engages a company to print their design on a fabric, would want to have utmost confidentiality of their design. Such an example would be as follows:

CONFIDENTIALITY OBLIGATIONS

3.3. ABC agrees and acknowledges that [Company] and its Representatives shall have access to Confidential Information, relating to [Design], through oral, visual, electronic or written means, solely by virtue of the and for the purpose of enabling the Confidentiality and [Company] and its Representatives to discharge its obligations towards ABC.

3.4. [Company] and its Representatives understand and acknowledges that the Confidential Information of [Design] is of immense value to ABC. [Company] and its Representatives understands that any use or disclosure of such Confidential Information including any inadvertent disclosure can cause immense and irreparable harm, loss, damage and injury to ABC and its designs including [Design] and its reputation and hence, undertakes to keep such Confidential Information confidential and use it solely in the manner expressly authorized by ABC.

3.5. Notwithstanding anything mentioned in clause 1.1., [Company] and its Representatives shall not be liable for the disclosure or use of information only if, and only to the extent that, said information was in the public domain at the time it was disclosed by ABC, or was known to and recorded in writing by [Company] and its Representatives prior to the time of disclosure by ABC, or is received from Third Party or passes into the public domain without breach of this Agreement.

3.6. [Company] and its Representatives agrees and undertakes that at all times for whatever reason to hold in the strictest confidence, and not to use, except for the benefit of [Company] and its Representatives, and absolutely refrain from in any manner divulging, discussing, disclosing the Confidential Information to any

Third Party or in any manner directly or indirectly using the Confidential Information without the written authorisation of ABC and its Representatives.

3.7. [Company] and its Representatives shall take all steps as may be reasonably necessary to protect the integrity of the Confidential Information and to ensure against any unauthorized disclosure thereof.

3.8. [Company] shall ensure that all its employees who are given access to the Confidential Information shall at all times be bound by similar non-disclosure obligations.

3.9. [Company] and its Representatives shall use the Confidential Information only for the purpose for which it was provided and not profit from the same in an unauthorized manner.

NOTICE

Notice provisions are probably the most common provision in a contract. Its essential purpose is to list the addresses to which parties should send their notices however, they do more than just this as it also allocates the risk of a notice's non-receipt.

A well-drafted notice provision should state the models by which a party may give notice. Typically, a provision permits notices to be given by in-person delivery, fax, emails, couriers, speed post and registered post. Ideally, those mode of services should be adopted, which can be easily monitored or traced. While most of the Indian drafters prefer to have a notice sent through government registered post, countries like the USA no longer permit delivery through US Postal Service because of its unreliability.[76] However, parties are gradually adopting the email mode of service that addresses all the concerns of reliability and monitoring. Notice provisions, thus, depend on a case to case basis and based on parties' preferences. The only thing to be careful is to write and double-check the addresses or contact points.

A typical notice provision is as follows:

7.8. NOTICES

7.8.1. Any notices, requests, demands and other communication that a Party is required to given under this Agreement ("**Notice**") shall be written in English and shall be delivered by courier, or registered/speed post and properly addressed as follows, and such notice is given by courier, or registered/speed post to be simultaneously given by email as well:

*In the case of Notices to **XYZ***:

Attention: [●]

Telephone: [●]

Email: [●]

Address: [●]

[76] Tina Lynn Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO?, 16.6 (2nd edn., 2014).

*In the case of Notices to **ABC**:*

Attention: [●]

Telephone: [●]

Email: [●]

Address: [●]

or at such other address as the Party to whom such Notices are to be given shall have last notified the Party giving the same in the manner provided in this Clause 7.8.1., but no such change of address shall be deemed to have been given until it is actually received by the Party sought to be charged with the knowledge of its contents. Unless there is evidence that it was received earlier, any Notice delivered to the Party to whom it is addressed as provided in this Clause 7.8.1., shall be deemed to have been given and received, if delivered by courier or registered/speed post, within [●] days of the dispatch of the said notice by courier; provided however that in case notices are given by courier, the Notice shall also simultaneously be given by email.

Another simple example would be:

1. That the Lessor and Lessee have further agreed that all communications and notices to be given by either of the party to the other party in connection with rights and obligations of both the Parties under or pertaining of this Lease Deed, shall be sent by registered post and shall be deemed to have been duly served if sent by registered post on the following addresses:
   1.1. To the Lessor- [●]
   1.2. To the Lessee - [●]
2. The Parties would not be at liberty to change their postal address with prior notice to the other party.

SEVERABILITY

If the contract is ever litigated, it is possible that a court could rule that only a part of the agreement is invalid, illegal, or unenforceable. In these situations, a refusal to enforce the entire contract might prove unduly harsh. Instead, courts often strike the offending provisions, allowing the rest of the agreement to stay in force through the help of severability clauses.[77]

The utility of a severability clause is that if the agreement is found to be legally prohibited or unenforceable, the offending provision is severed from the rest of the agreement which otherwise continues to operate as originally written. If the clause is absent, there is a risk of refusing to enforce the entire contract in light of that particular illegality.[78] The purpose

[77] Tina Lynn Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO?, 16.7 (2nd edn., 2014).
[78] Charles M. Fox, WORKING WITH CONTRACTS, 10.2.6 (2nd edn., 2008).

of a severability provision is to express the parties' intent that a court enforces the valid provisions of a contract, even if it finds a provision to be illegal or unenforceable.

A typical severability provision may look like this:

2. Severability:

2.1. In the event of any one or more of the provisions contained in this Agreement being waived, modified, or altered, none of the other provisions will in any way be affected or impaired thereby.

2.2. If any of the provisions of this Agreement become invalid, illegal, or unenforceable in any respects under any applicable law, the validity, legality, and enforceability of the remaining provisions will not in any way be affected or impaired.

2.3. Where the provisions of such applicable law may be waived, they are hereby waived by the Parties to the full extent permitted so that this Agreement will be deemed to be valid and binding and enforceable in accordance with its terms.

2.4. If any provision of this Agreement becomes invalid or unenforceable, the Parties agree to substitute for such invalid provision a new provision which serves the purpose of the invalid provision to the furthest possible extent.

A shorter version may read as follows:

7.1.1. If any part or parts of this Agreement shall be held unenforceable for any reason, the remainder of this Agreement shall continue in full force and effect. If any provision of this Agreement is deemed invalid or unenforceable by any court of competent jurisdiction, and if limiting such provision would make the provision valid, then such provision shall be deemed to be construed as so limited.

A different version with the additional requirement is as follows:

Any provision of this Agreement which is prohibited, unenforceable or is declared or found to be illegal, unenforceable or void in any jurisdiction shall, as to such jurisdiction, be ineffective only to the extent of such prohibition or unenforceability without invalidating the remainder of such provision or the remaining provisions of this Agreement or affecting the validity or enforceability of such provision in any other jurisdiction. If any such invalidity substantially affects or alters the commercial basis of this Agreement, the Parties shall negotiate in good faith to amend and modify the provisions and terms of this Agreement as may be necessary or desirable in the circumstances to achieve, as closely as possible, the same economic or commercial effect as the original provisions and terms of this Agreement.

AMENDMENTS

It is a commonplace for the parties to a contract to make changes to the contract to fix errors, to address circumstances that had not been contemplated in the original negotiations, or to change the deal terms. The same is done through amendments.[79] Simply put, an amendment is a change to a provision in an existing contract or the deletion or addition of a provision. A typical amendments clause providing for this possibility would state that the agreement may be amended only in writing and must be agreed to by an authorized representative of both parties.[80]

It is not unusual to make changes to a contract after it has been entered into, the contract may contain mistakes that need to be corrected, circumstances may arise that were not anticipated and therefore not addressed, or the parties have changed their understandings and may want to change their mutual terms and conditions. In such scenarios, a contract is required to be amended, and the possibility of it is incorporated in a contract through amendment clause.

Amendments that change existing provisions can be drafted either to amend specific language or to restate the entire provision. For example:

Section 16 – The Tenant shall not enter into any sublease of the Property, except to entities approved by the Landlord, which must not be reasonably withheld.

If this clause needs to be amended where the provision now should permit subleases to the Tenant’s affiliates without the need of Landlord’s consent. This can be drafted in two ways:

1. Section 16 is amended by adding the phrase “to affiliates of the Tenant and” after the word “except” appearing therein.
2. The Tenant shall not enter into any sublease of the Property, except to affiliates of the Tenant and to entities approved by the Landlord which must not be reasonably withheld.

The first way is a very brief way to do it, which at the same time is difficult to read. The reader will not be able to understand it without cross-referencing it the original provision. The second way is rewriting the provision for greater clarity and more user-friendliness. The most employed approach is the second one and rightly so too.

How to carry out these amendments could be a matter of choice. An amendment may have the appearance of a formal contract, with a heading, recitals, section headings, and the like. It is akin to entering into a new contract that contains only the changes being made to the original contract. Alternatively, the same thing can be achieved by the delivery of a letter agreement from one of the parties to others as long as its mutually decided and signed by all the parties. The idea is that the change in the contract should be mutually consented, understood and recorded in the form of writing. In simpler

[79] Kenneth A. Adams, A MANUAL OF STYLE FOR CONTRACT DRAFTING, 879 (3rd edn., 2013).

[80] Chris Goddard, *Basic Principles of Contract Drafting*, 36, *available at*, https://fdocuments.in/document/basic-principles-of-contract-drafting.html (Last accessed on August 15, 2020).

agreements, the second type is more preferred, but in multibillion-dollar or rupees contracts, parties would prefer the first route. [81]

Some of the examples of Amendment clauses are as follows:

7.9. Amendment

7.9.1. No variation, amendment, modification, alteration, or addition to this Agreement shall be effective or binding on either of the Parties unless set forth in writing and executed by them through their duly authorized representatives.

Other simple examples are:

This Agreement may only be varied or amended in writing signed by each of the Parties.

or

Every amendment or modification to be done to this Agreement shall be done in written and with mutual understanding of each Party.

[81] Charles M. Fox, WORKING WITH CONTRACTS, 7 (2nd edn., 2008).

MODULE III: CONCLUDING A CONTRACT AND POST CONTRACTUAL OBLIGATIONS

As discussed previously, boilerplates clauses are the last set of clauses that are incorporated in the body of the contract post which the contract is said to be completed. However, writing boilerplate clauses is not the last step of the contract drafting process as other procedural steps are required to be taken to make a contract valid and enforceable. This chapter explains the steps required to conclude a contract and how to deal with the post-contractual obligations.

CLOSING A CONTRACT

Closing a contract is essentially a procedural regularity following which the parties to the contract will be bound to the terms and conditions that have already been agreed upon. This closing of a contract is vital to the execution and proper implementation of the contract as the parties can challenge their obligations or performance as per the contract if the parties themselves do not ratify the same. The challenge will not merely rely on a term of a contract but the very 'incorporation' of it, i.e. whether the disputed terms form a part of the contract or not.

It is important to understand that closing may mean different things in different transactions. It may mean to be a consummation of a transaction at which time the parties exchange financial consideration.[82] However, for the relevance of this chapter, closing means the manner in which a contract has to be ended and the nuances associated with it.

At the time of closing a contract, firstly, the parties reassess the terms and the conditions that have been agreed upon. Thereafter, they include provisions for the closing date and closing delivery provisions apart from the place where the closing is to take place. In the closing deliveries provisions, each party covenants to the other how it will deliver its performance at closing. The question that arises in this instance is why is this necessary? That is so because it ascertains to the very details with certainty about the details of signing the contract and leaves no space for ambiguity. At times, the parties may originally be from different time zones, in such cases, the time of the location where the contract is being signed should be included. It confirms the moment of time from when the parties are legally bound by the terms and conditions of the contract.

It is also important to note that the parties to a contract should sign every page of the contract so as to ratify and confirm the contents of that particular pages, and not have the validity of any term or condition challenged. If a party has not signed a page, any person can easily replace the contents of that page. Hence, to avoid any legal troubles in the future and raise no question to the validity of the contract, at the very outset, the parties should sign the contract at every page.

[82] Tina Lynn Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO?, 178 (2nd edn., 2014).

This signature requirement is also necessary at the end of the contract when parties sign the contract in the signature blocks to finally accept and bind themselves in a contract. Such signature blocks are located at the end of the contract require signatures of the parties, authorised representatives of the parties (if the party is an organisation or a company), two witnesses (generally as a requirement in Indian laws), and details of the signatories such as their name, father's/mother's/husband's name and their address.

Signature blocks could be in one of the following ways:

IN WITNESS WHEREOF, the Parties have entered into this Agreement on the dates written below but this Agreement will be effective only on the Signature Date as defined in this Agreement.

For and on behalf of XYZ

By: ________________________________

Name: [●]

Date: [●]

Title: [●]

For and on behalf of ABC

By: ________________________________

Name: [●]

Date: [●]

Title: [●]

Witnesses:

1.

2.

OR

IN WITNESS WHEREOF, the Parties have signed this Agreement on the date above mentioned:

For ABC	For XYZ
Designation:	Designation:
Signature:	Signature:
Witness:	Witness:

OR

IN WITNESS WHEREOF, the Partner and the Company, by the signatures of their duly-authorized representatives below, intending to be legally bound, agree to all of the provisions of this Agreement.

By:	By:
Name:	Name:
Title:	Title:
Date:	Date:

OR

IN WITNESS WHEREOF the Borrower, the Lender and the Security Trustee have caused these presents to be executed by its authorised officer the day and year first hereinabove written in the manner hereinafter appearing.

THE COMMON SEAL of **ABC PRIVATE LIMITED** has pursuant to the resolution of its directors passed in that behalf on ___________________________ hereunto been affixed in the presence of _________________________ ____ ___ ____ ___, who has signed these presents in token thereof in the presence of:

1. ____

2. ____

SIGNED AND DELIVERED by the within named **XYZ INDIA LIMITED**, as the **Lender**, by the hand of ____ __ its _____________________________

SIGNED AND DELIVERED by the within named **123 LIMITED**, as the **Security Trustee**, by the hand of ____ __ its _____________________________

CONTRACTUAL VALIDITY

Contractual validity is the touchstone on which the drafting takes place. It essentially means that a drafter would draft a provision only if it is valid. Parties may agree upon certain terms and conditions, but it must be doubly checked whether such terms and conditions could be validly enforced. The parties may end up entering into a contract which is void, voidable, unlawful, unenforceable, or illegal. Hence, while drafting, serious consideration has to be laid to instances that differentiate the contract on these factors. A contract made for the betterment of one party at the cost of the other party does not affect the validity of the contract unless there is patent illegality attached to it. To make the contract valid and free of ambiguity, the following terms are briefly explained:

Void contracts are contracts that cease to be enforceable by law. They essentially violate public policy and can be nullified. They can also be made void when the competence of the parties is not achieved, or the terms are impossible to perform or are illegal to perform. Once a contract becomes void, the parties are freed of their obligations, and no specific performance needs to be made.[83] For instance, Marid and Benny may enter into a contract of extorting drugs, while the same is illegal in their jurisdiction. If Marid does not perform her obligations, Benny cannot enforce the contract in the court of law, for the simple reason that this contract being illegal and against the public policy, has been rendered *void ab initio*, i.e. the contract is as good as no agreement at all.

Voidable contracts, on the other hand, are contracts that are not void since the very inception but becomes void at the option of one party, i.e. one party holds power to enforce the contract in the court of law. Voidable contracts are valid contracts, but only one party is bound by it.[84] For instance, if Richa and Mira enter into a contract for the sale of a bottle. Richa particularly wanted a seamless copper bottle. While providing the same, Mira also conveyed to Richa that the prior owner of this bottle was Sachin. Richa bought the bottle but later got to know that Sachin did not own the bottle. The contract will be voidable at the instance of Richa because the misrepresentation was not material. Here, had Richa wanted the bottle owned by Sachin Tendulkar only and not any seamless copper bottle, the misrepresentation would be material, and that would make the contract void.

It should be ascertained that both the parties are competent to enter into a contract and the agreement is entered into *consensus ad idem,* i.e. the parties agree to the same thing in the same sense. For instance, it is ambiguous for the parties to enter into the sale and purchase for tea when one of the parties think the leaves to be from Darjeeling and the other thinks them to be from Munnar. A contract should conclude with 'meeting of minds.' Furthermore, the parties should also conclude the contract with the intention of carrying out their obligations as having been established in the contract.

The point is that whenever an exercise of contract drafting has taken place, it must be cross-checked with the clients and their counterparts to ensure whether what the parties intended or what the parties agreed upon has been met with the same meaning in the same sense and thus adequately recorded in the provisions. Moreover, every clause must be rechecked to ascertain its validity and enforceability.

ATTESTATION

Attestation to a contract is simply executing the contract by signing it in front of competent witnesses so as to assess its authenticity and genuineness. To ascertain the true copy of the contract, a certificate is given by the custodian of records demonstrating that the contract has been signed by the parties and is, in fact, a true copy of the contract.

[83] *See*, Void Contracts Practise Note' <https://www.lexisnexis.co.uk/legal/guidance/void-contracts>

[84] J. Beatson, A. Burrows, and J. Cartwright, ANSON'S LAW OF CONTRACT (29th edn, 2010).

Attestation is essentially a statement by the witnesses that the parties to a contract have ratified the contract in their presence.[85]

An attestation is different from an acknowledgement. The parties give an acknowledgement to the contract acknowledging the terms and conditions of the contract. On the other hand, attestation is given by the witnesses who only acknowledges the fact that the parties have actually signed the contract in his presence at a particular date and a particular time. The witnesses do not acknowledge the terms and the conditions of the contract but may be called upon to verify if the parties had free consent while entering into the contract, or if they entered the contract under undue influence. A witness attesting the contract is known as the attesting witness.[86]

While attesting to a contract, the witnesses do not merely sign their name but ascertain their identity with details. For instance, it is very less likely, almost impossible that there is only one Danny Brown, who acts as a witness. Hence, the attestation has to be in the following manner - Danny Brown S/o Fanny Brown R/o Brown Street, Hyderabad. This ascertains to the very peculiarity that who Danny Brown is and avoids every any ambiguity that may arise with respect to the identity of the witness.

The contract has space designated for the attestation to be made by the witnesses at the end of the contract. The parties also sign the contract next to such attestation.

NOTARIZATION

An agreement between the parties is a private document and essentially does not need to be notarized however, for an agreement to be a contract enforceable by law, i.e. for an agreement to be a contract, it has to be notarized. The purpose of a notarization is that it gives a public verification with respect to the name and details of the persons signing the contract and that the signature on the contract are of the same person whose signature it purports to be. This gives an effect of legalisation to the contract and also ensures proper execution of a contract and prevents the occurrence of fraud and other malpractice.

A notary does notarization. A notary is a person authorised by law to be capable of conducting the notarization of the documents. Now if the witness has already attested the contract, does it still need to be notarized as both the procedures seem to serve the same purpose. To answer this question, it has to be kept in mind that a notary acts as an independent witness while the attesting witness may or may not have reserved prejudice towards any party. Although the subject matter is particularly to verify the parties to the contract and not the contents of the contract, this may still be an important consideration.[87]

[85] *What does attest mean in a contract: Everything you need to know* <https://www.upcounsel.com/what-does-attest-mean-on-a-contract>

[86] *Attestation, Clause, Witness Defined* <https://www.upcounsel.com/legal-def-attestation-clause-witness>

[87] *Do contracts need to be Notarized* <https://www.upcounsel.com/do-contracts-need-to-be-notarized>

REGISTRATION

The parties to a contract may enter into a contract with certain terms and conditions and may later claim the different terms by unilaterally altering the terms and conditions of the contract. There is no doubt that a human tendency may go to the extent of forging someone’s signature to gain self-benefits. To prevent the parties from such circumstances, the parties should register the contract to ensure that either of the parties does not alter the initially agreed terms and conditions.

As far as Indian legal text is referred to, registration may or may not be done depending on the type of transaction and as warranted by the Indian Registration Act, 1908. For example, if a lease is beyond one year, it needs to be registered, but if the lease is below a time period of 1 year, say 11 months, it may not be registered. This is why the standard practice of entering into a lease is for 11 months to avoid the registration fees and the stamp duty associated with it. If paying the registration fees and stamp duty are not a concern, it is advisable that registration should be done to prevent the parties from any fraudulent or malicious activities leading to any legal troubles.

For registration, an additional page with an additional formality is required to be added in a contract. However, this practice is state-specific and must be checked with the practices followed by each state. The following is the example of registering a contract and the additional formality required in the state of Uttarakhand:

AND IN WITNESS WHEREOF, the Parties sign this Agreement and expressly agree that the Agreement shall take effect from the moment that the last Party signs it and that, in any case, the date and place of the signing of the Agreement shall be considered the date on which and the place where the last Party signs it. The references to the date of the signing, the date of the Agreement or similar references must also be understood as the date on which the last Party signs it.

Name and Address of the Sub-Lessor:
ABC, a partnership firm incorporated on [] with its principal place of business at []

<u>LEFT HAND</u>

Little-finger Ring- Finger Middle-finger Index- Finger Left-Thumb

RIGHT HAND:

Right Thumb Index Finger Middle-finger Ring Finger Little-finger

[]
(Sub-Lessor)

Name and Address of the Sub-Lessee:
XYZ, a limited liability company incorporated under the Companies Act 1956 and having its registered office at [], represented by its Authorized Signatory [Name], duly authorized pursuant to the [Board Resolution/Power of Attorney] dated [date].

LEFT HAND

Little-finger Ring- Finger Middle-finger Index- Finger Left-Thumb

RIGHT HAND:

Right Thumb Index Finger Middle-finger Ring Finger Little-finger

[]
(Sub-Lessee)

Witnesses

1.

2.

Photo attested by [Name of the Advocate], Advocate.

STAMPING

The registration of the documents is done by paying stamp duty. It is a tax levied by the government for legal recognition of the documents and acts as a source of revenue for the government.[88] This duty is stipulated by a particular state, and the state's concerned law should be looked into. At times, the parties attempt to escape this duty by not registering the documents. However, it is advisable that the parties to a contract should register a contract and elude paying the stamp duty.

Stamping is necessary while registering so as to make the contract is valid and enforceable in the court of law. A document is deemed to be duly stamped, if it bears an Adhesive or Impressed Stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with Law for the time being in force in India. If a document is not duly stamped, it is not admissible as a piece of evidence in the court of law. It is also important to note that stamping on the documents is done either at the time of execution of contracts or before the execution if done afterwards, may deem the stamping to be invalid, unless specific exclusion is provided by law. There are also e-stamps that can be attached to a contract, and it serves the purpose of a traditional stamping.

NOVATION

Novation in a contract is substitution of a new contract with an old contract in its entirety.[89] The parties to the contract are free of the obligations of the old contract and are bound by those of the new substituted contract. It amounts to change of parties to the contract. Essentially, novation means that one or more of the original parties to a contract transfer their rights and obligations to a third party/parties after which the third party/parties enter into a new contract with the remaining parties of the first contract. This new contract has the effect of substitution over the first contract.

A prime importance is paid to consent in such cases, hence, while drafting a contract, the parties should ensure that a clause of novation is drafted with utmost care explicitly mentioning the want of pre-requisite consent of all the parties, the ones being liberated

[88] Shinoj Koshy, *Stamp Duty and the Amendments to the Indian Stamp Act, 1899*, available at, https://www.mondaq.com/india/corporatecommercial-law/889646/stamp-duty-and-amendments-to-the-indian-stamp-act-1899 (Last accessed on August 15, 2020).

[89] Halsbury's Laws of England, Chapter 8, DISCHARGE OF CONTRACTUAL PROMISE.

from their obligation, the ones whose obligations are being created or altered through the new contract, and also the remaining parties to the contract.

It is pertinent for there to be a binding contract between the parties and an intention to novate the contract. If this intention is not present, then forming a new contract will not amount to novation but to merely enter into another contract irrespective of the already present contract.

The novation clause should specify taking 'written' consent of the parties. This is done to protect the parties from malicious intent of any party trying to alter the terms of the contract and from consent being inferred from a continuing party's conduct.[90] Such consent is especially important where mutual rights and obligations of the parties are involved as novation would drastically affect the same.

If the novation clause in a contract does not specify the mutual written consent of the parties, the parties are free to authorise unilateral novation. It is so because novation clauses require clear plea, issue and evidence.[91] However, it has to be noted that if a contract has no novation clause, the contract can still be substituted but only with the prior consent of all the parties. The novation clause should be drafted as such that the parties mutually agree to surrender their rights of performance of a contract and mutually exchange promises in furtherance of future promises.

If in the contract, any personal quality of work of a particular person is involved or the contract involves a beneficiary, the drafters should pay due consideration to the same and explicitly mention that novation in such cases materially affecting the contract cannot be done. For instance, if Sanjeeve and Rajesh enter into contract for service where the Sanjeeve was obligated to cook for Rajesh. Here, it has to be noted that novation of the contract amounting to shifting the obligations of Sanjeev to a third party cannot be done as it involves personal quality and the intention of the parties to perform the contract themselves and should novation be allowed, it will materially affect the contract.

The novation clause may transfer the rights and liabilities of a party to the contract to the third party in two ways:

Firstly, where the third party assumes the rights and obligations from a certain specified point of time.[92] For instance, a novation clause may mention that a party to the contract may irrevocable transfer his rights and obligation to a third party, with the prior written consent of the other parties to a contract. Such novation may be effected from the date of execution of the new contract.

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[90] '*Assignment and Novation Clauses* <https://smartcounsel.gtlaw.com.au/hrf_faq/novation-clauses/#:~:text=A%20novation%20clause%20will%20usually%20provide%20that%20a,consent%20being%20inferred%20from%20a%20continuing%20party%E2%80%99s%20conduct.>

[91] Babu Ram Alias Durga Prasad v Indra Pal Singh (Dead) By Lrs 1998 Indlaw SC 1136.

[92] *Novation Contract: Everything you need to know* <https://www.upcounsel.com/novation-contract-example>

Secondly, novation clause may include that the transfer of obligations and rights is effected ab initio, i.e. from the very beginning.[93] For instance, a novation clause may mention that a party to the contract may irrevocable transfer his rights and obligation to a third party, with the prior written consent of the other parties to a contract. Such novation may be bound to be effected from the date of execution of the first contract and not the subsequent contract.

ALTERATION

Contract alteration is a step taken after the execution of the contract. It means to bring material changes in the contract that have the value of revising the intent, the rights, or even the obligations of the parties to the contract. Although such alteration can be brought with or without the consent of the parties, yet the party whose consent was not taken for such changes, is not liable for the same and such changes are not enforceable with respect to the non-consenting party.[94] If such alteration is made without consent, it renders the alteration void, and such alteration is not material.

Such major alterations may include change in dates, timeline, signatures, payment schedules, or any other material factor in the contract. Just as in novation, the parties are not obligated to perform the prior terms and conditions of a contract once the novation is done. Similarly, once alteration has been done, the prior terms and conditions are not liable to be performed.[95]

It is also important to note that the alteration to a contract has to be deliberate. Such alteration has to be made either by express agreement or by necessary implication. Furthermore, in cases where the contract that has been altered does not itself contain obligations of the parties per se, but the parties instead rely on the contract for carrying out of their obligations, in such case, the alteration does not necessarily operate to discharge the parties from their underlying obligations.[96]

POST-DRAFTING CHECKLIST

The first module discussed the pre-drafting checklist that a good drafter would ideally follow to ensure that she does not miss out on anything important in a contract. Similarly, a good drafter will also make a post drafting checklist to ensure that nothing is missed while drafting a contract. This step is the last step of a contract before it goes for signatures and final execution.

To begin with the general aspects, a drafter should cross-check and ensure that the contract has achieved the following things:

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93 *Novation Contract: Everything you need to know* <https://www.upcounsel.com/novation-contract-example>

94 *Contract Alteration: Everything you need to know* <https://www.upcounsel.com/contract-alteration>

95 Section 62 of the Indian Contract Act, 1872.

96 Diganth Raj Sehgal, *Contract Alteration: A Detailed Study of its Effects*, available at, https://blog.ipleaders.in/contract-alteration-detailed-study-effects/ (Last accessed on August 15, 2020).

- Accurately embodies negotiated terms
- Covers all relevant facts
- Part of the agreements are well coordinated
- Definitions and defined terms are used consistently and appropriately
- The language is clear, concise, smooth, and well organised
- The intended reader ends up knowing all of the rights and duties of the parties

A model post drafting checklist that a drafter may consider is as follows:

- Does the title of the agreement indicate its type and purpose?
- Are the names of the parties and other identifying information correct?
- Are the recitals accurate, and do they contain the language of an agreement or only intention?
- Are the definitions given correctly and used consistently (one expression for one idea)
- Are the provisions for duties of the parties correct?
- Does the contract include an effective/execution date and a coming into force clause?
- Is the contract for a stated period, how can it be renewed? How can it be terminated?
- Are the obligations (representations and warranties) of your client correct, related to the transaction, and acceptable with regard to the risk allocation?
- Are the obligations (representations and warranties) of the other party correct, related to the transaction, and acceptable with regard to the risk allocation?
- Are the contracts clauses properly split up and numbered?
- Is the sentence structure clear? – active sentences and passive only where necessary;
- Is the language appropriate for a business to business contract? ('plain English only for consumer contracts') Is there a minimum of legalese?
- What are the remedies under the contract?
- Are the boilerplate (miscellaneous or general) provisions complete and correct?
- Is the signature provision or closing of the contract correct?

MODULE IV: NEGOTIATING A CONTRACT

Throughout these modules, the term ‘negotiation’ is used to describe the pre-drafting stage where the parties interact with each other and agree mutually on the terms and conditions which is later converted into the provisions of a contract. Naturally, it is one of the most crucial stages of a contract formation because without negotiating a contract, there will be nothing to draft. Hence, the concept requires a detailed understanding of negotiations, its relationship with the contract drafting and how it influences the drafting of a contract.

Negotiation is an art, using which, two or more people can agree on a mutual thing, resolve their differences, if any, and achieve their interests in an amicable manner. It is essentially a psychological game where the parties lay a fairground of the discussion, listen to each other, and attempt to attain the best options for themselves. It is premised on the fact that that stimulated conversations enhances mutual understandings and resolve differences.[97] Negotiation allows the parties to have a safe environment where discussions can be conducted. It allows both the parties to be privy to vital information that was otherwise unavailable to them and further helps them in attaining their goals.

In the realm of contract drafting, negotiation is a crucial stage more so because it forms the bedrock of the understanding between the parties. A contract is known as a private law between two persons or entities. The parties decide such private law amongst themselves, including its terms and conditions through negotiations. For example, if Party X wishes to enter into a contract with Party Z for distributing perishable goods, both the parties would want to talk about few specific aspects of the transaction that would be included in a contract. Such aspects could be who will be responsible if perishable goods are delivered decomposed or stale and are not fresh. Hence, to discuss those liability issues and to ensure that parties are obligated to provide fresh goods in a way that they are not decomposed easily, parties would want to discuss this once and chalk out a plan as to who will be responsible for what and how will things be carried out. Such chalking out a plan is what negotiation is all about.

A good round of negotiation can give a commercial advantage to parties and help them achieve their commercial interests. It will also give them a psychological satisfaction of having what they needed and get those terms recorded in a contract as compared to relying on a standard form of contract or at the whims and fancies of the other party.[98]

Another advantage of negotiating a contract before drafting is that it involves an emotional factor due to which the parties become more considerate towards each other

[97] Jeswald Salacuse, *The Importance of a Relationship in Negotiation- To Build a Long-Term Relationship in Negotiation, Work Collaboratively and Build Agreements that Benefit Both Side*s’ Program on Negotiation, Harvard Law School (May 5, 2020) <https://www.pon.harvard.edu/daily/negotiation-training-daily/negotiate-relationships/>

[98] Michele Gelfand and Jeanne Brett, THE HANDBOOK OF NEGOTIATION AND CULTURE, 114 (2004).

and hence make it more amenable for compliance.[99] Moreover, negotiation is not something different from what day to day bargaining looks like, for example, while purchasing footwear from a local vendor. The buyer negotiates the price of the footwear with the seller, and the purchase is made once a consensus is attained. A contract negotiation is similar, albeit with a formal lens.

Before the parties enter into a contract, it is important for them to attain a consensus with regard to the performance of the contract, what the parties seek to achieve from it, if time is an essence, what the parties expect from it, and even the price considerations. While there is no stringent rule according to which a contract cannot be drafted without first entering into negotiations, however, it is important for better performance and understanding to enter into pre-contract negotiations.

Therefore, the chapter is an attempt to understand the role of negotiations, its interplay with contract drafting, different approaches to a negotiation, planning for a negotiation, stages of negotiation, important aspects of proposals, influence, and persuasion, and the post negotiation processes.

RELATIONSHIP BETWEEN NEGOTIATION AND CONTRACT DRAFTING

Contract drafting is a skill that every legal professional must inevitably acquire. All commercial transaction run on contracts, be it the agreements for sale, shareholder agreements, government contracts, employment contracts, etc. In all such contracts, negotiation is omnipotent and antecedent to the execution of such contracts. The importance of negotiation can be reflected from the fact that the parties do not blindly accept the other parties' terms and contracts unilaterally.[100]

It is a common belief that only clauses related to price are to be negotiated, but there are several other clauses that should be negotiated like risk allocation clauses, liability clauses, termination clauses, etc. Since parties have long term commercial interests involved in a contract, they would want to carefully negotiate every clause most of the times.

Moreover, a well-negotiated contract is profitable and adds value to a contract. The term 'value' is not limited to monetary value but includes within its ambit a sense of security and affirmation concerning the needs and interests of the parties. For instance, a party to a contract may be willing to offer more compensation in turn of a better quality of the products that she shall be receiving and the other party may be willing to offer more workforce to increase the quality of the products which will, in turn, increase the amount being spent towards remunerations of the workers.[101]

Through negotiations, the parties can ascertain a common goal to be achieved. They can better understand the outcomes that can be achieved and collaborated. The constructive

[99] Michele Gelfand and Jeanne Brett, THE HANDBOOK OF NEGOTIATION AND CULTURE, 3 (2004).

[100] Tina Lynn Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO?, 206 (2nd edn., 2014).

[101] *Six Strategies for Creating Value at the Negotiation Table*, PROGRAM ON NEGOTIATION, HARVARD LAW SCHOOL (July 9, 2020) <https://www.pon.harvard.edu/daily/dealmaking-daily/dealmaking-six-strategies-for-creating-value-or-claiming-value-through-haggling/>

involvement of both the parties leads to a smooth negotiation and agile terms in the contract. It also involves prime aspects of confidentiality and exclusivity.[102]

In the absence of such thorough negotiations, parties would want to throw and impress upon the other party their own terms and conditions as preferred by them without paying heed to what the other party wants or is comfortable with. The outcome of such a unilateral contract is that the submissive parties end up not performing their part of obligations as it becomes too onerous for them or it catapults into a major dispute between the parties.[103] Hence, a proper negotiation between the parties for understanding the true needs and chalking out the respective obligations tailoring it to the need and capacity of the parties is the most crucial aspect of contract drafting and the fulcrum of their interplay.

DIFFERENT STYLES TO A NEGOTIATION

Having discussed the importance of negotiation and its interplay in a contract drafting, it would be prudent to jump into the technical aspects of negotiation to have an in-depth understanding of the process of negotiation and how it is beneficial in contract drafting. First in line is the various ways in which a negotiation can take place. It is commonly understood that there does not exist a straight jacket formula or stringent guidelines to negotiate.

Just like two different people have two different styles of writing, and speaking, similarly, two different people will have a different style of negotiating. It is different because a negotiation style is influenced by multiple factors such as the legal background of the negotiation, what outcomes the concerned individuals intend to achieve from the negotiation, the whims and fancies of the involved parties, etc. Above all, there are different prejudices, values, ideologies, preferences, pressures, objectives, and judgment in every negotiation and their concerned individuals which makes it difficult to follow a standard style for negotiation every time.[104]

Therefore, broadly, two different styles of negotiation are cooperative style or a comparative style. The cooperative style may also be referred to as the **problem-solving style.** This is a more harmonised style that aims at maximising the joint interests of both parties. It provides realistic arguments and seeks reasonable results while cooperating through the course of the process with minimal use of threats. Using this style, the negotiators maximise the disclosure of information and move psychologically towards the opponents in an attempt to create trust and build relationships.[105]

On the other hand, the competitive approach is a more adversarial methodology.[106] In this approach, the negotiator does not think about maximising the joint interests but their own

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[102] Fairweather Virgina, *Constructive Negotiation,* 17(3) *PM Network, 37 (2003)*.

[103] Larissa Tiedens and Alison Fragale, *Power moves: Complementarity in Dominant and Submissive Nonverbal Behavior*, 84(3) Journal of Personality and Social Psychology 558 (2003).

[104] Steve Gates, THE NEGOTIATION BOOK - YOUR DEFINITIVE GUIDE TO SUCCESSFUL NEGOTIATION, (2nd edn., 2016).

[105] Charles Craver, LEGAL NEGOTIATION PROCESS AND TECHNIQUES (2007).

[106] Charles Craver, LEGAL NEGOTIATION PROCESS AND TECHNIQUES (2007).

interests irrespective of the other party's interest. The negotiator using a competitive approach focuses on position rather than neutral standards, frequently using threats that helps to minimise the disclosure of information and manipulates the opponents.

It is pertinent to mention that the cooperative approach is flawed and is often oversold. The effectiveness of this style has to be determined in each peculiar circumstance. Adopting a cooperative style in an unsuitable condition without considering the style of the opponents at times leads to unusual and contradictory positions.[107]

The Competitive approach, on the other hand, may be seen as unethical. It is believed that when an opponent achieves their desired goal while the clients also achieve their goal, it is influencing with integrity. While, if the clients achieve their goals at the cost of their opponents, it is manipulation. The style of a negotiator may differ with peculiar facts and circumstances of the case, and the negotiator should strategically view her environment and the opponent's style before ascertaining his style.

Generally, independent of any style, to be an effective negotiator, one negotiating party needs to step into the other party's shoes and determine the circumstances from not only their perspective but the other's perspective as well and to use the other party's circumstance as an opportunity for themselves. The negotiator should ascertain what the other party's interests are; What is their threshold; What are the risks that the other party has associated?

DIFFERENT APPROACHES TO A NEGOTIATION

Apart from styles, a negotiator may have various approaches to the negotiation. They are as follows:

The Distributive Approach

A distributive approach is essentially a competitive approach. This approach is also referred to as 'the Win-Lose approach', 'zero-sum approach', or 'claiming value approach'. As the name suggests, using this approach, one party wins at the expense of the other party. This approach is coloured with making use of dominant position or dominant strategies for manipulation. [108] Negotiators who use this approach attempt to alter the opponent's beliefs by misleading information and gaining strategic advantage. It uses the commonly known as 'hardball' tactics. It is based on the assumption that some disputes involve pure win-lose conflict in that the gains of one party are invariably at the expense of the other.

The hardball tactic uses power or leverage to coerce the other party into changing their objectives, expectations, or position in the negotiation. It makes use of positional bargaining using the maximalist strategy by demanding more than can be attained. This kind of approach is more suitable for circumstances where the parties do not wish to build

[107] Timothy Williams, *Making Cooperative Negotiations Work*, <http://www.arbitratorwilliams.com/pages/cooperativenegotiations.html>

[108] Katie Shonk, *What is Distributive Approach*, PROGRAM ON NEGOTIATION, HARVARD LAW SCHOOL (June 4, 2020) <https://www.pon.harvard.edu/daily/negotiation-skills-daily/what-is-distributive-negotiation/>

relationships based on trust and mutual understanding.[109] For instance, when Sam and Michele were in a negotiation, Sam communicated his desire to attain maximum advantage to both the parties. However, he was attempting to establish dominance through his conduct by using loud voice at certain instances, exchanging intimidating glares, and using words like 'demands' instead of 'requests'. Though using the distributive approach is advantageous to the dominant party, but it creates hostility between the parties.

This approach is also taken when there is a fixed price on the table and negotiations circumvent the difference in prices. To successfully follow through this approach, it requires the negotiator to be persuasive. A negotiator should have the ability to constantly determine what the opponents may be thinking.[110] This can be achieved by understanding the issue from the opponent's perspective. It takes a great amount of preparation to successfully follow through the distributive approach.

If the negotiator is on the receiving end of the distributive approach, she can strategically deal with it using the competitive style. She may begin by following the cooperative style and making reasonable demands, but as the opponent's distributive approach takes over the negotiation, she may smoothly swift from cooperative to competitive. She may make threats to leave after citing her threshold.[111] Furthermore, she can base her entire claims on facts and figures as they offer less scrutiny. She needs to build a firm stand and refuse to be persuaded by her opponents.

The Compromise Approach

The parties may not always get what they seek. The human tendency is not always to bend in the situations that are coerced onto them. When the parties are unable to approach to an outcome that is ideal to them, they seek to meet midway. The parties give up a part of what they had originally sought and compromise to reach a final solution. A compromise can be ascertained to be the best way to negotiate if both are parties are adamant on their part. In this kind of approach, the parties usually start their interactions using competitive style, but when they do not seek any outcome, they swiftly adopt the cooperation style. [112] They make use of an equitable strategy of ascertaining fair sides. However, the parties do not adopt any style in totality.

It is usually in cases where the parties intend to maintain their relationship after the process of negotiation that they are even willing to seek a compromise. It is also considered that at times, to maintain such relations and avoid conflicts, the parties compromise more than they want to. In such an approach, since both the parties do not get what they originally wanted, they negotiate to make a deal that shall be most acceptable to them. If the issue of negotiations circumvents around the price, then the negotiators may go back and forth, giving offers and counteroffers until the same is

[109] Charles Craver, THE NEGOTIATION PROCESS (2003).
[110] Michele Gelfand and Jeanne Brett, THE HANDBOOK OF NEGOTIATION AND CULTURE, 115, 117 (2004).
[111] Michele Gelfand and Jeanne Brett, THE HANDBOOK OF NEGOTIATION AND CULTURE, 145 (2004).
[112]Andres Lares, *Negotiating Strategy: How to Compromise to Win,*
<https://www.shapironegotiations.com/negotiating-strategy-how-to-compromise-to-win/>

agreed upon. On the other hand, if additional issues are to be dealt with, the negotiators make additional concessions to the parties.

Managing concessions is a strategic process that considers the timing, amount, and nature of concessions to table the priorities and thresholds for the parties. For instance, Tamanna and Radhe are entering into a contract for the manufacture and delivery of alloys. The price of the commodity was a prime issue between the negotiating parties. However, when the same could not be negotiated. Both parties decided to compromise on the same and negotiate a deal that shall ultimately be sustainable for both parties. On conversing, it was revealed that Tamanna could manufacture the goods in better quality than what was previously agreed. For Radhe, it is acceptable, and hence in concession to the same, he extended the time of delivery from 6 months to 7 months. His commercial viability will not be lost in this period. Both parties ended up attaining a sustainable deal by compromising and trusting each other. It is pertinent to note that not everything can be compromised. For instance, in the above-stated illustration, if Radhe would have lost his commercial viability from a hike in the price or the delivery period, the same would result in a greater loss than profit to him. It is for this reason that the parties should establish their threshold and attempt to negotiate within those pre-defined limits.

The use of a compromising approach in a negotiation may be perceived differently by different cultures. While some view it as giving in or losing something, others view it as a healthy way to end the conflict and maintain a relationship. The primacy of relationships over substance is common in many societies, which may encourage compromise when core values or needs are not at stake.

The Integrative Approach

The integrative approach is essentially the cooperative style of negotiation. It is also known as 'collaborative approach', 'creating value approach', or 'the win-win approach'. It is important to note that a sense of satisfaction is one of the most important concerns. If the negotiators feel satisfied with the deal that they have attained, the approach leaves less value. The integrative approach can be said to be the best approach to negotiate. It gives the parties what they desire and most importantly, gives the parties a sense of satisfaction. In this approach, the parties maximise the sharing of information. Both parties attempt to give what the other party desires intending to maximise the value of the outcome. The focus is not on position bargaining rather on interest bargaining.[113]

However, it is not always possible to follow this approach, especially when parties have a conflict to resolve. If the long terms benefits are seen, then, this approach may be helpful as the parties keep an open mind and discuss the possibilities and the permutation and combinations of potential solutions. This approach may be taken in two parts - substantive and intrinsic value. The former, focusing on tangible issues, and the latter, on the cordial relationship and long-term interests of the parties. For instance, Peter and Raxon were getting into a contractual relationship where the liability of the parties extended for 20 years. For these parties, the costs involved will be a tangible substantive

[113] Charles Craver, LEGAL NEGOTIATION PROCESS AND TECHNIQUES (2007).

value, but the relationship that the parties will develop will be intrinsic value. The parties cannot afford to have bad blood between them as it would amount to costly and extensive disputes due to the long-term interests involved.

Negotiators following this approach need to have a behavioural foundation that does not involve intervening in personal feelings. This approach, much like the others involves strategic planning that shall be dealt with in the latter part of this chapter. Perspective is another important consideration. It is believed that negotiators with greater perspective-taking ability are more successful in achieving integrative agreements than negotiators with less perspective-taking ability.[114] Some may say that the integrative approach involves bargaining concessions, much like in the compromise approach. However, the difference that lies between them is that in the compromise approach the parties let go of what is most valuable to them however in the integrative approach the parties let go of what is least valuable to them. These approaches are not bottle tight formulas to a negotiation. The attitude of the negotiators is what determines the course of the process of negotiation.

PLANNING OF NEGOTIATION

It is certainly advisable to the parties that negotiation should not be entered into without proactive strategic planning. Any activity cannot be carried out without effective planning, for instance, a litigator plans his arguments before presenting them in a court, an architect prepares the plans of a building before constructing it, a doctor plans the manner of operation before performing it, a choreographer plans the dance before performing it, and this is a never-ending list. It is in the same manner that planning is a crucial aspect of negotiation.

Since there is no straight-jacket formula to negotiation, it is pertinent for the parties to determine their stand and the outcomes they seek. Planning is fundamental to negotiation as the parties' self-monitor and deciphers the consequences of their approach. It helps a party to develop an insight into the structure, gives confidence[115] and determines an ultimate offer that might be attractive to the opponents. Planning for negotiation is not only for determining the approach or the style that has to be taken during the process of negotiation, the parties also decide the attitude and behavioural aspects that they would be following in the negotiation process. The concession strategy that the parties may use cannot be executed without prior planning.

The negotiators should plan the happening of the entire event from the start to the end as if they are directing a play. Considering the number of stakeholders involved in a commercial negotiation, a party cannot just 'wing it' or 'go with the flow'. Moderations to a plan should also be considered because it is less likely for the actual event to go as planned. The parties being humans possess the tendency to alter their wants and needs, they can very easily be prejudiced. Hence, planning should include the possibility of happening and non-happening of certain events depending on the natural human traits.

[114] Michele Gelfand and Jeanne Brett, THE HANDBOOK OF NEGOTIATION AND CULTURE (2004).
[115] Steve Gates, THE NEGOTIATION BOOK - YOUR DEFINITIVE GUIDE TO SUCCESSFUL NEGOTIATION (2nd edn., 2016).

If a negotiator effectively changes her route in between the process after considering the behavioural aspects of the opponents, she has attained an upper hand in the process. This can only be achieved with effective proactive planning. Some of the major considerations while preparing for negotiations are discussed as follows -

BATNA

BATNA stands for 'Best Alternative to A Negotiated Agreement', BATNA discusses the party's options and alternatives. It establishes a threshold for the negotiating party. Typically, BATNA is the list of best alternatives that a party may get through negotiation. It determines the desired position of the party after the negotiation ends. It determines the limit for a party above which it will be profitable for the party to enter into a contract.[116] A negotiating party should not accept anything less than their BATNA and should take anything greater.

The parties may compare the consequences and outcomes from their current negotiation to the ones that can be attained from alternative exchanges - these alternative outcomes are operationalised as the "comparison level of alternatives," or **CLalt.** Hence, when CLalt is better than what the party is getting from the current negotiation, or if the BATNA is better than what the party is getting from the current negotiation, the party must not accept the same as it would lead to loss of profits to a party.

It is widely believed that determining BATNA is directly proportional to ascertaining power.[117] It is no doubt that power, even if veiled, plays a critical role in the process of negotiation. Presenting a BATNA, initiating the process, and taking charge while stoutly bringing forth the outcomes that a negotiator desire is a power move and creates a tint of dominance.[118]

As has already been discussed, BATNA establishes a threshold for the party. It is more formally referred to as a 'Reservation point' (**"RP"**). An RP is the quantification of a party's BATNA. It is the point in the negotiation process where the party does not seek the creation of value for himself and may leave the negotiation. It is the difference in both the party's RP that creates a bargaining zone between the negotiators. If the negotiation is price centric, then the Zone of Possible Agreement (**ZOPA**) can be determined by calculating the difference in the prices of both the parties.[119] This bargaining zone also ascertains the power that the negotiator's BATNA has had on the opponents.

For instance, if Mahi and Raj enter into a negotiation for entering into a contract for sale purchase of cement. Mahi, being the seller, has a RP of selling cement at the rate of INR 1000 for every 10kgs of cement. Raj, on the other hand, has a RP of buying cement at the rate of INR 900 for every 10kgs of cement. This difference of INR 100 is the ZOPA. The negotiation between the parties will circumvent to this price until the parties agree in

[116] Leigh Thompson and Geoffrey Leonardelli, THE BIG BANG: EVOLUTION OF NEGOTIATION RESEARCH, 115 (2004).
[117] Leigh Thompson, Jiunwen Wang, and Brian C. Gunia, NEGOTIATION (2016).
[118] Roger Fisher and William Ury, GETTING TO YES (2012).
[119] Leigh Thompson, Jiunwen Wang, and Brian C. Gunia, NEGOTIATION (2016).

between. However, while negotiating in the ZOPA, the parties are free to exercise their WATNA and leave the process.

WATNA

WATNA stands for 'Worst Alternative to Negotiated Agreement'. The question that good negotiators often ask themselves is what will be the worst alternative left for them if the present alternative is not sought through. A good negotiator does not only plan his BATNA but also his WATNA. It gives a better understanding of their RP and the consequences of the outcomes. BATNA and WATNA are two extreme ends of a negotiation. While BATNA relates to a circumstance where you can get better options, WATNA relates to a circumstance where you differ the cost of the value of leaving a negotiation. It is not wrong to say the both BATNA and WATNA are considered together to effectively raise a substantiated and sustainable outcome.[120] WATNA considers the bottom line to a negotiation. It considers the price value, or the fee or margin; the terms; the specifications; and other variables particular to a contract like delivery, time, etc. After ascertaining all such variables, the party determines his WATNA.

For instance, in a negotiation process between John and Arthur, Arthur proposes to give 7% leverage in price of goods purchased by John. Arthur claims it to be his final offer. However, John desires a minimum of 10% leverage. At this point, John evaluates his commercial viability and compares the profitability in entering into a negotiation and leaving the negotiation. John realises that this deal is of utmost importance to him as without it, he might loose his business. Hence, John’s WATNA is losing business and commercial advantage, if he walks out on this offer. After comparing and evaluating all the involved variables, John decides to accept the offer. However, if the offer would have been lower John’s WATNA, he would have walked away.

The job of a negotiator is not only to create his WATNA but also to exercise it. The negotiator has to be evaluative and re-evaluative in the process of negotiation and must know when is it the time to move away from the negotiation. A risk valuation should also be done by the party to determine a strong WATNA.

MLATNA

MLATNA stands for ‘Most Likely Alternative to Negotiated Agreement’, MLATNA is the best estimate reality check outcome. While BATNA and WATNA set benchmarks or RPs for negotiators, MLATNA is the establishment of most probable result that can be achieved by a party in reality if in case the negotiations are not sought through.[121] Realistically, the use of this technique is not common. However, the BATNA mentioned by the parties mostly speak of possible and realistic alternatives. Hence, it can be said that it is essentially the MLATNA and not the BATNA which has more practical use or have practical importance.[122]

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[120] Roger Fisher and William Ury, GETTING TO YES (2012).

[121] Katie Shonk, *What is Distributive Approach*, PROGRAM ON NEGOTIATION, HARVARD LAW SCHOOL (June 4, 2020) <https://www.pon.harvard.edu/daily/negotiation-skills-daily/what-is-distributive-negotiation/>

[122] Roger Fisher and William Ury, GETTING TO YES (2012).

Consider a situation where Pushkar and Rajan were acquainted with each other and had a pre existing contract between them. They wanted to enter into another contract for services for which they entered into the process of negotiation. Rajan being a well known service provider in the market already had a pre established dominance. He took the maximalist approach to the negotiation and demanded more price than what Pushkar would have given. Pushkar on the other hand, got to know about the negotiation style and strategy of Rajan from another competitor in the market. Being privy to the same, Pushkar made a reasoned counter offer. Rajan, applying his MLATNA accepted the offer and the parties cooperatively entered into a contract. This illustration shows that no one strategy is free of the other and both can be exercised simultaneously.

Option Analysis

While alternatives can be analysed by creating BATNA/MLATNA and WATNA, the parties should also consider the options that may lie within their BATNA and RP. It is very less likely that a negotiator's first offer is accepted by the other party, as the other party may also have his set alternatives.[123] In such a scenario, a negotiating party must be prepared with the options that can be discussed with the other party. All the possible options will be in line with the profitability of the party and should not cross the RP.

While determining these options, the party also needs to anticipate and understand the opponent's position. The **concession strategy** is vital for analysing the options. Concession is one of the important parts of a negotiation. It shows what the parties are willing to give up to reach an outcome. This strategy is the soul of the compromise approach. The success lies in not only making a concession strategy but strategically executing it. While planning the concession strategy, the negotiator needs to ascertain if there is a need to concede at all. If yes, then what is the point at which this need arises and how can the need be dealt with through concessions.[124]

At this stage of the negotiation process, the parties only need to have an open mind concerning concessions. A party cannot possibly decipher what concessions should be made without first studying the demeanour of the opponents. The parties can lay a bottom line concerning the concessions in every variable. The parties should not go beyond this bottom line to concede with the other party. In the negotiation process, the parties should not always offer the concession themselves. However, at times, it can represent trust and goodwill on the part of the offering party.[125]

Style and Strategy

As has already been discussed, the parties follow a particular style (collaborative or competitive) while negotiating. This style is determined by the strategy that is followed by a party. It is pertinent to ascertain whether the parties need to maintain a cordial relationship with each other, build trust, and work along with each other or can the party bear giving threats to achieve what it wants. Usually, in cases where there are long term

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[123] Leigh Thompson, Jiunwen Wang, and Brian C. Gunia, NEGOTIATION (2016).
[124] Theron O'Connor, PLANNING AND EXECUTING: AN EFFECTIVE CONCESSION STRATEGY (2003).
[125] Charles Craver, THE NEGOTIATION PROCESS (2003).

interests involved, the parties do not follow the maximalist strategy or the distributive approach to negotiation. In such a situation, it is more appropriate for the parties to adopt the integrative approach and proceed towards interest bargaining rather than positional bargaining.[126]

In the **maximalist position strategy**, the negotiators demand more than what they know can be attained from a particular negotiation. The negotiators veil their minimum or real expectations and avoid falling low. They sometimes offer concessions that are of not much value to them but portray to the other party that they have also given up a substantial part. However, if the other party also opens high or is on the competitive approach, it may pose risks to the party. It establishes a risk of bargaining stalemates. With such increased risks, the strategy brings high returns for those who employ it effectively and not just use it. This strategy can be effectively employed by competent negotiators using a competitive approach. Using this strategy, it has also to be noted that the demands should not be so high that it loses congruity and loses *prima facie* credibility. The opponent has to be critically studied before making such high demands. If the opponent has evaluated the costs, putting forth, high demands will not have desirable results.[127]

Another strategy that a negotiator can use is the **equitable positioning strategy** where the parties intend to be fair to each other. It is not always that the parties are solely concerned with their costs and profits. The parties may also be genuinely interested to collaborate, play just, and fair. Using this strategy avoids the delay caused and also minimises the deadlock, hence it can be said to be one of the most cost-effective methods.[128]

This strategy is successful if both parties follow it and intend to build trust. It runs with the collaborative approach. Using this strategy, the parties do not attempt to create dominance or start with quoting high as is done in maximalist strategy. Instead, the parties present their intention to proceed with a fair process and put forth reasonable and equitable demands. Although it depends on the peculiar facts and circumstances, interest bargaining shows a more value intrinsic stand than does the position bargaining.

The third strategy that can be used is **integrative positioning**. This strategy runs parallel to the integrative approach to negotiation. It attempts to bring the best for both the parties to a negotiation, without being at the cost of the other. It advocates against the positioning *per se*. It solves the problem and comes out with the best solution for the parties. Again, it is pertinent for the parties to have a similar intention for this strategy to work.[129] It is less likely to show effective results when one of the parties is attempting to create dominance using the maximalist strategy, and the other tries to use integrative positioning.

Furthermore, it is also pertinent for a negotiating party to step into the shoes of the other party and ascertain their exit points, best and worst alternatives. It has to be noted that the

[126] Charles Craver, LEGAL NEGOTIATION PROCESS AND TECHNIQUES (2007).
[127] Charles Craver, LEGAL NEGOTIATION PROCESS AND TECHNIQUES, 79 (2007).
[128] Charles Craver, LEGAL NEGOTIATION PROCESS AND TECHNIQUES, 79 (2007).
[129] Charles Craver, LEGAL NEGOTIATION PROCESS AND TECHNIQUES, 79 (2007).

importance of BATNA and WATNA cannot be understated under any circumstances. A party should create not only their alternatives but also decipher the alternatives of the opponents. Once the same has been done, the party can ascertain the bargaining gap and the ZOPA and accordingly decide the kind of strategy that they would want to pursue in their negotiations.

STAGES OF NEGOTIATION

Negotiation is viewed as an unstructured process with no fixed standard template. While it is true that there is no watertight mechanism that deals with the process of negotiation, it cannot completely be referred to an unstructured. On the other hand, appreciating the entire process, strategically and meticulously working towards it gives an upper hand to the party and ascertains better results.[130]

Having discussed the importance of negotiation, the associated variables, and the pre-negotiation preparation and planning, it has to be understood that once the negotiation begins, it is much more than 'sit and discuss'. It has defined stages. While the first stage of a negotiation process can be considered to be the preparation stage, the same has been discussed above. The following stages of negotiation are:

The Preliminary Stage -

This stage is for establishing the negotiator identities and the tone of interaction in the process of negotiation. This is important to build a cordial relationship between the parties, lay grounds for trust, and proceed in good faith. In this stage, the parties interact about their professional/personal information, for instance, the name of their law firm, their background, their experience, etc. To establish the tone of the interactions, the parties may also inquire about the prevalent negotiating strategies of the opponents so that they are not tricked by their opponents' cooperative style on the face of it.

Any critical information should not be leaked at this stage before determining the candour of the opponents. To ascertain the behaviour of the parties, it can be noted that usually, the people taking up the competitive approach remain competitive irrespective of the behavioural approach of the opponent however the people who take up the cooperative approach mould themselves into being competitive while facing competitive negotiators and cooperative while facing cooperative negotiators.[131]

Apart from noting the behaviours, the attitude of the opponents can also be ascertained. This is known as **attitudinal bargaining**. The opponents intend to create dominance through their manner of conversation and their demeanour. The opponents may try to create an intimidating atmosphere. They may give you an uncomfortable or a low chair, etc to create a psychological advantage over the other party.

On the other hand, If the opponents address the other party as Mr. or Miss. during the course of the negotiation, it means that they intend to keep it professional and will not bring any personal interference in the process. Facing such interactions, the other party

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[130] Charles Craver, THE NEGOTIATION PROCESS (2003).

[131] Jeffrey Rubin and Bert Brown, THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION, 185 (1975).

can exchange a warm handshake, friendly eye contact, and in between healthy humour with an attempt to personalise and harmonise the interaction.

Nonetheless, even if a negotiator is attempting to establish dominance, the preliminary stage should begin with building rapport with the opponents. This reduces the unproductive anxiety created by adversarial conduct.[132] A negotiator can still create dominance without laying the field with gimmicks from the very beginning of the process. This atmosphere that is created by the parties has a crucial effect on bargaining. Hostility certainly does not solve any problems. Instead, it pushes the party away from conceding. A positive atmosphere creates better and more efficient and collaborative outcomes. On the other hand, negative moods incline towards the competitive tone and distributive outcomes.

The Information Stage

After establishing identities and tone of interactions, the stage of value creation comes in. In this stage, the parties exchange their interests and needs. With conflicting strategies, it may be difficult to give information to the other party. For instance, if one of the parties is taking the collaborative style, he would be inclined towards sharing vital information, but if the other party is following the competitive style, he would be reluctant in sharing more information. If one of the parties is pretending to be collaborative at the face when truly he is competitive, it may cause severe loss of substantial information to the other party if the other party is unable to pick on it.

However, to ascertain the styles and tone was a part of the preliminary stage. Although no watertight lines can be built between these stages as the tone of interaction may keep on changing in the process with the involvement of various psychological factors and new information can be attained at a later stage as well. Nonetheless, the best way to ascertain the information is to simply ask questions.[133]

The negotiators should be prepared with a pool of questions that need to be asked from the other party. What kind of questions is what negotiators may ask themselves while preparing? There may be no straight answer to this. The questions may revolve around the current situations, beliefs of opponents, or even about the weather of the place from where your opponent has come. The motive is to get to know the opposite party, in doing so, a party may warm-up into asking unrelated questions like the weather or may shoot a piece of substantial information giving question.[134]

Usually, it is better to ask questions having a broader perspective as leading questions merely confirms what the party may already know. It is also more helpful to ask neutral questions so that it can be ascertained which side the other party is lingering on to. A party following the competitive style will try to answer the question accurately, thereby disclosing the least information possible. If open-ended and broad questions are asked from such a party, it may allow disclosure of some vital information either directly or

[132] Charles Craver, THE NEGOTIATION PROCESS (2003).
[133] Jeswald W. Salacuse, THE GLOBAL NEGOTIATOR, 48 (2003).
[134] Leigh Thompson, THE MIND AND HEART OF THE NEGOTIATOR, 60 (1998).

indirectly. The negotiators must be evaluative at this point and also comprehend the demeanour of the party while answering the questions. Constant eye contact should also be maintained with the party to not miss out on any cues.

The answering party is more likely to give more information if the eye contact is warm rather than intimidating, and if the listening party smiles and nods while listening. If in case, the answering party is attempting to elude from answering to certain aspects, the questioning party should mould the question in a form that compels that party to give definitive replies.[135] The negotiators with a knack of active listening and picking on vital information tend to gain the upper hand during this stage. Interpretation of such information that is discerned is always open to scrutiny. However, with constant signs and repetitive behaviour, such information can be relied on.

A common mistake done by negotiators is that they do not realise the value of this stage and rush further. However, with more vital information, it is certainly easier for the parties to negotiate further. Through a comprehensive information stage, the parties can ascertain the interests and needs of a party. Often the parties beat around the bush and take time to warm up before directly asking the other about some vital questions. While it is not wrong to warm up but a skilled negotiator knows to frame questions that although look like merely building trust and rapport but have veiled information in the answers to them. This involves the strategic planning of the questions.

For the answering party, it is pertinent to decipher which information is to be divulged and which is to be withheld. If this determination is made beforehand, the parties are more likely to have a more successful information stage. If an answering party does not intend on disclosing certain information, the use of "**blocking techniques**"[136] can be made. These techniques are used by parties to elude certain responses. They ignore answering some questions and involve the listener in another conversation. They may alternatively misinterpret the question being asked and thereafter move the conversation to topics that he would like to discuss. The response to a specific question may be general, and to a general question may be specific.

These blocking techniques prevent the disclosure of vital information. Hence, the same should be strategically planned to gain an advantage. On the other hand, if a party volunteers the information, it is "**reactive devaluation**." Since this is a piece of unsolicited information, it may be less reliable. While some view this stage as one free of gimmicks where parties simply communicate about their needs and interests, others might tactfully take advantage of this stage to gather information and ultimately use it for their good at the expense of others. If the interests are put forth along with laconic explanations of why a party deserves the requests, it is less likely for a party of the competitive style to discard such a request at the later stage of the negotiation.

The parties should effectively listen and try to ascertain the opponents' WATNA - if not you then who? After the parties have exchanged information, made evaluations, and have

[135] Donald G. Gifford, LEGAL NEGOTIATION: THEORY AND APPLICATIONS, 123 (1989).
[136] James Freund, SMART NEGOTIATING (1992).

an idea of the RP of the other party, a reasonable offer may be laid to pre-empt the process of negotiation.[137] Such initial offers may reveal much information about the other party. The parties' attempt to make an offer with their goals in the centre is known as **'bracketing'**.[138] It is advisable for a party to not make the first offer yourself instead induce the other party into making an offer. The first party making the offer is more likely to make the first concession and is more likely to attain less advantage from the negotiation. After such initial offers have been made, the parties move towards the next stage.

The Distributive/ Competitive Stage

At this stage, the entire focus of the negotiation shifts from knowing what the parties' interests and needs are to what are your interests and needs, i.e. the focus shifts from your opponents to yourself. This is the value claiming stage. The question that arises at this point is what would the followers of the collaborative style do? At this stage, the parties simply attempt to divide the pie in an egalitarian manner. Even a stout advocate for the collaborative style will find himself stuck in the conflict, attempting to create a win-win bargaining environment.

However, it is important to understand that practically, the bargaining power of both the parties may usually differ, either due to the upper hand of one of the parties experience in the field, or better goodwill, or due to the dominance that a party has already created, or due to any other reason. A manner to ascertain a win-win bargaining environment is articulated by a few renowned authors in their seminal work. To quote them, they say "*We are out to achieve all (or most) of our goals, to make our most desirable deal. But the best way to do so is to let the other side achieve some of their goals, to make their acceptable deal. That is win-win: big win for your side, little win for theirs.*"[139]

In this stage, once the parties have described their interests and wants, it is less likely that the terms and conditions of the parties are accepted in the first instance. At this point, the concession strategy comes into play. Skilled negotiators subtly move from their opening offers to their final objectives through strategically prepared concessions strategies. It is advisable to make rationale demands with reasons and principled concessions to maximise the bargaining effectiveness of a party. The concessions made should arrive with the parties at new bargaining points, and it should represent the spirit of compromise and good faith. It is also important for the parties to understand that the concessions should not be moved in or replied to in haste. Impatience should not be a virtue that keeps a negotiator from entering into sustainable negotiated agreements.

The focus should be on the aspirational level and not on the bottom line. It should also be noted that although the negotiators have planned their strategies, it is less likely that the similar offers will follow. Hence, the parties should be flexible and evaluative of which situation brings them more commercial advantage. When the terms that are being offered

[137] Charles Craver, THE NEGOTIATION PROCESS, 40 (2003).
[138] Charles Craver, THE NEGOTIATION PROCESS, 40 (2003).
[139] Roger Fisher and William Ury, GETTING TO YES (2012).

by the other party are not better than your BATNA, you shall not accept the same. In such cases, you reach the bottom line, and the bargaining power is more with you as you would have more to gain than to accept the disadvantageous proposal put forth by the other party.[140]

At this point, if the parties have other external options, they should disclose the same. If the party following the competitive approach is privy to such options, it may make them more accommodating. While divulging such information, a party should be calm and non-threatening. This allows the party to follow a collaborative problem-solving approach and exploit the mutual gains through the negotiation.

The negotiators may use some techniques in this stage like giving subtle warnings, making overt threats, stubbornness, ridiculing, flattery, and other manipulative practices. The essence of the stage lies in persuasive arguments presented in a logical, orderly, comprehensive, and articulate manner to enhance cumulative impact. **Power bargaining** is widely used at such a stage to prompt the opponents into thinking that more has been provided to them. It induces the parties into reassessing their situations.[141] This power bargaining can be done by casually mentioning the external options or merely making it known to the other party that they may move out of the negotiation. To portray so, the party has to exhibit his confidence in his position.

It is not uncommon for a negotiation to have several temporary impasses. In such cases, the parties should focus on the conversation that keeps the ball rolling. The proposals may be re-framed, turning them into more neutral. In such impasses, the parties should take a break which is more formally known as '**caucus**'.[142] It gives the parties time to think, interpret, and evaluate. A change in the physical environment or the location may also help.

A change in the bargaining team composition can also be considered. Bringing in a new attorney brings out a different aspect to the negotiation and renegotiates the stalled talks, which may prove to be beneficial to the parties. Another option is to bring in a mediator to facilitate the communication, however, it then changes the process from negotiation to mediation, and such steps are not usually required in pre-contract negotiations.

The Closing Stage

Once the concession strategies have been exchanged, and the parties have come to mutual accord, the parties move towards the conclusion of the transaction or the closing stage. It is for this reason that it is the value solidifying stage after having claimed the value in the distributive stage. Although by this stage, the concessions have already been made yet, it is seen that the majority of concessions tend to be made during the concluding portion of negotiations.[143] The parties attempt to bridge the gap through alternative concessions.

[140] Deepak Malhotra and Max Bazerman, NEGOTIATION GENIUS (2007).
[141] Charles Craver, LEGAL NEGOTIATION PROCESS AND TECHNIQUES, 20 (2007).
[142] Charles Craver, LEGAL NEGOTIATION PROCESS AND TECHNIQUES, 25 (2007).
[143] Roger Dawson, SECRETS OF POWER NEGOTIATING, 16 (2001).

By now, either the parties have either concluded with an attempt to mutual gains or have accepted the greater bargaining power and dominance of a party. At this stage, the negotiators should not make unreciprocated concessions, or change their positions. They should instead maintain the position that they have followed until now and not jump towards the conclusions. Patience and silence are the two most important strategies that should be incorporated. Patience with respect to the process and silence after announcing any change or establishing a position.

This stage can be one of the most competitive stages. Laying much reliance on the collaborative approach at this stage does not get more beneficial results. At this point, even the adversaries seek to attain final accords.

Cooperative/ Integrative Stage

After the closing stage, the parties have entered into a mutually acceptable agreement. Some might consider it to be the end of the negotiation stage but in cases where there are multiple issues involved, this stage of value maximising can be implemented. However, the same cannot be done if the issue only revolves around the price, in which case, there is nothing left to be maximised.

At the stage, alternative trade-offs are considered to enhance the value of both the parties. Until this point, it is less likely for the parties to achieve superior outcomes, they have rather achieved acceptable outcomes. The reasons for the same can be the deceptiveness of the parties in the information stage or the anxiousness of the parties in the distributive or closing stage. This cooperative stage stimulates the problem-solving attitude of the parties and attempts to increase the share of each party.[144]

It is at times difficult to differentiate between the closing stage and the cooperative stage. Skilled negotiators merge the ending of the former to the beginning of the latter as essentially they talk about the same thing - closing the deal. Nonetheless, both parties should realise this swift move to ascertain their behavioural strategies. At times, after a provisional agreement is made from the closing stage, the parties then propose to move towards the cooperative stage.[145]

The negotiators following the competitive style also tend to lean towards the cooperative win-win attitude in this stage. Since this stage focuses on maximisation, it is certainly important for the parties to candidly divulge their underlying interests, if the same has not been done until now owing to strategic reasons. It is only this truthfulness that will give efficient results. The parties should be suspicious of the proposals put forth by the adversaries as even though they act as cooperatives in this stage, it cannot be said with certainty if the proposals put forth do not have a manipulative tint.

To make the parties honor the deal, the opponents may make final concessions letting go of something that is of not much substantial value. The end of this stage results in a final agreement of which both the parties are satisfied.

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[144] Carrie Meadow, TOWARD ANOTHER VIEW OF LEGAL NEGOTIATION: THE STRUCTURE OF PROBLEM SOLVING (1984).
[145] Charles Craver, THE NEGOTIATION PROCESS, 63 (2003).

PROPOSALS, INFLUENCE, AND PERSUASION

The process of negotiation highly depends on the attributes of a person. It has already been established that dominance is a highly competitive factor in the process of negotiation. It creates persuasive value and hence induces the other party into accepting the demands and offers of a party. Proposals, influence, and persuasion are interconnected to each other. They are categorically discussed in following sections:

Proposals

The parties start making proposals in the distributive stage of the negotiation process. They are ensnared with bargaining encounters coloured with the attempt of noting a behavioural change in the opponents' composure. Behavioural environment, strategies and nuances determine a lot about a negotiator. Skilled negotiators making proposals attempt to urge the opponents into showing a paradigm shift in their behaviours and gain a psychological advantage where on the other hand, a skilled negotiator maintains his composure on the face of such proposals.[146]

This psychological advantage gained by some negotiators is due to "**anchoring**".[147] At times, certain negotiators give generous opening proposals that the opponents following the competitive style do not suit well. It is because the negotiators following competitive style often expect their opponents to be competitive and hence do not expect generous offers and introspect their selves when given such proposals. This might also come out to be a disadvantage for the proposing negotiator as the opponents increase their aspiration levels when given generous offers.

On the other hand, when a negotiator gives frugal offers, it has the opposite effect. The receiving negotiators do not raise their aspiration levels instead lower their goals. However, a competent attorney will base their proposal on a principled rationale thereby giving reasons as to why they deserve the demand they are making. Such proposals tend to have a deep impact on opponents. It establishes a firm position of the negotiator that is less likely to be dismissed. The principled proposals also define a bargaining agenda, it sets a standard that the opponents will need to meet.[148]

After receiving a principled proposal, if the other party offers baseless proposals, its value depreciates. It is for this reason, planning is a pertinent aspect of making proposals. The end of the distributive stage concerning proposals can be seen in two ways - theoretical and practical.[149] Theoretically, if the parties do not find themselves in a settling position, they should consider their WATNA and move out of the negotiation. On the practical hand, being humans, negotiators tend to complete what they have started. If a settling position is not attained, they feel the pressure and the fear of exercising their WATNA.

[146] Charles Craver, THE NEGOTIATION PROCESS, 15 (2003).
[147] Russell Korobkin and Chris Guthrie, PSYCHOLOGICAL BARRIERS TO LITIGATION SETTLEMENT: AN EXPERIMENTAL APPROACH, 138 (1994).
[148] Deepak Malhotra and Max Bazerman, NEGOTIATION GENIUS (2007).
[149] Leigh Thompson, Jiunwen Wang, and Brian C. Gunia, NEGOTIATION (2016).

They make behavioural changes and offer proposals lowering their aspiration levels. It is strongly advised that a good negotiator should understand and constantly evaluate both his BATNA and WATNA. Frivolous or self-damaging proposals should be avoided and most importantly, a proposal should be seen through concerning long term effects it has. On the receiving end of such proposals, humour is a mechanism that if rightly used may prevent such proposals in the future of the negotiation. Making the opponents privy to your alternative is also another way to demand serious, principally reasoned offers.

Influence

The process of negotiation does not follow statutory principles and is a blend of psychological and sociological principles that influence other interpersonal transactions. Every negotiation process is influenced by the demeanour, the dominance, and the power of the negotiators. Influence can be ascertained from the initial stages of negotiation, i.e. the preliminary stage and information where the parties get to know each other.

While the negotiators following the competitive style influence the other party with their dominance and create bargaining power, the negotiators following the cooperative style do not tend to leave much influence on the competitive negotiators. Thereafter in the distributive stage, when the parties start to make their initial offers and attempt to anchor the other party, it leaves a tint of influence. As has already been discussed that parties are influenced differently and have different behaviours to react to overly generous offers and frugal offers.[150]

A skilled negotiator knows not to get influenced by such extreme offers. They use strategies to not get influenced by such anchors. For instance, ignorance of anchor. It is rightly said that ignorance is bliss. A negotiator should ignore the extreme offers of the opponents. They can also pretend that they have not heard it or pass statements that make your opponent's feel that both the parties stand on a different footing concerning the negotiation and attempt to bridge the gap with a conversation. Another strategy that can be used is to separate the information from the influence of the proposal. It is not always that a proposal is coupled with both information and influence, it tends to have influence regardless, but the onus is on the receiving negotiator to recognise the same.

A skilled negotiator would only gather the relevant information from the offer, and stick to their evaluations without being induced by the gimmicks of the other party. At times, some negotiators get anxious with extreme offers and affect their ZOPA however it is advisable to a negotiator to not go so or to not get carried away with the flow that the opposite party is trying to create.

While at the same time, it is important to realise when some substantial information may be a reason to alter your ZOPA, for instance when a party communicates to the other about the alternatives that they have, it is critical to ascertain if a party is forging such information or if it is true and substantial. One way of ascertaining the same is to ask the

[150] Deepak Malhotra and Max Bazerman, NEGOTIATION GENIUS (2007).

party about the details of the market competitor whom they consider to be an alternative and why do they think so.

Another strategy that can be coupled with this strategy is to avoid dwelling in their anchor as more discussion on it assigns more power to it, however, some negotiators induce the other party to justify their extreme offers. It has to be determined by a negotiator concerning particular facts and circumstances of a peculiar case as to which option will reduce the influence on you and your agreements. Where ignorance cannot be exercised, a negotiator may adopt a strategy where they make an anchored counteroffer. A risk associated with this is that it counters aggression with aggression, hinges the trust relationship and the parties ultimately reach an impasse. Attitudinal bargaining highly influences the parties.[151]

In such circumstances, the parties may take time to rethink their proposals and the influence that it creates. The closing stage is a crucial stage where the influence created in the distributive stage peeks as the parties are reaching an end. For parties following the collaborative style, they create a positive influence on the other party which is deemed to be healthy for a negotiation process.

Persuasion

Persuasive value in a negotiation cannot be understated. Persuasion also establishes dominance. Skilled negotiators who are persuasive usually have prime control over the negotiation process from the very beginning. Persuasive negotiators are those who can provide seemingly valid reasons to negotiators following the competitive style and provide them with their objectives. To bolster their claim, they apply objective standards rather than basing it on subjectivity.[152]

In the preliminary stage, the negotiators persuade their opponents into giving more and more information. It is usually the negotiators following the competitive style that persuade and induce the other party into giving more and more information and in turn divulge minimal information. They strategically carry forward the conversation in a manner that circumvents the information that they require. This persuasive knack of certain negotiators can prove to be incredibly useful if it is implemented effectively. Negotiators use this persuasion to induce the other party in giving initial offers as it is more likely for people to give initial concessions if they give initial offers.[153]

The technique of persuasion is also highly used in principled bargaining. Although a principled proposal will have more effect and is less likely to be thrown off the table, if the same proposal is made with a persuasive value, manipulating the other party into thinking that the proposal is beneficial for both the parties and it fulfils the interests of both the parties makes it more assuring.

[151] Charles Craver, LEGAL NEGOTIATION PROCESS AND TECHNIQUES, 30 (2007).
[152] Jonathan Harr, A CIVIL ACTION, 277 (1996).
[153] Roger Fisher and William Ury, GETTING TO YES (2012).

However, to have a deeper effect on the parties, persuasive arguments should be presented in a logical manner so as to not appear aggressive. Such arguments should enhance and reaffirm your position in the negotiation. At times, the parties also employ the strategy of emotional persuasiveness. This also happens when there is a relationship of harmony and trust between the parties. The negotiator facing such persuasive offers and arguments should decipher the real intent veiled behind the same and not be influenced by it.

Controlled voice volume can be a characteristic of persuasiveness.[154] The intensity of your presentation and the pitch of your voice is a subjective factor to associate persuasiveness. Some might view loud voice as aggressive while others might view it as controlling and persuasive. The negotiator has to fathom the situation at hand, study the cues of the opponents, and then decide if using a loud voice will be persuasive or not. However, studies show that low-intensity discussions are likely to be more persuasive than high-intensity presentations.[155] The persuasiveness of a negotiator in the closing stage can also prove to be fruitful for a party as the parties tend to be anxious at the end.

Post Negotiation Process

Post negotiation process is one of the most important part even though it is not considered to be a stage per se. Mostly parties do not execute this process however it is advisable to the parties as the same is critical to their improvement. Post negotiation process allows the parties to review what they have already done and the scope of any future improvement.

Post negotiation process is important not only for individuals but for corporations as well as it acts as a permanent memory for the organisation. The representatives of an organisation in a negotiation may not always stay in the organisation, they might get replaced or promoted or transferred, etc hence creating a set of notes describing the entire event helps and educates the people who might need to be privy to the happening of those events. It is for this reason that the Minutes of Meeting should be drafted and signed by the parties to authenticate it. It ascertains that there were no assumptions made rather discussions were laid.

The 'After Action Review' is a process common in the military where after happening of a certain event, the officers stop their work, form a circle, and debrief the other about what happened and what is the scope of improvement. This professional approach is primarily what the post negotiation process is. Here, the parties should diagnose the facts through cause and effect reasoning to identify the underlying reasons for your win or your loss hence it is important to educate yourself and follow up with the final contract that has been drafted after the negotiation.[156]

Some negotiators make a checklist to ascertain what their needs were and what has been achieved. The parties should also exchange performance feedback and build on the

[154] Charles Craver, THE NEGOTIATION PROCESS (2003).
[155] Roy Lewicki, Joseph Litterer, John Minton, and David Saunders, NEGOTIATION, 214 (1994).
[156] Roger Fisher and William Ury, GETTING TO YES (2012).

success of a negotiation while monitoring the outcomes of the negotiation. It tells you what the lacunae in the negotiation process were and how can the same be overcome. The parties may also request re-negotiation under the hardship clause of their contract.

MODULE V: SAMPLE AGREEMENTS

This module comprises sample agreements for reference and understanding. The key clauses that should be contained in each type of agreement have been mentioned and the entire agreements have not been reproduced for the sake of brevity. Also, given that Indian courts have not formally recognised the principles of modern contract drafting mentioned in this module, the sample agreements mentioned below contain the language as is used currently by the legal fraternity. For a quick reference of the principles in modern drafting, the examples given in the module should be read.

POWER OF ATTORNEY

Given below is a sample special power of attorney for giving authorisation to a person to represent executant in their pending litigation:

SPECIAL POWER OF ATTORNEY

(REVOCABLE)

KNOW EVERYONE by these presents that I **[•Name of the Executant•],** R/o **[•Address of the Executant•]** (**"Executant"**) DO HEREBY nominate, constitute, appoint and authorize my **[•Relationship with the Attorney Holder•]**, **[•Name of the Attorney Holder•],** R/o, **[•Address of the Attorney Holder•]** (**"Attorney"**) as my true and lawful ATTORNEY for me, on my behalf, and in my name, to do, and execute, all, or any, of the following acts, deeds and things in respect of litigation pending or to be filed before the Hon'ble Supreme Court of India against the XYZ and all future suits, appeals, criminal complaints, executions, writ petitions or any other court proceedings arising out of, or in connection with the aforesaid proceedings filed/pending before any Court/Tribunal/Authority of competent jurisdiction.

The said attorney is hereby authorised and empowered as follows:

1. To represent me, before The Hon'ble Supreme Court of India against XYZ.

2. To represent me, before the Court of Law/Tribunal/Authority including High Court as well as Supreme Court to all intents and purpose in connection with any suit, criminal complaints, execution, writ petition or any other court proceedings either pending or which may subsequently be filed arising out of the proceedings against XYZ.

3. To appear for and prosecute and defend all actions and proceedings, to sign and verify all plaints, written statements and other pleadings, applications, petitions or

documents to be presented before the Court/Tribunal/Authority arising out of the proceedings against XYZ.

4. To withdraw and receive documents from the Court/Tribunal/Authority or from the opposite party, either in any suit, criminal complaint, writ, execution or otherwise and to sign and deliver for me proper receipts and documents in connection with the proceedings against XYZ.

5. To engage and appoint any Solicitor, Advocates or Counsels to act and plead and otherwise conduct the aforesaid proceedings, whenever my said Attorney thinks proper to do so in the proceedings against XYZ.

6. To commence or carry on and prosecute or defend at law all actions, suits, complaints, claims, demands, disputes and to refer them to arbitration or to enter into a compromise and for all or any of the said purposes to do and execute such instruments, deeds or things as shall be necessary or expedient arising out of the proceedings against the XYZ.

7. To do all other lawful acts and things in connection with the proceedings against the XYZ as mentioned above as effectually as I could do the same if I was personally present.

8. To execute any deed or sign any plaint, complaint, writs and documents which may be required and to do any other act, matter or thing which the Attorney shall consider necessary or expedient for carrying out any of the purpose or acts herein above authorized in the same manner and as fully and effectually in all respects as I would have done while personally present.

9. I, hereby undertake to ratify everything which the Attorney shall lawfully do or purport to do in exercise of the power, authorities and liberties hereby conferred upon the Attorney under or by virtue of these powers.

IN WITNESS WHEREOF, I **[•Name of the Executant•]**, the Executant has signed on these presents in the presence of the following witnesses, on the date, month and year herein below mentioned.

Signature

(ABC)

Witness No. 1:

Witness No. 2:

FRANCHISE AGREEMENT

The following are the core clauses that a franchise agreement should have:

Definitions

Depending on the nature of the transaction, a franchisee agreement would have the following standard definitions.

Agreement: means this franchise agreement.

Franchise: means the right granted by this agreement.

Business day: means a day on which banks are open for trading in India

Business Name: means the name set out in item 2 of the first schedule which is the only name under which the franchisee shall conduct the business.

Franchise fee: means the initial fee payable by a franchisee for the grant and other matters as specified

Intellectual property: includes all licensed copyright design, trademarks, patent, process & corporate name, computer software licensed by ABC and the goodwill of any licensed business name, secret process or confidential information licensed by the ABC including the marks of the system.

Month: means a calendar month

Services: means these services forming part of the system from time to time

Response time: to respond to all enquires by customers or potential customers on the same day as they are made.

Confidential information: means but not limited to the operation manual is trade secrets, information, methods, ideas, concepts, price, forms, techniques , data base, copy right materials and all records relating to the system including Psychometric test.

Customer: means a person or entity with which the franchisee provides services.

Discontinue: means to terminate case the operating the business.

Field consultant: means any person nominated by the company from time to Time, visit the franchisee and facilitates the commercialization.

Appointment

1. ABC appoints the Franchisee on an exclusive basis in the Territory and to term and conditions of this Agreement;

2. The Franchisor hereby grants to the Franchisee all the relevant rights to carry on business as a Franchisee.

3. Franchisee can use the trade names, trademarks, of ABC for the business purpose.

4. Franchisee can use the Franchisor’s copyright, material, know-how, and knowledge.

Franchise

On the signing of this Agreement the Franchisee will pay to the Franchisor the sum of INR 10,00,000/-the Initial Franchise Fee.

The Franchisee shall also pay the Franchisor all reasonable expenses incurred by the Franchisor in obtaining payment from the Franchisee where any payment due to the Franchisor is overdue. Such costs to include (but not be limited to) legal fees, court fees and enforcement fees.

Term

This Agreement shall remain in force for the period of 5 years from the date of signature by the parties.

The Franchisor agrees to allow the Franchisee to renew the Franchise subject to renewal terms being agreed and where the Franchisee has operated the Franchise successfully and in accordance with the terms of this Agreement and the Franchisee Manual.

Franchisor's Responsibilities

The Franchisor will carry out the following during the term of this Agreement:

- Provide a copy of the Operations Manual and a replacement copy of the Operations Manual if and when it is updated during the course of this Agreement
- Provide initial training to the Franchisee, so that the Franchisee can successfully operate the Franchise
- Regularly monitor and audit the Franchise to ensure that quality standards are met and that service sale targets are achieved by the Franchisee.
- Provide ad hoc advice where the Franchisee encounters operational problems that they are unable to overcome mises.
- Franchisor Advice to franchisee on alterations to and fixtures and fittings in the Premises.
- General advice to franchisee on how to set up the franchise.
- Provide initial training programmers for the Franchisee.
- Provide the Franchisee with know how, advice and guidance relating to the Business.
- Supply products and service to the Franchisee.
- Supply printed material when required

Franchisee's Obligations

The Franchisee shall:

- Only use Printed material, Psychometric test, invoices, and Services which are supplied by the Franchisor.
- Operate the Business in accordance with the Operations Manual.
- Use online/offline testing and Guidance and Counseling services in connection with the Business as have been approved by the Franchisor.
- Maintain the Premises to the highest standards and not carry out any alterations without the Franchisor's consent.
- Use best endeavors to promote and extend the Business.
- Operate the Business during hours specified by the Franchisor.
- Ensure that staff is well dressed, clean and polite.
- Franchisee should not appoint any person as employ and manager who has not completed the Franchisor's training course and been approved by the Franchisor.
- At the request of the Franchisor provide potential information as reasonably requested.
- Franchisee requires franchisor's approval whenever they want to do campaign, newspaper advertisements with respect to advertising.
- Use the trademarks, logos and name on the entire document in the same format given by XYZ, head office.
- Franchisee has to display code of ethics of counseling in the office premise which is provided by the XYZ.
- Online registration of every client is compulsory.
- Records of clients will be maintained by both of us Franchisee and franchisor.
- Appointments of staff with the approval of head office.
- When dealing with client Franchisee has no right to suggest any thing to client as a layman thought.
- The franchisee should also advertise and promote the franchise in accordance with the directions, requirements and specifications of the franchisor from time to time.
- Franchisee should enhance and promote the intellectual property, goodwill and

reputation of the franchise at all times.

- The Franchisee will maximize efforts to develop the franchise and maintain the image, identity and reputation of the entire franchising system.
- The Franchisee hereby undertakes to supply the Franchiser with all information concerning office operation, enabling evaluation of the quality of business management, as well as the financial reports required for effective management of the Chain. The Franchisee will allow the Franchiser and/or its Representatives or Field Consultant free access to the franchised business premises and permit examination of the relevant documents at any official timing.

Sale of Business

The Franchisee shall have no right to transfer the franchise

Confidentiality

Franchise shall keep all information of confidential nature as strictly confidential and shall not disclose it to third Parties without the prior written consent of XYZ during the term of this Agreement.

Franchise will not disclose revenue Information without prior written consent of XYZ

Non-Competition

Neither the Franchisee nor the Individuals will during the term of the franchise:

- Carry on any other business
- Entice employees from the Franchisor or other Franchisees.
- Use or disclose confidential information for any purpose other than a purpose set out in the Agreement.

Termination

The Franchisor may terminate this Agreement if the Franchisee:

- Fails to commence business within one month of execution of the Agreement
- Is in breach of [any of] the terms of the Agreement
- Persistently defaults in payment of any amounts due to the Franchisor
- Is found to have supplied materially and services false or misleading information in or supporting the franchise application

- Goes into liquidation/bankruptcy or is insolvent

Consequences of Termination

The Franchisee:

- Must cease use of the Franchisor's trade name and trademarks and must not thereafter hold itself out as being a franchisee of the Franchisor.
- Must pay to the Franchisor all sums payable to the Franchisor whether or not then due
- Shall return to the Franchisor all manuals literature promotional material letter heads Invoices or anything else which bears the trade name of or indicates any association with the Franchisor
- Shall provide the Franchisor with a list of all customers and potential customers of which it is aware.
- Shall not make use of or disclose any confidential information relating to the system or the Franchised business
- Shall not compete with the Franchisor.

LICENSING AGREEMENT

The following are the sample clauses that are generally found in a licensing agreement.

1. Grant of License

1.1. Subject to the terms and conditions as stated herein, E hereby grants a revocable, personal, non-assignable, non-transferable, non-sub-licensable, non-exclusive, [royalty-free] license to P (or any of its agencies, service providers, subsidiaries, associate companies, holding company, group companies), in the Intellectual Property of O, solely for the purposes of printing on, labelling, packaging, marketing and promotion of O on all available mediums, in the territory of New Delhi/NCR, for a period of three (3) months ("**Term**") from the Effective Date.

1.2. This Agreement may be renewed before the expiry or after by written mutual consent.

2. Consideration

2.1. P shall pay [•total amount•] to E, per purchase order, for the use of [Define what is being licensed].

3. Ownership

3.1. The Parties hereby acknowledge that E is the sole and absolute owner and proprietor of the Intellectual Property of O and shall continue to remain as such. Nothing in this Agreement gives rise to or confers any proprietary interest in favor of P in respect of O, its trademark, brand name, technology, including but not limited to O's source code, domains, servers, database, access logs, patterns, web application, etc.

3.2. It is specifically clarified that P shall be the owner of, and have the right to use, develop, generate, design and exploit all material/content in connection with O, by any and all means, in or on any medium, and E shall not have any claim on the same, whatsoever, subject to clause 3.1 above.

3.3. P shall be allowed to use O and its related Intellectual Property, either individually or with each other, or in conjunction with P's own Intellectual Property, for the purpose of, and in relation to its brands only.

3.4. Any new material/content developed using O or in connection with O, specifically made for P, by P or derived by P shall vest with P exclusively.

4. Use of License

4.1. Except as prohibited by law, P agrees that it will not do anything inconsistent with the ownership of O and shall not create any third-party interest in the same, in any manner whatsoever, including but not limited to copying, imitation, modification, photocopy, reproduction, secondary reproduction, etc.

4.2. P shall not compete with E with respect to O or any product, service or Intellectual Property similar to O for a period of 10 years, unless E consents to the same in writing. This clause shall survive termination.

5. Termination

5.1. Either party can terminate this Agreement by a written one month notice to the other party, or at the expiry of the Term of this Agreement, or by breach of this Agreement, unless waived by either party in writing.

5.2. P shall keep all information received or sent or in the knowledge of P confidential even after the termination of this Agreement. This clause shall survive termination.

6. Representation and Warranties

6.1. The Parties represent and warrant that (a) both the Parties have all the necessary power of authority to grant the rights to P as detailed in this Agreement; (b) the grant of rights or the license does not and will not violate the terms of any other contract, covenant or agreement between the parties or any third party; (c) both the Parties have all the necessary rights, approvals, consents and permissions required to grant and receive the license and the same is not encumbered in any manner whatsoever; (d) both the Parties undertake that the license shall not be used to create, use, distribute or circulate content which is defamatory, obscene or otherwise objectionable or violative of the rights of privacy and the same shall not be used for any act which is communal, against public policy or hurtful to public sentiment.

7. Indemnity

7.1. Both the Parties shall indemnify and hold harmless, each other, its employees, agents, directors, officers, shareholders, and representatives, harmless from and against any and all copyright, infringement claims, demands, causes of action, losses (including but not limited to, losses arising from reproduction, copying or theft of Intellectual Property) and damages, liabilities judgments, settlements, expenses (including legal fees), incurred in connection with or arising out of (i) any breach of the terms of this Agreement; (ii) willful misconduct or negligence; (iii) or arising out of or from a claim made by a third party.

8. Reasonable Efforts

8.1. Both Parties shall make reasonable efforts and shall do, execute, or cause to be done or cause to be executed, all such acts or deeds/documents to fulfil the terms and conditions of this Agreement and also co-operate with each other with respect to the grant or application of any license, approval, permission, no objection certificate etc. required to give effect to this Agreement.

9. Jurisdiction and Governing Law

9.1. All disputes in connection with, or arising out of this Agreement shall be governed by and interpreted in accordance with the laws of India. The courts at Gurgaon, Haryana shall have exclusive jurisdiction.

10. Agency or Joint Venture

10.1. Nothing contained in this Agreement shall be construed or interpreted to create any agency, partnership, joint venture or any other form of collaboration between the Parties and the Parties shall at all times be independent contractors not having the authority to contract for, or bind, either Party, in any manner whatsoever.

ESCROW AGREEMENT

The following are the core clauses of an escrow agreement that can be usually found in a typical escrow agreement.

1. DEFINITIONS AND CONSTRUCTION

1.1. **Definitions**

Unless otherwise defined, capitalized terms in this Agreement (including the Recital above) shall have the meanings given to them in the Facility Agreement and if not defined in the Facility Agreement, the other Financing Documents. In this Agreement the below-mentioned terms shall have the following meaning:

"Account" means the Escrow Account and each of the sub-accounts being the Revenue Account, the Operations and Maintenance Account, the Debt Payment Account, the Debt Service Reserve Account, the Statutory Dues Account, the Compensation and Liquidated Damages Account, the Loss Proceeds Account, the Dispute Reserve and Enforcement Proceeds Account, the Surplus Account, the Distribution Account and Accounts means all of them collectively;

"**Bank Charges**" shall have the meaning ascribed to the term under Section 17.5;

"**Business Day**" shall mean

(i) in relation to the making of any Disbursement by a Lender, any day on which such Lender and all other Lenders who have to make simultaneous Disbursements are authorised by Applicable Law to be open for business in the place of their respective lending offices; and

(ii) in relation to all other matters, a day (other than a Saturday working Saturdays of Scheduled bank, Sunday or a public holiday) on which banks are open for general business in Mumbai.

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"**Business Hours**" shall mean time span between 10:00 AM to 3:00 PM of a Business Day;

"**Compensation and Liquidated Damages**" means the following:

(a) The liquidated damages paid under any of the Project Documents for breach of performance guarantees or warranties under any Project Documents after utilisation for repair or for replacement of defective or underperforming component of the Project, that is subject to such warranty, in consultation with the Lenders;

(b) the proceeds resulting from the expiration, termination or revocation of any clearance or any Project Document;

(c) the proceeds from the expropriation, condemnation or other taking by any Governmental Agency of all or part of the assets of the Borrower relating to the Project: and

(d) the proceeds resulting from an arbitral or judicial award in relation to (a), (b) and (c)above;

"**Day**" shall mean each twenty-four hour period of time beginning and ending at 00.00 midnight, Indian Standard Time;

"**Debt Service**" shall mean the repayment of the Facility, payment of interest, liquidated damages, Default Interest, Additional Interest, and all amounts to be paid to the Lenders under the Transaction Documents;

"**Disputed Payment**" means an amount equivalent to:

a) the amount disputed but paid by any person subject to a dispute relating to the Project and which the Borrower would be liable to refund to such person upon an adverse determination of the dispute; or

b) a reserve amount determined by the Auditors to meet any contingent liability relating to the Project or provision made by the Auditors.

"**Escrow Default**" shall have the meaning set forth in Section 18 of this Agreement;

"**Escrow Account**" means the account so named specified in Section 2.1;

"**Effective Date**" means the date on which this Agreement is executed;

"**Facility Agreement**" shall mean the Facility Agreement dated on or about the date of this Agreement executed by and between the Borrower, the Lenders, Security Trustee and Facility Agent, as amended and supplemented from time to time;

"**Final Settlement Date**" shall mean the date on which all the Obligations have been irrevocably and unconditionally paid and discharged in full to the satisfaction of the Lenders and a no-dues certificate is issued by the Lenders;

"**Fiscal Quarter**" shall mean each of the following calendar quarters: (a) April 01 to June 30; (b) July 01 to September 30; (c) October 01 to December 31; and (d) January 01 to March 31;

"**Month**" shall mean a period beginning at 00.00 hours of the first day of the calendar month and ending at 23:59:59 hours on the first day of the next calendar month;

"**Monthly Distribution Date**" means the last Business Day of each Month;

"**Project**" shall have the meaning ascribed to the term in the Facility Agreement;

"**Rupee**" or "Rs." shall mean the lawful currency of India;

"**Secured Party**" shall mean the Lenders' Agent, the Security Trustee and the Lender(s) and a reference to Secured Parties shall be construed accordingly;

"**Surplus Account**" means the account so named which is established in accordance with Section 2.1 and maintained by the Borrower pursuant to this

Agreement into which the cash from the Project accrues after satisfying the Priority Cash Flow Application;

"**Statutory Dues Account**" means the account so named which is established in accordance with Section 2.1 and maintained by the Borrower pursuant to this Agreement;

"**Statutory Dues Amount**" means with reference to each Month, all Taxes payable by the Borrower in respect to the Project in such Month;

"**Taxes**" shall mean any and all present and future taxes relating to the Project, including without limitation, gross receipts, sales, turn-over, value added, use consumption, property, income, franchise, capital, occupational, license, excise, interest and documentary stamps taxes, and customs and other duties, assessments, or fees relating to the Project, however imposed, withheld, levied, or assessed by any country or government subdivision thereof or any other taxing authority;

“**Transaction Documents**” shall have the meaning ascribed to the term in the Facility Agreement.

1.2. **Construction**

In this Agreement:

A. reference to an Account includes a reference to any sub-account of that Account;

B. reference to an "amendment" includes a supplement, modification, novation, replacement or re-enactment and "amended" is to be construed accordingly;

C. a reference to "assets" include all properties whatsoever both present and future, (whether tangible, intangible or otherwise) (including Intellectual Property and Intellectual Property Rights), investments, cash-flows, revenues, rights, benefits, interests and title of every description;

D. a reference to "authorisation" includes an authorisation, consent, clearance, approval, permission, resolution, licence, exemption, filing and registration;

E. a reference to "control" includes the power to direct the management and policies of an entity, whether through the ownership of voting capital, by contract or otherwise;

F. a reference to "encumbrance" includes a mortgage, charge, lien, pledge, hypothecation, Security Interest or any lien of any description whatsoever;

G. unless the context otherwise requires, the singular includes the plural and vice versa;

H. headings and the use of bold typeface shall be ignored in its construction;

I. a reference to a Section or Schedule is, unless indicated to the contrary, a reference to a section or schedule to this Agreement;

J. references to this Agreement shall be construed as references also to any separate or independent stipulation or agreement contained in it;

K. the words "other", "or otherwise" and "whatsoever" shall not be construed ejusdem generis or be construed as any limitation upon the generality of any preceding words or matters specifically referred to;

L. references to the word "includes" or "including" are to be construed without limitation;

M. references to a person shall include such person's successors and permitted assignees or transferees;

N. all references to agreements, documents or other instruments include (subject to all relevant approvals) a reference to that agreement, document or instrument as amended, supplemented, substituted, novated or assigned from time to time;

O. words importing a particular gender include all genders;

P. any reference to a public organisation shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over the functions or responsibilities of such public organisation;

Q. references to "Party" means a party to this Agreement and references to "Parties" shall be construed accordingly;

R. references to any law shall include any constitution, statute, law, rule, regulation, ordinance, judgment, order, decree, authorisation, or any published directive, guideline, requirement or governmental restriction having the force of law, or any determination by, or interpretation of any of the foregoing by, any judicial authority, whether in effect as of the date of the Financing Documents or thereafter and each as amended from time to time;

S. words and abbreviations, which have, well known technical or trade/commercial meanings are used in the Agreement in accordance with such meanings; and

T. "repayment" includes "redemption" and vice-versa and repaid, repayable, repay, redeemed, redeemable and redemption shall be construed accordingly;

U. In the event of any disagreement or dispute between the Lenders and the Borrower regarding the materiality or reasonableness of any matter including any event, occurrence, circumstance, change, fact, information, document, authorisation, proceeding, act, omission, claims, breach, default or otherwise, the opinion of the Lenders as to the materiality or reasonableness of any of the foregoing shall be final and binding on the Borrower.

2. THE ACCOUNTS

2.1. Establishment of the Accounts

The Borrower and the Escrow Bank confirm that the Borrower shall establish in the name of the Borrower with the Escrow Bank an account titled the "ABC Escrow Account" (“**Escrow Account**”). The Escrow Account shall have the following sub accounts for the purposes of this Agreement, namely:

i. a sub-account denominated in Rupees titled the "**ABC Revenue Account**";

ii. a sub-account denominated in Rupees titled the "**ABC Debt Payment Account**";

iii. a sub account denominated in Rupees titled the "**ABC Debt Service Reserve Account**";

iv. a sub-account denominated in Rupees titled the "**ABC Loss Proceeds Account**";

v. a sub-account denominated in Rupees titled the "**ABC Compensation and Liquidated Damages Account**";

vi. a sub account denominated in Rupees titled the "**ABC Surplus Account**";

vii. a sub account denominated in Rupees titled the "**ABC Dispute Reserve and Enforcement Proceeds Account**";

viii. a sub account denominated in Rupees titled the "**ABC Operations and Maintenance Account**";

ix. a sub account denominated in Rupees titled the "**ABC Statutory Dues Account**"; and

x. a sub account denominated in Rupees titled the "**ABC Distribution Account**”.

2.2. Maintenance of the Accounts

The Escrow Bank shall, save as otherwise provided herein, maintain the sub-accounts of the Escrow Account in accordance with the terms of this Agreement in its usual practices and applicable regulations from time to time in the Escrow Account.

2.3. **Operating Procedures**

The Escrow Bank and the Borrower have prior to the execution of this Agreement, agreed (after consultation with the Lenders) on the detailed mandates, terms and conditions and operating procedures for the Escrow Account (as set out in Annexure II to this Agreement), provided however, in the event of any inconsistency between this Agreement and such mandates, terms and conditions or procedures, this Agreement shall prevail.

2.4. **General Right of Withdrawal**

The Escrow Bank shall not make any transfer or withdrawal other than in accordance with this Agreement, unless the Borrower has delivered evidence of the prior written consent of the Facility Agent approving such transfer or withdrawal.

Notwithstanding anything stated in this Agreement, the Facility Agent/Lenders shall at any point of time, have the right to instruct in writing to the Escrow Bank to stop taking any instructions from the Borrower with respect to each Account under this Agreement and operations thereunder. Upon receipt of such instructions and with immediate effect, the Escrow Bank shall cease to take any instructions under this Agreement from the Borrower, without the approval of the Facility Agent and it shall thereafter act only upon the instructions of the Facility Agent/ Lenders with respect to operations of the Accounts under this Agreement.

2.5. **Business Day**

If a Monthly Distribution Date is not a Business Day, the Borrower shall be entitled to instruct the Escrow Bank to make payment to or withdrawal from such Account (and the corresponding withdrawal from or payment to any other Account) on the immediately preceding Business Day on which banks are generally open for business in such place, provided, that any such payments and withdrawals would have been permitted on such Monthly Distribution Date.

2.6. **Obligations of the Borrower**

The restrictions in this Agreement on withdrawal of funds from the Escrow Account shall not affect the obligations of the Borrower under any of the Transaction Documents, provided, that the restrictions or acts or omission by the Escrow Bank shall not result in preventing the Borrower from fulfilling its obligations under the Facility Agreement.

In the case of any inconsistency between the provisions of this Agreement and those of the Facility Agreement, the provisions of this Agreement shall prevail to the extent of such inconsistency.

The Borrower shall deliver a copy to the Facility Agent of any notice or document delivered to the Escrow Bank in relation to any transfers to address insufficiencies in any of the Accounts, any request seeking certification of satisfaction of the Restricted Payment Conditions or in relation to any Event of Default and any Notice of Debt Service.

2.7. **Payment Instructions of the Borrower**

Any payment instructions of the Borrower to the Escrow Bank under this Agreement shall be, in accordance with the Operating Budget or as may be approved by the Lenders.

2.8. **Deposit of Project Proceeds**

On and from the Effective Date of this Agreement, all Project Proceeds shall be deposited and withdrawn forthwith by the Escrow Bank to and from the Account(s) at the time and in the manner required by this Agreement.

2.9. **Notice of Debt Service**

a) The Borrower shall procure from each of the Lenders and provide, a notice setting out the Debt Service (and the dates on which) due for the next one (1) year for the purpose of estimating the amounts to be deposited in the Debt Payment Account and the Debt Service Reserve Account in order to maintain the Required Balances therein ("**Notice of Debt Service**"), to the Escrow Bank and the Escrow Bank shall make the deposits and withdrawals into/ from the relevant account in accordance with such Notice of Debt Service. The Notice of Debt Service shall be provided by the Borrower within the first seven (7) Business Days in each Fiscal Year. The Borrower shall provide supplemental notices to the Escrow Bank in case of any changes to the most recent Notice of Debt Service, within 7 (seven) days from the date of any change.

b) Failure of the Borrower to procure and deliver the Notice of Debt Service from the Lenders shall not relieve the Borrower from its obligations to make payments to such Lender in accordance with the Financing Documents.

3. THE ESCROW ACCOUNT

3.1. **Revenue Account**

The Revenue Account shall be opened in the name of the Borrower and shall be denominated in Rupees. Any requests herein under shall be in accordance with the Annexure II provided hereto.

3.1.1. **Deposits into the Revenue Account**

The Borrower:

i. shall procure that all Project Proceeds (including disbursements from the Lender(s)) shall be credited or deposited in the Revenue Account;

ii. shall procure that any other amount that would be payable to the Borrower in respect of the Project (unless otherwise specified in this Agreement) shall be credited to, or deposited in, the Revenue Account upon payment thereof;

iii. shall procure that any surplus in any of the Accounts after utilisation of the funds therein as required under this Agreement (including utilisation of surplus amounts) other than the Distribution Account shall be deposited into the Revenue Account; and

iv. may make other voluntary deposits of the Borrower's funds into the Revenue Account at any time.

In the event, the Borrower or any of its nominees, agents or affiliates is in receipt of whole or part of any payments towards the Project Proceeds, the Borrower or the concerned nominee, agent or affiliate, as the case may be, shall hold the same in trust for the benefit of the Lenders and shall forthwith inform the same to the Lender and immediately deposit such payments into the Revenue Account.

3.1.2. **Interest**

The Escrow Bank shall, save as otherwise provided herein, maintain the Accounts in accordance with the terms of this Agreement and its usual practices and applicable regulations. Each Account shall be an INR denominated, a non-interest bearing account with no cheque book facility, and withdrawal rights in relation to the same shall be in accordance with the terms of this Agreement.

3.1.3. **Withdrawals**

As long there is no Event of Default, the Escrow Bank shall hold monies in, or withdraw amounts in accordance with the Borrower's instructions for the following purposes and in the following order of priority (hereinafter called the "**Priority Cash Flow Application**"):

i. to pay an amount equal to the Statutory Dues Amount for the Month following that Monthly Distribution Date in accordance with the Operating Budget to the Statutory Dues Account;

ii. on each Monthly Distribution Date to pay an amount equal to the Operations and Maintenance Costs for the Month following that Monthly Distribution Date in accordance with the Operating Budget to the Operations and Maintenance Account;

iii. on each Monthly Distribution Date to pay an amount into the Debt Payment Account such that, the balance in Debt Payment Account equals the Required Balance in respect thereof;

iv. on each Monthly Distribution Date, to pay an amount into the Debt Service Reserve Account such that the balance in the Debt Service Reserve Account equals the Required Balance in respect thereof;

v. to pay an amount into the Disputes Reserve and Enforcement Proceeds Account so that after such payment the Disputes Reserve and Enforcement Proceeds Account shall be funded with the amount of any Disputed Payment referred to in item (b) of the definition of Disputed Payment;

vi. all amounts remaining after the transfers required pursuant to Sections 3.1.3(i) to (v), for transfer to the Surplus Account.

4. STATUTORY DUES ACCOUNT

4.1. **Account**

The Statutory Dues Account shall be established in the name of the Borrower and shall be denominated in Rupees. Any requests herein under shall be in accordance with the Annexure II provided hereto.

4.2. **Withdrawals from the Statutory Dues Account**

The Escrow Bank shall withdraw amounts from the Statutory Dues Account as follows: -

a) on such dates in a Month as may be requested by the Borrower, not exceeding the Statutory Dues Amount for that Month in accordance with the Operating Budget as required to pay the Taxes for that Month as evidenced by a certificate of the Borrower; and

b) on the last Business Day of each Month, all cash balance in the Statutory Dues Account shall be withdrawn and deposited into the Revenue Account towards the Priority Cash Flow Application in accordance with Section 3.1.3.

4.3. **Insufficiency in the Statutory Dues Account**

On any date, if funds available in the Statutory Dues Account are insufficient to meet the Taxes which are due and payable, the Escrow Bank shall transfer monies, first from the Distribution Account, second from the Surplus Account, third from the Revenue Account and fourth from the Dispute Reserve and Enforcement Proceeds Account with the prior approval of the Lender.

5. OPERATIONS AND MAINTENANCE ACCOUNT

5.1. **Account**

The Operations and Maintenance Account shall be established in the name of the Borrower. The Operations and Maintenance Account shall be denominated in

Rupees. The request herein under shall be in accordance with the Annexure II provided hereto.

5.2. **Deposits**

On each Monthly Distribution Date, the Escrow Bank shall deposit amounts into the Operations and Maintenance Account in accordance with Section 3.1.3(ii) such that the deposited amounts are equivalent to the Operations and Maintenance Costs for the Month following that Monthly Distribution Date.

5.3. **Withdrawals**

The Borrower shall withdraw amounts from the Operations and Maintenance Account to pay an amount equal to the Operations and Maintenance Costs for the Month in accordance with the Operating Budget.

5.4. **Insufficiency in Operation and Maintenance Account**

On any date, if funds available in the Operations and Maintenance Account is insufficient to meet the Operation and Maintenance Costs, the Escrow Bank shall transfer monies, first from the Distribution Account, second from the Surplus Account, third from the Revenue Account provided that there is no insufficiency in the Statutory Dues Account and fourth from the Dispute Reserve and Enforcement Proceeds Account with the prior written consent of the Lender.

6. DEBT PAYMENT ACCOUNT

6.1. **Account**

The Debt Payment Account shall be established in the name of the Borrower and shall be denominated in Rupees. The request herein under shall be in accordance with the Annexure II provided hereto.

6.2. **Deposit**

On each Monthly Distribution Date, the Escrow Bank shall deposit amounts into the Debt Payment Account in accordance with Section 3.1.3 and 6.4 such that the Required Balance for the Debt Payment Account is maintained.

6.3. **Withdrawals**

The Escrow Bank shall, on receipt of written instructions of the Borrower, withdraw amounts from the Debt Payment Account:

i. to pay the following amounts due under the Facility Agreement in accordance with the Notice of Debt Service and the most recent Base Case Business Plan pursuant to the Financing Documents in the following order of priority:

a) on the date on which such payment is required to be made under the Facility Agreement, amounts as provided for in the Notice of Debt Service;

b) on each Interest Payment Date, any interest payable under any of the Financing Documents (including Default Interest, etc.), as provided for in the Notice of Debt Service; and

ii. any credit balance remaining in the Debt Payment Account on any Monthly Distribution Date after the making of the payments referred to in Section 6.3 (i) shall be transferred to the Revenue Account, provided that the Required Balance in the Debt Payment Account is maintained.

7. DEBT SERVICE RESERVE SUB-ACCOUNT

7.1. **Debt Service Reserve Sub-Account**

The Debt Service Reserve Sub-Account shall be established in the name of the Borrower. The Debt Service Reserve Account shall be denominated in Rupees.

7.2. **Deposit to the Debt Service Reserve Sub-Account**

The Borrower shall maintain the Debt Service Reserve Sub-Account and shall deposit therein the Debt Service Reserve Amount from the proceeds of the Drawdown of the Facility.

7.3. **Withdrawal from the Debt Service Reserve Account**

On any date, the Escrow Bank shall withdraw amounts from the Debt Service Reserve Account:

i. to make payments to the Debt Payment Account in accordance with Section 6.4; or

ii. to the extent that the balance of the Debt Service Reserve Sub-Account exceeds the Debt Service Reserve Amount, on the instructions of the Borrower to pay the excess in the Debt Service Reserve Account (or such lesser amount as the Borrower may specify) solely to the Revenue Account.

Any withdrawal from the Debt Service Reserve Account will be subject to the following conditions:

i. The amounts accumulated in the Debt Service Reserve Account should be used only for the servicing of the Facility.

ii. The amount in Debt Service Reserve Account would be utilised only in case of a shortfall in cash flows for meeting debt service requirements from time to time.

iii. No payments of dividend to equity shareholders, interest or repayments to the providers of unsecured loans, if any, shall be made until the required appropriations/replenishments are made to the Debt Service Reserve Account, to the satisfaction of the Lenders, and except with the prior written consent of the Lenders.

iv. The Borrower shall invest the funds from the Debt Service Reserve Account only in Permitted Investments and securities as approved by the Lenders.

8. COMPENSATION AND LIQUIDATED DAMAGES ACCOUNT

8.1. Compensation and Liquidated Damages Account

The Compensation and Liquidated Damages Account shall be established in the name of the Borrower and shall be denominated in Rupees. Any requests hereunder shall be in accordance with the Annexure II provided hereto.

8.2. Deposits to the Compensation and Liquidated Damages Account

The Borrower shall procure that all Compensation and liquidated damages are deposited in the Compensation and Liquidated Damages Account.

8.3. Withdrawals from the Compensation and Liquidated Damages Account

The Escrow Bank shall on receipt of written instructions from the Facility Agent withdraw amounts from the Compensation and Liquidated Damages Account, any amounts received as liquidated damages (including performance liquidated damages) under the Project Documents to pay: (i) first, for the replacement/repair of the work contemplated by such Project Document that was not completed or any additional work that is necessitated because of the circumstances giving rise to the payment of such liquidated damages. Provided, that the Borrower shall seek the written consent of the Lenders, subject to confirmation of the Lenders' Engineer, before using the amounts received as liquidated damages under this Section to pay for the replacement/repair of the work contemplated by such Project Document that was not completed because of the circumstances giving rise to the payment of such liquidated damages; and (ii) second, to prepay the Facility, at the option of the Lenders in accordance with the Facility Agreement.

Any amounts not required to be applied towards the above, or with respect to which the Lenders have not consented under this Section 9.3, will be used towards prepayment of the Facility, at the option of the Lenders, in accordance with the Facility Agreement.

In the event the Lenders do not exercise the option of being prepaid, the balance shall be transferred to the Revenue Account for Priority Cash Flow Application in accordance with Section 3.1.3 (Withdrawal).

9. LOSS PROCEEDS ACCOUNT

9.1. Account

The Loss Proceeds Account shall be established in the name of the Borrower and shall be denominated in Rupees. Any requests herein under shall be in accordance with the Annexure II provided hereto.

9.2. Deposits to the Loss Proceeds Account

The Borrower shall deposit all insurance claims awarded for loss of all or a part of the Project, or for any other reason (other than business interruption, delayed start-up and liability insurance proceeds) relating to the Project in the Loss Proceeds Account.

9.3. **Withdrawals from the Loss Proceeds Account**

The Escrow Bank, shall, on receipt of written instructions from the Facility Agent, withdraw amounts from the Loss Proceeds Account to apply towards the claims under any physical loss or damage policy relating to the Project shall be released to the Borrower for applying such amounts towards repairing or making good such physical loss or damage or towards insurance proceeds of third party liability, employer's liability and automobile liability insurance shall be paid to the Person who incurred such liability or to any person who has discharged such liability, provided that in the case of proceeds attributable to any claim such monies shall be applied only with the written approval of the Lenders (and as confirmed by the Lenders' Engineer that the loss can be repaired or made good by the application of such monies). Any surplus shall be used to prepay *pro-rata* the Outstandings at the option of the Lenders, in accordance with the Financing Documents. However, in the event the Lenders do not exercise the option of being prepaid the balance shall be transferred to the Revenue Account for Priority Cash Flow Application in accordance with Section 3.1.3 (Withdrawal);

10. SURPLUS ACCOUNT

10.1. **Account**

The Surplus Account shall be established in the name of the Borrower and shall be denominated in Rupees. The request herein under shall be in accordance with the Annexure II provided hereto.

10.2. **Deposit**

On each Monthly Distribution Date, the Escrow Bank shall transfer any balance in the Revenue Account after giving effect to the Priority Cash Flow Application to the Surplus Account in accordance with Section 3.1.3.

10.3. **Withdrawals from Surplus Account**

A. The Escrow Bank shall transfer amounts from this Account to meet any insufficiency of funds in the following order of priority:

i. On any date, the Escrow Bank shall withdraw amounts required to meet any insufficiency of funds in the Statutory Dues Account in accordance with Section 4.4;

ii. On any date, the Escrow Bank shall withdraw amounts required to meet any insufficiency of funds in the Operations and Maintenance Account in accordance with Section 5.4;

iii. On any date, the Escrow Bank shall withdraw amounts required to meet any insufficiency of funds in the Debt Payment Account in accordance with Section 6.4, with the prior written consent of the Facility Agent;

iv. On any date, the Escrow Bank shall withdraw amounts required to meet any insufficiency of funds in the Debt Service Reserve Account in accordance with Section 8.4, with the prior written consent of the Facility Agent;

v. On any date, the Escrow Bank shall withdraw amounts required to meet any insufficiency of funds in the Disputes Reserve and Enforcement Proceeds Account in accordance with Section 14.4, with the prior written consent of the Facility Agent; and

vi. On and from March 31, 2021 and every year thereafter and subject to the maintenance of DSCR above 1.1, the Lenders shall have the right in accordance with the Facility Agreement to exercise the Cash Sweep equivalent to 50% (Fifty percent) of the surplus cash available, beyond DSCR of 1.1, in the Surplus Account. The said monies shall be utilized for the mandatory prepayment of the outstanding principal amount of the Facility in the inverse order of maturity till the Final Settlement Date.

B. The Escrow Bank shall, not more than once in every Fiscal Year after (i) any transfers required to be made pursuant to Section 11.3(A) above have been made; (ii) the Borrower has submitted the Audited Annual Financial Statement and auditor report to the Lenders; and (iii) the Restricted Payment Conditions having been satisfied on the date of transferring such amounts to the Distribution Account, transfer amounts in the Surplus Account to the Distribution Account, pursuant to the written request from the Facility Agent.

C. Any amount in the Surplus Account shall be invested only in the Permitted Investment and securities as approved by the Lenders.

D. Any withdrawal from Surplus Account shall be done with the prior written approval of the Facility Agent.

11. DISTRIBUTION ACCOUNT

11.1. Account

The Distribution Account shall be established in the name of the Borrower and shall be denominated in Rupees. The request herein under shall be in accordance with the Annexure II provided hereto.

11.2. Deposit

The Escrow Bank shall transfer any balance in the Surplus Account to the Distribution Account in accordance with Sections 11.3(B).

11.3. **Withdrawals**

Until the Escrow Bank receives from the Facility Agent a written notice that an Event of Default or Potential Event of Default has occurred and is continuing and has not subsequently received notice from the Facility Agent that such Event of Default has been cured or waived, and subject to Section 11.3(B) above, the Borrower shall be entitled to withdraw amounts from the Distribution Account to make a Restricted Payment.

12. DISPUTE RESERVE AND ENFORCEMENT PROCEEDS ACCOUNT

12.1. **Account**

The Dispute Reserve and Enforcement Proceeds Account shall be established in the name of the Borrower. The Dispute Reserve and Enforcement Proceeds Account shall be denominated in Rupees. The request herein under shall be in accordance with the Annexure II provided hereto.

12.2. **Deposits**

The Lenders/Security Trustee shall deposit any proceeds obtained from enforcing the Security into the Dispute Reserve and Enforcement Proceeds Account. At any time, when any Disputed Payment is received by the Borrower, the Borrower shall deposit the same into the Disputes Reserve and Enforcement Proceeds Account. On any Monthly Distribution Date, the Escrow Bank shall transfer, into the Disputes Reserve and Enforcement Proceeds Account, an amount equal to the amount of any Disputed Payment referred to in item (b) of the definition of Disputed Payment.

12.3. **Withdrawals**

The Escrow Bank, shall withdraw amounts from this Account as follows:

i. On any date, the Escrow Bank shall withdraw amounts required to meet any insufficiency of funds in the Statutory Dues Account in accordance with Section 4.4, with the prior written consent of the Facility Agent;

ii. On any date, the Escrow Bank shall withdraw amounts required to meet any insufficiency of funds in the Operations and Maintenance Account in accordance with Section 5.4;

iii. On any date, the Escrow Bank shall withdraw amounts required to meet any insufficiency of funds in the Debt Payment Account in accordance with Section 6.4, with the prior written consent of the Facility Agent;

iv. On any date, the Escrow Bank shall withdraw amounts required to meet any insufficiency of funds in the Debt Service Reserve Sub-Account in accordance with Section 8.4, with the prior written consent of the Facility Agent;

v. to make withdrawals from this Account upon evidence received by the Facility Agent that the dispute has been finally determined, to pay: (a) any amounts determined to be payable to any Person; and/or (b) transfer the balance of the amounts deposited with respect to the relevant Disputed Payment which is finally determined to the Revenue Account for Priority Cash Flow Application in accordance with Section 3.1.3;

vi. to make withdrawals from this Account upon evidence received by the Facility Agent that the dispute has been finally determined, to pay any amounts determined to be payable to any Person and in respect of a contingent liability, to make withdrawals to meet any actual liabilities or losses arising out of such contingent liability; and

vii. Mandatory Prepayment to the Lenders.
In case of any surplus in the Disputes Reserve and Enforcement Proceeds Account after meeting such liability and payment to the Lender, the balance shall be transferred to the Revenue Account for Priority Cash Flow Application in accordance with Section 3.1.3 (*Withdrawal*), with written request from the Borrower/Facility Agent.

12.4. **Insufficiency**

In the event that funds in the Disputes Reserve and Enforcement Proceeds Account are insufficient to meet any liability arising out of a contingent liability or the payments to be made to the Lenders, the Escrow Bank shall transfer monies from, first from the Distribution Account, second from the Surplus Account, to meet the insufficiency and third from the Revenue Account provided that the insufficiencies in the Statutory Dues Account, Operations and Maintenance Account, Debt Payment Account and Debt Service Reserve Account, in the order of priority as specified in the Priority Cash Flow Application are met.

13. WITHDRAWALS FOLLOWING EVENT OF DEFAULT

13.1. Potential Events of Default or Events of Default

Notwithstanding anything to the contrary contained herein, if the Facility Agent or any Secured Party notifies the Escrow Bank that a Potential Event of Default or Event of Default or an Escrow Default may/has occurred, and is continuing, then, until such time as the Facility Agent or Secured Party has notified the Escrow Bank that the Potential Events of Default or Event of Default or Escrow Default has been cured or waived under the relevant Transaction Document, the Escrow Bank shall act only on the instructions of the Facility Agent and make withdrawals from the Accounts in accordance with the instructions of the Facility Agent only. The Borrower hereby irrevocably and unconditionally authorizes the Escrow Bank to act upon such instructions of the Facility Agent.

13.2. Procedure following an Event of Default or Potential Events of Default

The Escrow Bank, at any time after the notification by the Facility Agent or the Secured Party of the occurrence of a Potential Events of Default or Event of Default or an Escrow Default and until such time as it is notified by the Facility Agent that such Potential Events of Default or Event of Default or Escrow Default has been remedied, cured or waived, shall:

A. not act on the instructions of the Borrower pursuant to this Agreement in relation to any sums at such time standing to the credit of the Accounts except with the prior written consent of the Facility Agent;

B. be entitled to pay to the Facility Agent/Lenders/Security Trustee any sums standing to the credit of the Accounts for application by the Lenders in or towards the payment and discharge of any amounts owing to the Secured Parties under the Financing Documents in accordance with the Financing Documents; and

C. not honour any cheques or other payment instructions of the Borrower without the prior written consent of the Lenders/Facility Agent.

Upon the occurrence of a Potential Events of Default or Event of Default, the Borrower undertakes not to issue any cheque or payment instructions to the Escrow Bank without the prior written consent of the Facility Agent.

13.3. Determination by Escrow Bank of Potential Event of Default or an Event of Default or Escrow Default

For the purposes of determining whether a Potential Event of Default or an Event of Default or Escrow Default has occurred, the Escrow Bank shall be entitled to rely on written notice or confirmation from the Lenders/Facility Agent to that effect and shall not be responsible for, entitled to or obliged to make any independent determination in respect of the occurrence or otherwise of an Event of Default or a Potential Event of Default or Escrow Default. The Borrower and the Escrow Bank hereby irrevocably and unconditionally agree that such written notice or confirmation of the Facility Agent/Lenders shall be final and binding on them.

14. ESCROW BANK PROVISIONS

14.1. The Escrow Bank and the Secured Parties

The Borrower hereby appoints the Escrow Bank to act as trustee for the Secured Parties and the Borrower in connection herewith, and authorises the Escrow Bank to exercise such rights, powers, authorities and discretions as are specifically delegated to the Escrow Bank by the terms hereof together with all such rights, powers, authorities and discretions as are reasonably incidental hereto, and the Escrow Bank accepts such appointment pursuant to the terms hereof.

14.2. Rights and Obligations of the Escrow Bank

A. The Escrow Bank undertakes to perform only such duties as are specifically set forth to be performed in this Agreement and such other duties as are specifically directed by the Secured Party, without gross negligence, bad faith or wilful misconduct. In the absence of clear direction in this Agreement, the Escrow Bank shall take no action under this Agreement until it has received specific direction from the Facility Agent as provided in this Section 17;

B. The Escrow Bank may, in the absence of wilful default, bad faith or gross negligence on its part, rely as to any matters of fact which might reasonably be expected to be within the knowledge of the Borrower and are contained in a certificate signed by or on behalf of the Borrower;

C. The Escrow Bank shall, within one (1) Business Days after receipt, deliver a copy to the Facility Agent and the Secured Parties of any notice or document received by the Escrow Bank in its capacity as Escrow Bank from the Borrower or any other person hereunder or in connection herewith; and

D. The Escrow Bank shall, within one (1) Business Days after receipt, deliver a copy to the Borrower of any notice or document received by the Escrow Bank from the Facility Agent or any of the Secured Parties in connection herewith;

E. The Escrow Bank is hereby authorized to comply with and obey all orders, judgments, decrees or writs entered or issued by any court/tribunal (collectively, "Court Order") or any instructions received from statutory authorities and in the event the Escrow Bank obeys or complies with any such order, judgment, decree or writ of any court or instructions from statutory authorities, in whole or in part, it shall not be liable to any Party hereto nor to any other person or entity, by reason of such compliance, notwithstanding that it shall be determined that any such order, judgment, decree or writ be entered without jurisdiction or be invalid for any reason or be subsequently reversed, modified, annulled or vacated;

F. None of the provisions of this Agreement shall require the Escrow Bank to expend or risk its own funds or otherwise incur financial liability or expense in the performance of any of its duties hereunder;

G. The Escrow Bank undertakes to perform only such duties as are specifically set forth to be performed in this Agreement, in good faith and using reasonable skill and diligence, but in no event shall the Escrow Bank be liable for consequential damages except to the extent of its misconduct, negligence, wilful default, or fraud as finally determined by a court of law;

H. The Escrow Bank has been appointed hereunder for the sole purpose of dealing with the funds received by it only in accordance with the express terms of this Agreement and that no duties, obligations or responsibilities to any person other than as expressly set forth herein are intended and the Escrow Bank shall not in any way be liable for the form, perfection, registration, disposition or maintenance of the trust established hereby, except as set forth in this Agreement;

I. The Escrow Bank (in its role as Escrow Bank hereunder) may refrain from taking any action, which in its reasonable, opinion, would or might contravene any Applicable Law in any relevant jurisdiction, and do all such things in its reasonable opinion necessary to comply with any such law.

14.3. **Termination**

14.3.1. This Agreement shall remain in full force and effect until Final Settlement Date, unless terminated earlier by the mutual consent of the Parties or otherwise in accordance with the provisions of this Section by written notice from the Secured Party to the Escrow Bank.

14.3.2. The Borrower may, by not less than sixty (60) days prior notice to the Escrow Bank and with the prior written consent of the Lenders/Facility Agent, terminate this Agreement and appoint one or more Escrow Bank(s), provided that the new Escrow Bank(s) is/are acceptable to the Lenders and arrangements are made satisfactory to the Lenders for transfer of the amounts deposited in the Accounts to new Accounts established with the successor Escrow Bank(s).

14.3.3. The Lenders may, after giving notice of sixty (60) days at any time remove the Escrow Bank with or without cause or the Escrow Bank may after giving notice of sixty (60) days resign and the Lenders and the Secured Parties may appoint a successor Escrow Bank by written notice of such action to the Borrower, the Escrow Bank and the successor Escrow Bank within the aforesaid notice period, failing which the Escrow Bank shall be entitled to appoint the successor Escrow Bank.

14.3.4. The Escrow Bank shall be entitled to terminate this Agreement, subject to providing the prior written notice of 60 (sixty) days to the Lenders, if the Borrower fails to comply with any of its obligations to the Escrow Bank under this Agreement and fails to remedy the failure within Forty Five (45) days after receipt of notice thereof from the Escrow Bank to the Borrower and the Lenders. For abundant clarity it is hereby specified that the notice period of 60 (sixty) days referred above shall commence from the expiry of 45 days remedy period provided by the Escrow Bank to the Borrower.

i. Any successor Escrow Bank appointed as provided in this Section shall execute acknowledge and deliver to the Secured Party, the Borrower and to its predecessor trustee Escrow Bank an instrument accepting such appointment and agreeing to discharge the functions of the Escrow Bank in accordance with this Agreement, and such successor Escrow Bank; without any further act, deed or conveyance, shall become vested with all the rights, powers, duties and obligations of its predecessor hereunder, as if it was originally named as Escrow Bank under this Agreement;

Provided that on the written request of the Secured Party or of the successor Escrow Bank, the Escrow Bank ceasing to act shall, upon payment of all amounts then due to it pursuant to the provisions of Section 17.5, execute and deliver an instrument or instruments transferring and assigning to such successor Escrow Bank (without obligation to indemnify such successor Escrow Bank) all the rights and powers of the Escrow Bank so ceasing to act; and

ii. Upon the request of any such successor Escrow Bank, the Borrower shall execute any and all instruments in writing in order more fully and certainly to vest in and confirm to such successor Escrow Bank all such rights and powers as may be required under this Agreement.

14.3.5. Any corporation into which the Escrow Bank may be merged or converted or with which it may be consolidated, or any corporation resulting from any merger, conversion or consolidation to which the Escrow Bank shall be a party, or any corporation succeeding to the corporate trust business of either, shall, subject to the consent of the Lenders and the Secured Parties, be the successor of the Escrow Bank.

14.3.6. In case of termination of the Escrow Agreement as per this Section 17.4, the Escrow Bank shall facilitate the smooth handover of the documents/information in its possession, to the successor Escrow Bank.

14.4.1. **Indemnity**

The Borrower hereby indemnifies and shall keep indemnified the Escrow Bank for any and all liabilities, obligations, losses, damages, penalties, actions, judgements, suits, costs, expenses, claims or disbursements of any kind or nature whatsoever which may be imposed upon, incurred by or asserted against the Escrow Bank in any way in connection with or arising out of the negotiation, preservation or enforcement of any rights under, or in carrying out its duties under this Agreement or the Financing Documents (other than those arising as a result of the Escrow Bank or such other person's gross negligence, wilful default, fraud, breach of law or criminal acts as determined by a court of law or tribunal having jurisdictions or express instructions of the Lenders). The obligations of the Borrower under this Section 17.10 to indemnify and keep indemnified the Escrow Bank shall survive the satisfaction, discharge or other termination of this Agreement and the resignation or removal of the Escrow Bank under this Agreement. The Lenders shall provide supporting documents as far as possible regarding the incurring of the expenses.

14.4.2. **Email Indemnity**

All written instructions being furnished to the Escrow Bank by the Borrower or the Facility Agent under this Agreement may be communicated to the Escrow Bank through Registered/Speed Post/Courier/ Email. In the event the said instructions are communicated through any electronic mode, the Escrow Bank shall not be responsible or liable for determining the authenticity or accuracy of the same, except as reasonable required to do so and shall be entitled to rely upon the instructions on an 'as it is' basis. Thereby, in the event the instructions are found to be unauthorised/ fraudulent/ incomplete/ inaccurate at any time, the Borrower shall keep the Escrow Bank indemnified against any claims, losses, damages, costs and/or expenses incurred by the Escrow Bank or brought against it by any person.

14.5. **Not Acting in Individual Capacity**

In accepting the trusts hereby created, the Escrow Bank acts solely in its capacity as Escrow Bank and not in its individual capacity and all persons having any claim against the Escrow Bank by reason of the transactions contemplated by the Transaction Documents shall look only to the Borrower for payment or satisfaction thereof, save and except as provided in this Agreement, and other than as a result of its wilful misconduct or gross negligence.

15. REPRESENTATION AND WARRANTIES OF THE ESCROW BANK AND THE BORROWER

Each of the Escrow Bank and the Borrower represent and warrant that they are duly organised and validly existing under the laws of India with power to enter into this Agreement and to exercise its rights and perform its obligations hereunder and has taken all corporate and other actions required for the execution of this Agreement and the performance of its obligations hereunder and the Borrower further represents and warrants that all the representations and warranties under the Facility Agreement shall be valid for the purposes of this Agreement. The Escrow Bank represents and warrants that it shall hold all funds in the Accounts in accordance with the provisions of the Agreement and further represents and warrants that it has obtained all approvals, permits and other clearances required for the execution of this Agreement and the performance of its obligations hereunder.

16. MISCELLANEOUS

16.1. Successors and Assignors

This Agreement shall be binding on and shall inure to the benefit of the Parties hereto and their respective successors in title and permitted assigns.

16.2. Waiver

Failure by any Party at any time to enforce any provision of this Agreement or to require performance by the other Parties of any provision of this Agreement shall not be construed as a waiver of such provision and shall not affect the validity of this Agreement or any part of it or the right of the relevant Party to enforce any provision in accordance with its terms.

16.3. Severability

If any condition, Section or provision of this Agreement not being of a fundamental nature is held to be illegal or unenforceable, the validity or enforceability of the remainder of this Agreement shall not be affected thereby.

This arrangement is subject to applicable law and regulations and would be modified/discontinued based on the prevailing law/regulation at any point of time with intimation to the Lenders and either party shall be under any liability or obligation or continue implementation of the said arrangement till such time the terms are modified by the Parties as per the prevailing/amended law at that point of time.

16.4. Amendments

No amendment to this Agreement shall be binding unless in writing and signed by the duly authorised representatives of the Parties.

16.5. Governing Law

This Agreement shall be governed by and construed in accordance with Indian law.

EMPLOYMENT AGREEMENT

The following are the core clauses that are usually found in a typical Employment Agreement.

1. DEFINITIONS AND INTERPRETATION

1.1. **The capitalized terms in this Agreement wherever used shall have the following meanings:**

"**Act**" means the Companies Act, 2013, as applicable and amended from time to time and the rules made thereunder.

"**Affiliate**" shall mean, in relation to a Person ("**Subject Person**"), (a) being a corporate entity, any entity or Person, which Controls, is Controlled by, or is under the common Control of such Person, (b) where such Party is an individual, any Person, directly or indirectly Controlled by such Party, including a Relative of such Party, unless expressly stated otherwise, (c) in any other case, a Person Controlled by a Party/Parties to this Agreement.

"**Board**" means the board of directors of the Company, as duly constituted from time to time in accordance with the Act.

"**Business Information**" means the reports, project reports, operation procedures, protocols, instruction and training manuals, tables of operating conditions, market forecasts, specifications, data, quotations, tables, lists and particulars of customers and suppliers, marketing methods and procedures, and any other technical, industrial and commercial information and techniques in any tangible form (including, but not limited to paper, electronically stored data, magnetic media, microfiche, film and microfilm).

"**Business Intellectual Property**" means the Intellectual Property owned, used (either under a license, assignment or otherwise) or held for use by the Company.

"**Company Goodwill**" has the meaning set-out under Clause 4.6 (Rights and Responsibilities).

"**Competitor**" means any Person which competes with the Business or engages in a business similar to the Business of the Company.

“**Confidential Information**” means any and all confidential or proprietary knowledge, information, data, trade secrets and materials (whether written or oral, or in electronic, recorded or other form, whether or not marked as confidential or proprietary, and whether disclosed before, on or after the date of this Agreement) relating to the Business, the Company or any of its Affiliates, any of the Company or any of its Affiliates customers or suppliers, or any other third party who furnishes such knowledge, information, data, trade secrets or materials to the Company or any of its Affiliates, including:

(a) all information that the Employee shall have obtained or received as a result of the discussions leading up to or the entering into or implementation of this Agreement;

(b) the terms of this Agreement;

(c) any and all the methods, systems, information, data, trade secrets and materials disclosed to the Employee by the Company or any of its Affiliates from time to time prior to and during the Term, including any information pertaining to any dispute under this Agreement;

(d) information, data and materials relating to the future plans or financial position of the Business, the Company or any of its Affiliates, including marketing strategies, pending projects and proposals, proprietary information relating to the development, utility, operation, functionality, performance, cost, know-how, details of present and proposed businesses and similar items;

(e) personnel information and materials of the Company or any of its Affiliates, including employee lists and contact information, employee performance information, employee compensation information, recruiting sources, consulting information, contacts, and cost, salary package and components and similar information;

(f) any information or material that gives the Company or any of its Affiliates an advantage with respect to its Competitors by virtue of not being known by those Competitors;

(g) all industrial and intellectual property rights used or required by the Company or any of its Affiliates, including patents, trademarks, service marks, trade names, domain names, designs, copyrights, drawings, plans, specifications, formulae, customer data, agreements, processes, equipment, specifications, designs and computer software (including in each application thereof), in each such case in any part of the world and whether or not registered or registrable, and all know-how, inventions, formulae, trade secrets, confidential or secret processes and information, including all documents relating thereto; and

(h) any information or material regarding the Company's or any of its Affiliates' business, business dealings, transactions, affairs, or any information concerning any of the Company's or any of its Affiliates' vendors, suppliers, agents, distributors, consultants, customers and clients.

"**Control**" means, with respect to any Person, the ability to direct the management or policies of such Person, directly or indirectly, whether through the ownership of shares or other securities, by contract or otherwise, provided that in all events, (a) the direct or indirect ownership of or the power to direct the vote of 50% (Fifty Per cent) or more of the voting share capital of a Person or the power to control the composition of the board of directors of a Person shall be deemed to constitute Control of that Person; and (b) in the case of a natural person, her immediate family, or the trustees of any trust of which she or her immediate family is a beneficiary or any company in which she and her immediate family together (directly or indirectly) have an interest of 50% (Fifty Per cent) or more or any Person who is accustomed to act according to the instructions of such natural person, shall be deemed to be within the Control of such natural person (the expressions "**Controlling**" and "**Controlled**" shall have the corresponding meanings).

"**Intellectual Property**" means all Business Information, intellectual property and any rights thereto (whether or not filed, perfected, registered or recorded), including but not limited to all patents, moral rights, trademarks, trade names, service marks, service names, brand names, internet domain names and sub domains, inventions, processes, formulae, copyrights, business and product names, logos, slogans, trade secrets, industrial models, processes, designs, database rights, methodologies, computer programs (including all source codes), technical information, manufacturing, engineering and technical drawings, know-how, all pending applications for and registrations of patents, entity models, trademarks, service marks, copyrights, designs and internet domain names and sub-domains and similar proprietary rights of whatever nature, in each case, anywhere in the world.

"**Law"** or "**Laws**" means any applicable national, federal, central, international, foreign, state, provincial, local or other law including all applicable provisions of all (a) constitutions, decrees, treaties, statutes, laws (including common law), codes, notifications, rules, regulations, policies, guidelines, circulars, directions, directives, ordinances, notes, clarifications, releases or any other forms of delegated legislation of any governmental authority having jurisdiction over the Parties; and (b) court orders, judgments, writs, injunctions, decrees or similar orders or orders of any tribunal or governmental authority.

"**Person**" means and includes an individual, a sole proprietorship, an association, syndicate, a corporation, a firm, a partnership, a joint venture, a trust, an unincorporated organization, a joint stock company, a limited liability company or other entity or organization, body corporate, governmental authority, judicial authority, a natural person in his capacity as trustee, executor, administrator, or other legal representative and any other entity including a government or political subdivision, or an agency or instrumentality thereof and/or any other legal entity.

1.2. **Interpretation**

1.2.1. Reference to any Laws shall be construed as meaning, including references to any amendment or re-enactment (whether before or after the Execution Date) for the time being in force and to all statutory instruments or orders made pursuant to such statutory provisions;

1.2.2. The words "hereof," "herein" and "hereunder" and words of similar import when used in this Agreement shall refer to this Agreement as a whole and not to any particular provision of this Agreement. The words "include", "including" and "among other things" shall, in all cases, be deemed to be followed by "without limitation" or "but not limited to" whether or not they are followed by such phrases or words of like import.

1.2.3. Words denoting the singular shall include the plural and vice versa, and words denoting any gender shall include all genders;

1.2.4. Table of contents, headings, subheadings, titles, subtitles to clauses, sub-clauses and paragraphs are for information and convenience only and shall not form part of the operative provisions of this Agreement or the annexures hereto, and shall not affect the interpretation or construction of this Agreement.

1.2.5. References to Recitals, Clauses, Appendices, Annexures, Paragraphs, Preamble and Schedules are to recitals, appendices and annexures to, and clauses, paragraphs, preamble and schedules of this Agreement, all of which form part of this Agreement.

1.2.6. Unless otherwise specified, references to days, months and years are to calendar days, calendar months and calendar years, respectively.

1.2.7. If there is any conflict or inconsistency between a term in the body of this Agreement and a term in any of the schedules or any other document referred to or otherwise incorporated in this Agreement, the term in the body of this Agreement shall take precedence.

2. APPOINTMENT

2.1. On and from the Effective Date, the Company has appointed the Employee and the Employee has agreed to such appointment as a Director**.**

2.2. The Employee shall serve as the Director (as defined under the Act) of the Company. The Employee agrees to be bound by the terms and conditions laid down in this Agreement and the Policies, during the Term. The Employee shall be identified as an officer in charge/default of the Company, or as an occupier of any premises used by the Company. Further, the Employee shall be entrusted with all such responsibilities for the running and the management of the Company.

3. PLACE OF EMPLOYMENT

The Employee's principal place of employment shall be at Hyderabad. The Employee may be required to undertake such travel in and outside India, from time to time, as may be necessary in the interests of the Business at the sole discretion of the Company.

4. RIGHTS AND RESPONSIBILITIES

4.1. The Employee is required to carry out all duties that are normally associated with employment in her designation including those specified in **SCHEDULE II**.

4.2. The Employee shall report to and be subject to the superintendence of the Board and shall give the Board such information regarding the operations and affairs of the Company handled by her, as they shall require.

4.3. During the Term, the Employee shall devote her substantial time, attention and energy to perform the duties assigned to her and shall faithfully and diligently perform such duties of her office in relation to the day-to-day management of the Company and the Business, including those managerial, administrative and supervisory duties specified by Policies or by the Board.

4.4. The Employee may from time to time be required to undertake on a temporary or permanent basis other duties within any department of the Company or its subsidiaries for no additional compensation. The Parties agree and acknowledge that the remuneration and benefits specified in **Error! Reference source not found.** hereto will compensate the Employee for all the services rendered by her.

4.5. The Employee shall not do anything to the prejudice of the Company, the Business or any trade or business in which the Company or any of its Affiliates may be directly or indirectly interested.

4.6. The Employee shall not (a) make or deliberately or maliciously cause or permit to be made any untrue, derogatory, disparaging, or misleading statement in relation to the Company and any of its Affiliates, members, officers, or employees and the Business, (b) make any statements, or take any other actions whatsoever, to disparage, defame, sully or compromise the goodwill, name, brand or reputation of the Company, any of its Affiliates or the Business (collectively, the "**Company Goodwill**") or (c) take any other action that could likely injure, hinder or interfere with the Company, any of its Affiliates or the Business, or any of their respective business relationships or the Company Goodwill.

4.7. The Employee shall abide by the policies, codes, rules and regulations of the Company, including any applicable policy of the Affiliates of the Company (together the "**Policies**") as may be amended from time to time at the discretion of the Company and as may be instructed by the Company. To the extent that such policies, rules and regulations are contrary to the terms of this Agreement, the terms of this Agreement shall prevail.

4.8. The Employee shall not accept any payments directly from the clients of Company other than on behalf of Company in accordance with the Polices.

4.9. If the Employee becomes aware of any facts, matters, circumstances or information which may relate to or affect the Company, any of its Affiliates or the Business or which constitute a breach of or be inconsistent with any of the representations and warranties provided in Clause 6 (Representations and Warranties) of the Agreement, she shall forthwith communicate the same in writing to the Board giving full particulars of the matters of which he is aware.

4.10. The Employee shall use her reasonable best efforts (a) to maximize the profitable growth of the Company and (b) to realize the most recent business plan of the Company as adopted by the Board from time to time.

4.11. It is expressly understood that to the extent the Articles of Association of the Company or the Act, as the case may be, require any action by or relating to the Company to be approved by the Board or the shareholders of the Company, the Employee shall not act on such matters except in the manner and to the extent provided therein or delegated to her in writing by the Board or shareholders of the Company, as the case may be.

4.12. The Employee shall manage the Company and its employees and agents in accordance with the applicable Laws, including the Act.

4.13. Notwithstanding anything to the contrary contained herein, the Employee will forthwith on receipt of written instructions from the Board cease to perform or exercise any of the duties, powers or responsibilities that had been delegated to the Employee by the Board. Further, the Employee will, in accordance with the provisions of this Agreement, cease to perform or exercise any of the duties, powers or responsibilities delegated to the Employee by the Board upon cessation or termination of her employment with the Company.

4.14. The Employee agrees that at the time of leaving (whether by resignation, termination or otherwise) the employment of Company, she will deliver to Company (and will not keep in Employee possession, recreate or deliver to anyone else) any and all devices, records, data, notes, reports, proposals, lists, correspondence, specifications, drawings, blue prints, sketches, materials, equipment, other documents or property, or reproductions of any aforementioned items developed by her pursuant to her employment with Company or otherwise belonging to Company, its successors or assigns.

4.15. The Employee shall not after her termination of employment with the Company represent herself as being employed with the Company or any of its Affiliates.

4.16. The Employee agrees and undertakes that during the Term or thereafter, she shall not divulge or make use of any Confidential Information. The obligations contained in this Clause 4.16 shall not apply to any Confidential Information which:

(i) at the date of this Agreement or at any time after the date of this Agreement comes into the public domain other than through breach of this Agreement by the Employee;

(ii) can be shown by the Employee to the reasonable satisfaction of the Company to have been known to the Employee prior to it being disclosed by the Company to the Employee;

(iii) subsequently comes lawfully into the possession of the Employee from a third party not known to be to any prohibition against transmitting the Confidential Information;

(iv) is requested or required to be disclosed by any court of competent jurisdiction or any competent judicial, governmental, arbitral, supervisory or regulatory body; or

(v) is independently developed by the Employee without use of, or reference to, any Confidential Information.

4.17. The Parties agree that on expiry of the Term, the Employee shall cease to be the Director of the Board. The Parties agree that 30 (Thirty) days prior to the expiry of the Term, the Parties shall execute a transition services agreement (which will be effective from the following day of the expiry of the Term), whereby the Employee shall agree to continue to provide and assist the Company in managing certain specific operations of the Company on the terms and conditions as mutually agreed to between the Parties therein.

5. COMPENSATION AND BENEFITS

5.1. In consideration of the services to be rendered by the Employee to the Company, the Employee shall receive gross annual remuneration of INR [●] (Indian Rupees [●] only), subject to deduction of tax at source, which will be paid on a monthly basis ("**Gross Remuneration**"). The detailed description of annual gross remuneration and particulars of other emoluments, allowances, benefits is annexed as **Error! Reference source not found.** hereto.

5.2. The Company shall reimburse the Employee for reasonable Business-related travel, lodging and other expenses incurred by the Employee in the performance of her duties under this Agreement and in the course of her employment, provided that the Company shall be entitled to require claims for such expenses to be supported by receipts, vouchers or other evidence of payments, in accordance with the Policies.

5.3. The Employee shall be responsible for payment of any taxes over and above the taxes withheld by the Company on the payments made in accordance with this Agreement.

6. REPRESENTATIONS AND WARRANTIES

6.1. The Employee hereby represents and warrants to the Company, as on the Effective Date and during the Term, each of the following:

6.1.1. The Employee is an individual competent to contract and not disqualified from entering into a contract on account of any reason whatsoever.

6.1.2. The Employee is not subject to any non-competition or other covenant or restriction contained in any agreement, commitment, arrangement or understanding (whether oral or written) that would (a) in any way conflict with or limit her ability to commence work for the Company on or after the Effective Date or (b) otherwise limit her ability to perform all of her responsibilities in accordance with the terms and conditions of this Agreement.

6.1.3. The Employee has full power, authority and legal right to enter into and perform her obligations under this Agreement and has taken all necessary action (corporate, statutory or otherwise) to execute, deliver and perform this Employment Agreement. This Agreement constitutes a valid and binding agreement of the Employee enforceable against her in accordance with its terms.

6.1.4. The Employee has never been suspended, censured or otherwise been subjected to any disciplinary action or other proceeding, litigation or investigation by any court of law, state or governmental body or agency or any regulatory authority or self-regulatory organisation.

6.2. The representations, warranties, covenants and undertakings of the Employee in this Employment Agreement are at the date hereof, and will be throughout the Term, true, accurate and complete in all respect.

7. TERM AND TERMINATION

7.1. Term

The Agreement shall take effect on the Effective Date and shall remain in effect therefrom, for a period commencing from the Effective Date and ending on [●] the "**Initial Term**" and, together with any extensions of employment of the Employee with the Company, the "**Term**"), unless terminated prior to the expiry of the Term pursuant to the provisions of this Agreement.

7.2. Termination

7.2.1. Termination with cause by the Company.

(a) Notwithstanding anything contained in this Agreement, the Board, after having provided the Employee with a notice to rectify the cause of termination within a period of 30 (Thirty) days (when the cause of termination is capable of rectification) ("**Notice Period**") and the Employee failing to rectify such potential cause of termination to the satisfaction of the Board within the Notice Period, may terminate the Employee's employment contemplated under this Agreement at any time without any notice or payment in lieu of notice, for any of the following causes:

(i) Gross non-performance or gross negligence in the performance of duties and responsibilities hereunder;

(ii) deliberate and persistent failure to comply with lawful directions of the Company or the Board;

(iii) breach of material terms of this Agreement or breach of representations and warranties contained herein;

(iv) breach of any material applicable Law or statutory duty;

(v) material breach by the Employee to any agreement or policies to which it is party to with the Company or its Affiliates;

(vi) securing any personal profit related to the Business or embezzlement of funds of the Company or any of its Affiliates; or

(vii) conduct that is clearly prohibited by the Policies, including Policies prohibiting discrimination or harassment based on age, gender, race, religion, disability, national origin or any other protected category, in each case, as evidenced by the findings of an inquiry conducted by a committee appointed by the Board, or chronic alcoholism or any narcotic use.

(b) Notwithstanding anything contained in this Agreement, the Company may at any time, by notice in writing to the Employee, terminate the employment contemplated under this Agreement for permanent incapacitation by illness, injury, physical or mental disability, accident or any other circumstances beyond her control from performing her duties under this Agreement (for the purposes of this sub-clause incapacity for an aggregate period of 90 (ninety) days in any period of 6 (six calendar months, regardless of whether such days are consecutive, shall be deemed to be permanent incapacity).

7.2.2. For avoidance of any doubt, it is hereby stated that this Agreement shall automatically stand terminated in the event of the death of the Employee, and the Company shall not have any further liability or obligation to the Employee, her executors, heirs, assigns or any other person claiming under or through her estate, save and except the amounts due and payable to the Employee for the services rendered by her for the period prior to her death or other amounts payable to her executors, heirs, assigns or any other person claiming under or through her estate as per the Policies.

7.2.3. Termination pursuant to Clause 7.2.1 shall be made in writing to the Employee, which notice shall set forth in reasonable detail relating to the termination event on which the Company is relying for such termination.

7.3. **Effects of Termination**

7.3.1. Upon cessation of employment, the Employee shall co-operate and issue such letters and documents as required by the Company to intimate the statutory authorities regarding cessation of employment, including directorship if the Employee is on the Board, and the Employee shall not prevent or obstruct the Company from complying with requirements of applicable Laws in relation to her cessation of employment with the Company.

7.3.2. In event of the termination pursuant to the terms of this Agreement, the Employee shall not be entitled to any losses, damages, costs, expenses, charges, compensation or severance compensation, bonus or any other amounts whatsoever from the Company arising out of or in connection with such termination.

7.3.3. The Employee shall continue to be bound by duties of good faith and fidelity to the Company during the Termination Notice Period.

7.3.4. The Employee hereby agrees and undertakes that she shall not be entitled to claim damages, injunction or other reliefs or compensation for termination of her employment other than as stipulated in the terms of this Agreement; provided that nothing contained herein shall prohibit either the Employee or the Company from taking steps to obtain injunctive or prohibitive reliefs against the other for breach or violation of its obligations under this Agreement.

7.3.5. The termination of employment of the Employee in accordance with the terms of this Agreement shall be without prejudice to the Company's right to claim the losses, damages, costs, expenses or charges it has suffered as of result the breach of any term or condition of this Agreement by the Employee and any other relief to which the Company may be entitled under applicable Law.

7.3.6. Upon termination or cessation of her employment with the Company:

(a) the Employee shall immediately hand over charge to such person nominated for that purpose by the Company and shall return to the Company, all property of the Company as may be in her possession, control or power, including computer, vehicles, credit cards, data, information, files, books, magazines, reports, documents, manuals, audio and video tapes, floppies and discs and any other knowledge databases of the Company records and all documents containing Confidential Information or other proprietary information of the Company and any letter of authority or power of attorney issued to the Employee, shall be surrendered by her to someone duly authorized by the Company upon the termination of her employment;

(b) the Company shall pay, in full and final settlement, all amounts due to the Employee (including reimbursements of out of pocket expenses (if applicable), statutory payments including any accrued leave to which the Employee may have been entitled to or may have earned (but which have not yet been paid) as of and up to the effective date of such termination), and the Employee shall acknowledge that the amounts so received by the Employee are in full and final settlement of any amounts due to be paid to the Employee by the Company, *provided however*, in the event no amounts are due and payable by the Company the Employee shall acknowledge the same in writing;

(c) Clause 1 (Definition and Interpretation), Clause 4.6, Clauses 4.13 through 4.16 (Rights and Responsibilities), Clause 7.3 (Effects of Termination), Clause 8 (Non-Solicitation and Non-Compete), Clause 10 (Indemnity), Clause 11 (Additional Remedies), Clause 15 (Governing Law and Jurisdiction), Clause 16 (Dispute Resolution) and Clause 17 (Notices) as are applicable or relevant thereto, shall survive termination of this Agreement.

7.3.7. Notwithstanding anything contained in this Agreement, upon termination of the Employee, he shall no longer be deemed to be an 'officer in default' in respect of the Company, and consequently shall not be liable for any non-compliances with respect to the Company, arising from events that have occurred on and from the date of her termination.

8. NON-SOLICITATION AND NON-COMPETE

8.1. Non-solicitation

The Employee, undertakes that she shall not and shall cause her Affiliates not to, directly or indirectly, either alone or jointly with any other Person, in any capacity whatsoever, for a period of 5 (five) years from the Effective Date, or till such time he, ceases to hold any shares in XYZ, whichever is later:

8.1.1. solicit, canvass or entice away from any client or customer of the Company any business carried on by the Company, or persuade any Person which is a client/customer of the Company to cease doing business or to reduce the amount of business which any such client/customer has customarily done or might propose doing with the Company, whether or not the relationship between the Company and such client/customer was originally established in whole or in part through their efforts; or

8.1.2. solicit any employee of the Company who is or was employed as an employee, senior manager, executive, officer or director of the Company; or

8.1.3. employ, engage, consult or appoint in any capacity, directly or indirectly, whatsoever, any senior manager, executive, officer or director in the employment of the Company as on the Effective Date.

8.2. **Non-compete**

In order to protect the Company's sensitive and valuable proprietary information, property (including Intellectual Property) and technologies, as well as its goodwill and business plans to which the Employee has been exposed prior to the date hereof as a result of her involvement in the Business, the Employee undertakes that she shall not and shall procure that her Affiliates shall not, directly or indirectly, either alone or jointly with any other Person, in any capacity whatsoever, for a period of five (5) years from the Effective Date, or till such time he ceases to hold any shares in XYZ, whichever is later:

8.2.1. singly or jointly, directly or indirectly (including through any other Person), in any capacity including for their own account or as agent, employee, officer, director, consultant, investor, shareholder or equity owner, establish, develop, finance, invest or hold any interest in, carry on or assist in carrying on, be engaged in or provide professional advice to any other Person, business, enterprise or venture that is similar to, or competes directly or indirectly with, the Business of the Company; or

8.2.2. directly or indirectly, either alone or jointly with any other Person, in any capacity whatsoever, use any of the Business Intellectual Property inter alia use any trade, business or domain name or mark, logo or design previously used in the Business by the Company or anything which may be reasonably construed as being capable of being confused with any of them;

8.2.3. assist, facilitate or encourage any other Person to do any of the above

8.3. **Exceptions**

Notwithstanding the foregoing, the Company acknowledges and agrees that engaging in any or all of the following activities by the Employee will not amount to breach of the non-compete obligations of the Employee:

8.3.1. as a passive financial investor acquiring securities not exceeding 5% (five percent) of the total share capital of any listed company which is a Competitor; or

8.4. The Parties acknowledge and agree that adequate consideration has been provided for the non-compete and non-solicit covenants in this Agreement and the above undertakings and their term are justified in view of the particular nature of the Business and the knowledge of the Employee of the Business.

8.5. Each of the restrictions contained in this Clause 8 (Non-solicitation and Non-compete) shall be construed as a separate provision of this Agreement and may be enforced independently of the other restrictions. If any restriction is unenforceable but would be valid if reduced in scope or duration, the restriction shall apply with the minimum modifications as may be necessary to make it valid and enforceable. The Employee acknowledges that each restriction is no greater than is reasonably necessary to protect the interests of the Company and its Affiliates.

9. NON-WAIVER

No delay, failure or omission on the part of the Company to exercise any of its powers, rights or remedies under this Agreement will operate as a waiver of such powers, rights or remedies, nor will any single or partial exercise of any such powers, rights or remedies preclude any further exercise of them.

10. INDEMNITY

The Employee agrees to indemnify and hold harmless the Company, any of its Affiliates and its and their officers, directors, shareholders and employees from any and all direct and actual claims, liabilities, losses, damages, and expenses, including reasonable attorneys' fees, incurred by the Company, any of its Affiliates or any of its or their officers, directors, shareholders and employees arising from or resulting from a material breach by the Employee of the provisions of this Agreement. The Company agrees to indemnify and hold harmless the Employee from any and all claims, liabilities, losses, damages, and expenses, including reasonable attorneys' fees, incurred by the Employee arising from or resulting from performance by the Employee of its duties and responsibilities as the Director of the Company and acting in accordance with the directions of the Board.

11. ADDITIONAL REMEDIES

Notwithstanding anything contained in this Agreement, the Parties acknowledge that in addition to any remedy available to the Company, whether provided herein or conferred by Law, the Company shall be entitled to obtain an injunction against the Employee from a civil court of competent jurisdiction and the right to specific performance of the provisions of this Agreement.

12. SEVERABILITY

All provisions of this Agreement shall be severable and no such provision shall be affected by the invalidity of any other provision hereto to the extent that such invalidity does not so render such provision invalid. If any provision of this Agreement is held by a court of competent jurisdiction to be illegal, invalid or unenforceable, the remaining provisions shall remain in full force and effect. Any invalid or unenforceable provision of this Agreement shall be replaced by the Parties with a provision which is valid and enforceable and most nearly reflects the original intent of the invalid or unenforceable provision.

13. SUCCESSORS AND ASSIGNS

This Agreement shall be binding upon and inure to the benefit of the Parties. Neither this Agreement nor any right, remedy, obligation or liability arising hereunder or by reason hereof nor any of the documents executed in connection herewith may be assigned by any Party without the consent of the other Party; provided however, that the Company may assign this Agreement, without the consent of the Employee, to any of its Affiliate or to any Person or entity that acquires or succeeds to all or any part of the Business.

14. AMENDMENT

No modification or amendment of this Agreement and no waiver of any of the terms or conditions hereof shall be valid or binding unless made in writing and duly executed by both the Employee and the Company (through due authorisation of the Board).

15. GOVERNING LAW AND JURISDICTION

This Agreement and the relationship between the Parties hereto shall be governed by and construed in accordance with Indian law. Subject to the provisions of Clause 16 *Dispute Resolution*), the courts at Hyderabad shall have exclusive jurisdiction over this Agreement and any issues or claims in relation to all matters arising out of this Agreement.

16. DISPUTE RESOLUTION

16.1. Any action, dispute or difference arising under or relating to this Agreement (**"Dispute"**) shall at the first instance be resolved through good faith negotiations between the Parties hereto, which negotiations shall begin promptly, within 5 (five) days after a Party has delivered to the other Party a written request for such consultation. If the Parties are unable to resolve the Dispute in question within 10 (ten) days of the commencement of negotiations, the Dispute shall be referred to and finally and conclusively settled by arbitration conducted in accordance with the Arbitration and Conciliation Act, 1996 as amended from time to time and the rules prescribed thereunder.

16.2. The venue and seat of arbitration shall be Hyderabad, India and the language of arbitration shall be English.

16.3. The arbitration shall be conducted by a sole arbitrator jointly appoint by the Parties. If Parties fail to appoint an arbitrator within 30 (thirty) days after service of the notice of arbitration, such arbitrator shall be appointed in accordance with provisions of the Arbitration and Conciliation Act, 1996.

16.4. Except as may be otherwise determined by the arbitrator, each Party shall pay its own fees, disbursements and other charges of its counsels, and the fees and expenses of the arbitrator, and other miscellaneous costs of arbitration, shall be shared equally by the Parties.

16.5. When any Dispute is under arbitration, except for the matters under Dispute, the Parties shall continue to exercise their remaining respective rights and fulfil their remaining respective obligations under this Agreement.

16.6. The arbitration award shall be final and binding on the Parties subject to applicable law in force and the award shall be enforceable in any court of competent jurisdiction in India.

17. NOTICES

All notices or other communications required or permitted to be delivered or given hereunder shall be in writing and shall be delivered by hand or sent by registered, certified or express mail, or reputable courier service or electronic mail, and shall be deemed delivered or given when so delivered by hand, or if mailed, 7 (Seven) days, or 1 (one) day after electronic mail has been sent as follows:

To the Company

Attention: [●]

Address: [●]

Telephone: [●]

Email: [●]

To the Employee:

Address [●]

Telephone [●]

Email [●]

18. ENTIRE AGREEMENT

This Agreement and the schedules hereto constitute the entire understanding relating to terms of employment between the Employee and the Company and supersede all prior offers, agreements, statements or representations, written or oral between the Parties.

TERM LOAN/ FACILITY AGREEMENT

The following are the general clauses that are usually present in a typical loan/facility agreement.

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Agreement:

"**Account Bank**" means the bank appointed in accordance with the Escrow Agreement where the Transaction Accounts are/ shall be opened.

"**Accounting Principles**" means the generally accepted accounting principles in India or such other accounting standards as may be applicable under Applicable Laws.

“**Act**” means the Companies Act, 1956 or the Companies Act, 2013, as applicable.

“**Actual Interest Paid**” means the Interest paid by the Borrower at the Actual Interest Rate on the Loan(s) on the first 8 (eight) Interest Payment Dates immediately succeeding the first Utilisation Date of Tranche I.

“**Actual Interest Rate**” means the rate at which Interest is paid by the Borrower on the Principal Amount on the first 8 (eight) Interest Payment Dates immediately succeeding the first Utilisation Date of Tranche I, which shall in no event be less than the Minimum Interest Rate.

“**Affiliate**” of any specified Person means any other Person directly or indirectly Controlling or Controlled by or under direct or indirect common Control with such specified Person and, in relation to a natural person, includes any Relative of such natural person.

“**Applicable Law**” means, with respect to any Person, applicable provisions of all: (i) Authorisations, constitutions, treaties, statutes, laws, codes, rules, regulations, ordinances or Orders, or any similar form of decision of, or determination by, or any interpretation, policy or administrative instruction having the force of law of any of the foregoing, of any Governmental Authority; and (ii) Orders of or agreements with any Governmental Authority directly applicable to such Person, whether in effect as of the Execution Date, or thereafter.

“**Approved Plans**” means, in relation to the Projects, the plans set out in Schedule 4 to this Agreement and shall include any other plan as approved by the relevant Governmental Authorities.

“**Articles of Association**” means the articles of association of the relevant Obligor.

“**Assets**” means assets or properties of every kind, nature, character and description (whether immovable, movable, tangible, intangible, absolute, accrued, fixed or otherwise) as operated, hired, rented, owned or leased by a Person from time to time, including cash, cash equivalents, receivables, securities, accounts and note receivables, real estate, plant and machinery, equipment, patents, copyrights, domain names, trademarks, brands and other Intellectual Property, raw materials, inventory, furniture, fixtures and insurance.

“**Authorisation**” means any consent, grant, concession, certificate, license, approval, resolution, no-objection, waiver, permit, exemption, sanction, lease, ruling, filing, notarisation, lodgement, registration, notification or other authorisation of any nature which is required to be granted by, or obtained from (a) any Government Authority, or (b) any Person (other than a Government Authority):

(i) for the incorporation of the Borrower and/ or the other Obligors (as applicable) and their due existence and for performance of their obligations under the Transaction Documents;
(ii) for the execution, validity and enforceability of any Transaction Document;
(iii) for or in relation to the Project or the Secured Assets;
(iv) for the conduct of business of the Borrower and/ or the other Obligors and shall in any event include any such clearances listed in the Transaction Documents; or
(v) in relation to anything which will be fully or partly prohibited or restricted by law if a Government Authority intervenes or acts in any way within a specified period after lodgement, filing, registration or notification, the expiry of that period without intervention or action.

"**Business Day**" means a day (other than a Saturday or Sunday or a public holiday) on which banks are open for general business in Mumbai.

"**Business Plan**" means the business plan for each of the Projects (as finalised and agreed

"**Execution Date**" means the date of this Agreement.

"**Facility**" means the term loan facility made available under this Agreement as described in Clause 2.

"**Final Settlement Date**" means the date on which the Secured Obligations have been irrevocably paid and settled in full, to the satisfaction of the Lender.

"**Financial Year**" means each period of 12 months commencing on April 1 of any calendar year and ending on March 31 of the subsequent calendar year or such other period as may be determined by the Borrower in accordance with this Agreement.

"**Indenture of Mortgage**" means the indenture of mortgage to be executed by the Mortgagors in favour of the Security Trustee, for securing the Secured Obligations, as may be amended, amended and restated, modified, or supplemented from time to time.

“**Initial Mortgaged Properties**” means the Dandekar Bridge Mortgaged Property, the Eminence Mortgaged Property, the Hadapsar Mortgaged Property and the Vadgaon Mortgaged Property.

“**Intellectual Property**” means all patents, trademarks, permits, service marks, brands, trade names, trade secrets, proprietary information and knowledge, technology, computer programs, databases, copyrights, licences, franchises, formulae, designs, rights of confidential information and all other intellectual property.

“**Intellectual Property Rights**” means all rights, benefits, title or interest in or to any Intellectual Property, anywhere in the world (whether registered or not and including all applications for the same).

“**Interest**” means the amount of interest payable on the Principal Amount at the Interest Rate.

“**Litigation**” means any action, suit, arbitration, proceeding, summons, inquiry or investigation of any nature, civil, criminal, administrative, governmental, regulatory or other investigations, proceedings, requisition or disputes, by or before any court, tribunal, Governmental Authority or any arbitrator(s).

“**RERA**” means the Real Estate (Regulation and Development) Act, 2016, the rules and regulations framed thereunder and all notifications, circulars, press releases, guidelines, orders, clarifications or instructions issued thereunder by any Governmental Authority (including by the RERA Authority).

“**Secured Assets**” means collectively the Mortgaged Properties, and all other Assets of the Borrower, the other Obligors or any other Person on which a Security is created in favour of the Security Trustee to secure the Secured Obligations.

“**Security Interest**” means:

(i) a mortgage, charge, pledge, lien or other encumbrance securing any obligation of any Person;

(ii) any arrangement under which money or claims to money, or the benefit of, a bank or other account may be applied, set off or made subject to a combination of accounts so as to effect discharge of any sum owed or payable to any Person; or

(iii) any other type of preferential arrangement (including any title transfer and retention arrangement) having a similar effect.

"**Tax**" means any tax, levy, impost, duty or other charge or withholding of a similar nature (including any penalty or interest payable in connection with any failure to pay or any delay in paying any of the same).

2. THE FACILITY

Subject to the terms of the Finance Documents and subject to Applicable Laws, the Lender agrees to lend to the Borrower and the Borrower agrees to borrow from the Lender a rupee term loan facility of an amount equal to the Commitment, in 4 (four) tranches of INR 70,00,00,000 (Indian Rupees seventy crore) ("**Tranche I**"), INR 35,00,00,000 (Indian Rupees thirty five crore) ("**Tranche II**"), INR 12,00,00,000 (Indian Rupees twelve crore) ("**Tranche III**") and INR 3,00,00,000 (Indian Rupees three crore) ("**Tranche IV**").

3. PURPOSE

3.1 Purpose

The Borrower shall apply all amounts borrowed by it under the Facility for the purposes set out below or such other purposes as specified by the Lender in writing:

Purpose	**Amount (in INR)**
(i) *Tranche I of INR 70,00,00,000:*	
(a) For repayment/ payment of the entire outstandings in respect of the Identified Debt;	48,00,00,000
(b) For construction and development of the Projects; and	16,00,00,000
(c) Payment of costs and expenses incurred/ to be incurred in connection with the Facility as approved by the Lender.	6,00,00,000
(ii) *Tranche II of INR 35,00,00,000:*	
For construction and development of the Projects.	35,00,00,000

Purpose	**Amount (in INR)**
(iii) *Tranche III INR 12,00,00,000:*	
Towards pre-funded Interest.	12,00,00,000
(iv) *Tranche IV of 3,00,00,000:*	
Towards Debt Service Reserve Amount.	3,00,00,000
Total	**120,00,00,000**

3.2 **Monitoring**

The Secured Parties are not bound to and shall not be required to monitor or verify the application of any amount borrowed pursuant to this Agreement.

3.3 **End use**

The Borrower shall, within 30 (thirty) days of each Utilisation Date, deliver to the Security Trustee a certificate from an independent practising chartered accountant setting out the details of the purposes for which the proceeds of that Utilisation was applied. *Provided however that*, in case a subsequent Utilisation is proposed anytime prior to the expiry of the aforesaid period of 30 (thirty) days, such certificate shall be delivered prior to such proposed Utilisation.

4. **SECURITY**

4.1 The Secured Obligations and the performance of the obligations of each of the Obligors under the Finance Documents, including their respective payment obligations, shall be secured by the following in the form and manner satisfactory to the Secured Parties:

(i) a first ranking exclusive mortgage by the Mortgagors in favour of the Security Trustee over the Mortgaged Properties, including by way of deposit of, endorsement on, the development rights certificates issued in respect of any TDR pertaining to any of the Mortgaged Properties (or any part thereof) in favour of the Security Trustee;

(ii) Corporate Guarantees issued by the Corporate Guarantors in favour of the Security Trustee; and

(iii) Personal Guarantees issued by the Personal Guarantors in favour of the Security Trustee.

4.2 The Borrower shall execute the Demand Promissory Note and the Letter of Continuity simultaneously with the execution of this Agreement on the Execution Date and shall deliver the Demand Promissory Note and the Letter of Continuity to the Security Trustee.

4.3 The Obligors shall, prior to the first Utilisation Date of Tranche I, create the Security (save and except the Security Interest over the Subsequent Mortgaged Properties) and perfect the Security (save and except the Security Interest over the Subsequent Mortgaged Properties) within 1 (one) Business Day from the first Utilisation Date of Tranche I, in terms of this Agreement and the other Finance Documents.

4.4 Each of the Obligors hereby agree, undertake and covenant to sign all such additional agreements, deeds and documents, and make all filings and take any other steps as may be required by the Secured Parties for the purpose of creating and/ or perfecting and/ or maintaining the Security Interest over any right, title, estate, interest in, to or upon the Secured Assets, in a form and manner to the satisfaction of the Secured Parties.

5. CONDITIONS OF UTILISATION

5.1 Conditions Precedent to Utilisation

5.1.1. The Borrower shall not deliver a Utilisation Request with respect to Tranche I unless the Security Trustee has received all of the documents and other evidences listed in Part A of Schedule 2 ("**Conditions Precedent to Tranche I**") in a form and substance satisfactory to the Secured Parties or has waived the compliance of conditions as per Clause 5.3 below.

5.1.2. The Borrower shall not deliver a Utilisation Request with respect to Tranche II (or any part thereof) unless the Security Trustee has received all of the documents and other evidences listed in Part B of Schedule 2 ("**Conditions**

Precedent to Tranche II") in a form and substance satisfactory to the Secured Parties or has waived the compliance of conditions as per Clause 5.3 below.

Provided however that, in respect of the end use of the Facility specified in Clause 3.1(iii) and Clause 3.1(iv), the Lender shall be entitled to disburse the aforesaid amounts at its sole discretion without the need for any action by the Borrower, including delivery of a Utilisation Request and the Conditions Precedent to Tranche III shall not apply in respect of the same.

5.2 Further conditions precedent

The Lender shall not be required to fund a Utilisation in accordance with this Agreement unless on the date of the Utilisation Request and on the proposed Utilisation Date:

(i) no Default is continuing or would result from availing the Facility (or any part thereof); and

(ii) each of the representations and warranties made by the Borrower and each of the other Obligors in this Agreement and the other Finance Documents are true in all respects.

5.3 Waiver of Conditions

The fulfilment or satisfaction of any of the Conditions Precedent may be waived by the Secured Parties, in writing, at their sole discretion, following a written request from the Borrower setting out: (i) the Conditions Precedent in respect of which the Borrower seeks a waiver; and (ii) the reasons for seeking such waiver.

5.4 Conditions Subsequent to Utilisation

The Borrower shall comply with and fulfil and shall cause the relevant Obligor to comply with and fulfil, the Conditions Subsequent in the form and manner satisfactory to the Secured Parties.

6. UTILISATION

6.1 Delivery of a Utilisation Request

The Borrower may utilise the Facility by delivery to the Lender of a duly completed Utilisation Request not later than 10:00 a.m. 5 (five) Business Days before each Utilisation Date or at such shorter notice as may be acceptable to the Lender. *Provided however that*, in respect of the end use of the Facility specified in Clause 3.1(iii) and Clause 3.1(iv), in the event the Lender delivers a duly completed Utilisation Request at its sole discretion, without the requirement of fulfilment of the relevant Conditions Precedent, the Borrower hereby agrees that it shall be deemed that such Utilisation Request has been submitted on behalf of the Borrower.

6.2 **Completion of a Utilisation Request**

(i) Each Utilisation Request shall be irrevocable and will not be regarded as having been duly completed unless:

(a) the proposed Utilisation Date is a Business Day within the Availability Period for Tranche I, the Availability Period for Tranche II and/ or the Availability Period for Tranche III, as the case may be; and

(b) the amount of the Utilisation complies with Clause 6.3.

(ii) The proceeds of the Utilisation shall be credited into the relevant Transaction Account and shall be released to the Borrower in accordance with the terms of the Escrow Agreement or in such other manner as permitted by the Lender in its sole discretion.

6.3 **Amount**

The amount of the proposed Utilisation must be an integer multiple of INR 50,00,000 (Indian Rupees fifty lac) or such other amount as may be agreed by the Lender at its sole discretion.

7. **REPAYMENT**

7.1 **Repayment of the Facility**

Subject to the other provisions of this Agreement, the Borrower shall repay the Principal Amount in 8 (eight) successive quarterly instalments (each a "**Repayment Instalment**") starting from December 31, 2019 and on each of the dates specified in Schedule 11 (each a "**Repayment Date**") such that the Facility is fully repaid by the Maturity Date. The amount of each Repayment Instalment shall be calculated by applying the relevant percentage of the outstanding Principal Amounts as specified in Schedule 11. Any cancellation of the Facility pursuant to Clause 8 and/ or prepayment of the Facility pursuant to Clause 9.1 and/ or Clause 9.2 shall proportionately reduce the amount of the Principal Amount to be repaid in the order and manner as specified in Clause 9.

7.2 Re-borrowing

The Borrower shall not re-borrow any part of the Facility which has been repaid.

7.3 Appropriation

Other than as may be expressly set out in this Agreement, any amounts paid by the Borrower under this Agreement shall be appropriated in the following order:

(i) firstly, towards meeting costs, charges, expenses and other monies payable as per the Finance Documents including interest thereon;
(ii) secondly, towards payment of accrued Default Interest;
(iii) thirdly, towards Interest Difference (if applicable);
(iv) fourthly, towards payment of accrued Interest;
(v) fifthly, towards payment of any Prepayment Premium;
(vi) sixthly, towards payment of any principal amount due under the Finance Documents; and
(vii) seventhly, towards payment of any other sum due but unpaid under the Finance Documents.

Notwithstanding anything contained hereinabove, the Secured Parties may, at its absolute discretion, appropriate any payment in any manner towards the Secured Obligations and other dues payable to the Secured Parties by the Obligors in respect of any Finance Document, in such order as the Secured Parties may deem fit in its sole discretion.

8. CANCELLATION

8.1 Illegality

If it becomes unlawful for the Lender to perform any of its obligations as contemplated by this Agreement and/ or the other Finance Documents or to fund or maintain the Facility:

(i) the Lender shall notify the Borrower upon becoming aware of that event;

(ii) upon the Lender notifying the Borrower, the Commitment will immediately stand cancelled; and

(iii) the Borrower shall repay the Secured Obligations on the Interest Payment Date occurring after the Lender has notified the Borrower or the date specified by the Lender in the notice delivered to the Borrower (being no earlier than the last day of any applicable grace period permitted under Applicable Law), whichever is earlier.

8.2 Change of Control

If the Promoters cease to have Control over the Borrower at any time prior to the Final Settlement Date:

(i) the Borrower shall, and/ or cause the Obligors to, promptly notify the Lender upon becoming aware of that event;

(ii) the Borrower shall not make the Utilisation Request unless otherwise agreed by the Lender and the Lender shall not be obliged to fund the Utilisation; and

(iii) the Lender shall have the right to cancel the Facility and/ or declare that all the Secured Obligations immediately become due and payable whereupon all such Secured Obligations shall become immediately due and payable.

8.3 Cancellation by the Borrower

The Borrower shall not cancel the Facility or any part thereof without the prior written approval of the Lender.

8.4 Other Conditions

(i) No Commitment cancelled in whole or in part under this Agreement shall subsequently be reinstated.

(ii) Any notice of cancellation under this Agreement shall be irrevocable.

9. PREPAYMENT

9.1 Voluntary Prepayment

(i) Until the completion of a period of 12 (twelve) months from the first Utilisation Date of Tranche I, the Borrower shall not be permitted to prepay in whole or in part the Facility, *provided that* the Borrower, may, upon delivering a prior written notice of at least 1 (one) Business Day to the Lender or such shorter notice period as may be permitted by the Lender, prepay in whole or in part the Facility only out of the Surplus Funds in accordance with the terms and conditions of the

Escrow Agreement. *Provided further that* such prepayment shall not be for more than 50% (fifty percent) of the entire Principal Amount then outstanding unless otherwise permitted by the Lender in writing.

(ii) After the expiry of 12 (twelve) months from the first Utilisation Date of Tranche I till 24 (twenty four) months from the first Utilisation Date of Tranche I, the Borrower shall, upon delivering a prior written notice of at least 5 (five) Business Days to the Lender, be entitled to prepay the Facility in whole or in part.

(iii) After the expiry of 24 (twenty four) months from the first Utilisation Date of Tranche I, the Borrower shall, upon delivering a prior written notice of at least 5 (five) Business Days to the Lender, be entitled to prepay in whole or in part the Facility.

(iv) Any prepayment in accordance with sub-clause (ii) and sub-clause (iii), save and except in case of prepayment out of the Surplus Funds in accordance with the terms and conditions of the Escrow Agreement, shall be subject to payment of a prepayment premium of 2% (two percent) and 1% (one percent), respectively, of the principal amount of the Facility being prepaid ("**Prepayment Premium**").

The prepayment made pursuant to Clauses 9.1 above is hereinafter referred to as "**Voluntary Prepayment**". *Provided that* any Voluntary Prepayment shall also be subject to the conditions specified in Clause 9.3 below.

9.2 Mandatory Prepayment

Until the Final Settlement Date, the Lender shall have a right to utilise the Receivables and/ or the Surplus Funds to mandatorily prepay the Secured Obligations in accordance with the terms of the Finance Documents, which prepayment shall be without payment of Prepayment Premium ("**Mandatory Prepayment**"). The Borrower shall, and shall cause the other Obligors to, ensure that the outstanding Secured Obligations are prepaid to the Lender in accordance with the instructions of, and to the satisfaction of, the Lender in the event of a Mandatory Prepayment. *Provided that* any Mandatory Prepayment shall also be subject to the conditions specified in Clause 9.3 below.

10. INTEREST

10.1 Rate of Interest

The interest shall accrue on the Principal Amount at the Interest Rate.

10.2 Interest Periods

(i) First Interest Period: The first Interest Period for the Facility (or any part thereof) shall start on the first Utilisation Date and shall end on the last day of that Financial Quarter. The first Interest Payment Date shall be June 30, 2018, which shall be the end of the First Interest Period.

(ii) Subsequent Interest Periods: All subsequent Interest Periods for the Facility (or any part thereof), after the first Interest Period, shall start on the first day of the Financial Quarter immediately succeeding the previous Interest Period and shall end on the last day of that Financial Quarter.

(iii) Last Interest Period: The last Interest Period for the Facility (or any part thereof) shall start from the first day of the Financial Quarter and shall end on the Maturity Date or the Final Settlement Date (in the event the entire Secured Obligations are not paid on the Maturity Date).

10.3 Payment of Interest

The Borrower shall, for each Interest Period, pay Interest on the Principal Amount, on the Interest Payment Date, as calculated in Clause 10.1 above. *Provided however that*, on the first 8 (eight) Interest Payment Dates immediately succeeding the first Utilisation Date of Tranche I, the Borrower may pay Interest at any rate equal to or greater than the Minimum Interest Rate and the Borrower shall pay an amount constituting the Interest Difference (together with Interest accruing at the Interest Rate on the outstanding Interest Difference) along with the Repayment Instalments in the manner specified in Schedule 11.

10.4 Default Interest

(i) The Borrower shall be liable to pay default interest, without prejudice to the other rights of the Secured Parties, if an Event of Default has occurred, at the rate of (i) 4% (four percent) per annum over and above the Interest Rate in case such Event of Default is cured to the satisfaction of the Secured Parties within a period of 25 (twenty five) days from the date of occurrence of such Event of Default; and (ii) 6% (six percent) per annum over and above the Interest Rate in case such Event of Default is not cured to the satisfaction of the Secured Parties within a period of 25 (twenty five) days from the date of occurrence of such Event of Default ("Default Rate"), on all outstanding amounts under the Finance Documents (including any Taxes that may be deducted at source). The Default Interest will be payable from the date of Event of Default till such time the Event of Default is cured to the satisfaction of the Secured Parties and the entire defaulted amount along with Default Interest has been paid to the Secured Parties to its satisfaction. The Default Interest shall be payable on demand and in the absence of any such demand on the immediately succeeding Interest Payment Date.

For the avoidance of doubt, any payment by the Borrower of the Default Interest shall not prejudice the other rights available to the Secured Parties in terms of this Agreement and/ or any Finance Document which may be exercised by the Secured Parties, without the requirement of serving any prior intimation to the Borrower, in accordance with the terms of this Agreement or any Finance Document. *Provided that* the obligation to pay the Default Interest shall not entitle the Borrower to set up a defence that no Event of Default as mentioned hereunder has occurred.

(ii) The Borrower acknowledges that any Default Interest, Prepayment Premium or any other interest payable under this Agreement and/ or any other Finance Document is not a penalty and is a reasonable compensation for the loss that would be suffered by the Secured Parties.

10.5 Stamp Duty

Any stamp duty, registration and other similar Taxes applicable in any relevant jurisdiction in connection with any Finance Document (including but not limited to registration of any Finance Document and amendment of the Memorandum of Association, Articles of Association or any other Charter Document of the Obligors) shall be borne and payable by the relevant Obligors. The Borrower shall pay and, within 3 (three) Business Days of demand, indemnify the Secured Parties against any cost, loss or liability the Secured Parties incur in relation to any stamp duty, registration and other similar Taxes payable in respect of or in connection with any Finance Document.

11. REPRESENTATIONS

The representations and warranties made by the Borrower on behalf of itself and the other Obligors, to the Secured Parties in this Clause 15 are made as of the date hereof and as of each date till the Final Settlement Date. Each of the below mentioned representations and warranties are true, accurate, complete, and not misleading in any manner.

The Borrower acknowledges that the Secured Parties, have agreed to enter into the Finance Documents and the Lender has agreed to make the Facility available to the Borrower on the basis of, and in full reliance on the representations, warranties and statements made herein and the Borrower agrees and acknowledges that it has procured that each of the other Obligors acknowledges and accepts that the Secured Parties have agreed to enter into the Finance Documents on the basis of, and in full reliance on the representations and warranties made herein.

11.1 Status

(i) The Borrower is a duly organised and validly existing private limited company incorporated in India under the Act;

(ii) Each of the Obligors (other than the Borrower), which are companies, are duly organised and validly existing companies incorporated under Applicable Laws;

(iii) Each of the Obligors (other than the Borrower), which are limited liability partnerships, are duly organised and validly existing limited liability partnerships incorporated under Applicable Laws;

(iv) Each of the Obligors (who is a natural person) is a citizen and resident of India, is solvent, is of sound mind and is a major; and

(v) Each Obligor has the power and authority to own its properties and Assets and to transact the business in which it is engaged or proposes to be engaged.

11.2 Binding Obligations

The obligations expressed to be assumed by each of the Obligors in each of the Transaction Documents (to which each is a party) are, legal, valid, binding and enforceable.

11.3 Non-conflict with other Obligations

The entry into and/ or performance by the Obligors of, and the transactions contemplated by, the Transaction Documents do not and will not conflict with:

(i) Applicable Law;

(ii) the Charter Documents of any of the Obligors; or

(iii) any agreement or instrument binding upon each of the Obligors and/ or any of their Assets,

or (except as provided in any Security Document) result in the existence of, or oblige them to create, any Security Interest over any of their Assets.

There are no agreements or instruments, which have been executed by any of the Obligors which have the effect of amending or modifying the Transaction Documents.

11.4 Power and Authority

Each of the Obligors have the power to enter into, perform, deliver and comply with the provisions of each of the Transaction Documents (to which it is a party), and has taken all necessary actions (including corporate actions (as applicable)) to authorise its entry into, performance and delivery by it of, each of the Transaction Documents to which it is a party and the transactions contemplated by those Transaction Documents.

None of the transactions contemplated hereunder or under the Transaction Documents are in violation of Applicable Law including (without limitation) Section 185 and 186 of the Companies Act, 2013.

11.5 Validity and Admissibility of Authorisations

All Authorisations (including those under RERA) required or desirable for each Obligor (as applicable):

(i) to enable it to lawfully enter into, exercise its rights and comply with its obligations in the Transaction Documents to which it is a party;

(ii) to enable it to carry on its business as it is being conducted from time to time, including all Authorisations required in relation to the Project(s) and the Secured Assets;

(iii) to make the Transaction Documents to which it is a party admissible in evidence in its jurisdiction of incorporation; and

(iv) to enable it to create the Security to be created by it pursuant to any Security Document and to ensure that such Security has the priority and ranking it is expressed to have,

have been obtained or effected and are in full force and effect.

As on date of this Agreement, the Authorisations more particularly specified in Schedule 7 have been obtained or effected in relation to the Projects and each of them are in full force and effect.

11.6 Compliance with Applicable Law

Each Obligor is in compliance with all Applicable Laws in relation to the conduct of its business and is not subject to any present, potential or threatened liability by reason of non-compliance with such Applicable Law.

11.7 Arm's Length Basis

All transactions entered into by the Obligors with any related party or any other Person are on an arm's length basis.

12. AFFIRMATIVE COVENANTS

The Borrower hereby covenants with the Secured Parties that the Borrower shall, and where there is a reference to an Obligor, procure that the other Obligors shall be in compliance with the following covenants, at all times until the Final Settlement Date:

12.1 Corporate Covenants

Each of the Obligors shall:

(i) diligently preserve its corporate existence and status and all rights, contracts, privileges and concessions now held or hereafter acquired by it in the conduct of its business and ensure that the Obligors take all necessary steps to continue to remain solvent;

(ii) carry out and conduct its business with due diligence and efficiency and in accordance with sound managerial and financial standards and business practices with qualified and experienced management and personnel; and

(iii) not do or voluntarily suffer or permit to be done any act or thing whereby its right to transact its business might or could be terminated or whereby payment of any Secured Obligations might or would be hindered or delayed.

12.2 Compliance with Applicable Laws, Authorisations and Charter Documents

Each of the Obligors shall:

(i) comply in all respects with the Applicable Laws, the relevant Charter Documents and Authorisations (as applicable) in relation to all its business;

(ii) obtain, comply with and do all that is necessary to maintain in full force and effect, all Authorisations in relation to its business from time to time, including those required for construction and development of each the Projects (in accordance with the timelines prescribed for such Authorisations in this Agreement or as required under Applicable Law, whichever is earlier);

(iii) supply certified copies to the Security Trustee of all necessary Authorisations required to enable it to:

- perform its obligations under the Transaction Documents;
- ensure the legality, validity, enforceability or admissibility of the Transaction Documents in evidence in India;
- construct and develop each of the Projects within the timelines as stipulated in the Construction Schedule and the Business Plan; and
- carry on its business as it is being conducted from time to time.

(iv) comply at all times with anti-money laundering and combating the financing of terrorism standards set by the Lender.

12.3 Indemnity

Each of the Obligors shall jointly and severally:

(i) reimburse all sums paid or expenses incurred by the Secured Parties or any Receiver, Nominee Director, attorney, manager, agent or other Person appointed by the Secured Parties for all or any of the purposes mentioned in the Finance Documents immediately on, but not later than 3 (three) days from the receipt of a notice of demand from any of them in this behalf and all such sums shall carry interest at the Default Rate as from the date when the same shall have been advanced, paid or become payable or due till such time the sums have not been paid to the Secured Parties to its satisfaction;

(ii) if any sum payable under any of the Finance Documents shall be paid by the Secured Parties, the Obligors shall, forthwith on demand, reimburse the same to the Secured Parties and until payment or reimbursement of all such sums, the same shall be a charge upon the Secured Assets; and

(iii) indemnify the Secured Parties for any loss suffered or liability incurred by the Secured Parties:

i. if any no-objection certificates or other Authorisation from the existing creditors of the Obligors, as applicable, have not been obtained by the said Obligor;

ii. in case of any fraud, misrepresentation, negligence or breach by any of the Obligors of any representations, undertakings, warranties, covenants or other provisions of the Transaction Documents;

iii. in case of breach by any of the Obligors of any Applicable Law;

iv. in case of occurrence of any Default;

v. due to any of the Transaction Documents, not being duly stamped and/ or registered in accordance with Applicable Law;

vi. due to any defect in title of the relevant Obligors to the Secured Assets;

vii. in the event any Litigation involving the Obligors, which is current, threatened, pending or filed, has and/ or is expected to have a Material Adverse Effect;

viii. in connection with any liability of any of the Obligors in respect of any Tax;

ix. on account of any act or omission of any Obligor or any of its employees, officials, directors, representatives or agents; or

x. on account of loss of any ownership/ leasehold/ sub-leasehold/ development rights of the Borrower or any of the Obligors in any of the Mortgaged Properties.

13. NEGATIVE COVENANTS

The Borrower hereby covenants with the Secured Parties that until the Final Settlement Date, the Borrower shall not, and shall procure that, unless otherwise specified, each of the other Obligors shall not, take any action set out below, without the prior written approval of the Lender:

(i) pull down or remove any building or structure (except any temporary structure) forming part of the Secured Assets, other than as required under the terms and conditions of this Agreement;

(ii) enter into a single transaction or a series of transactions (whether related or not) and, whether voluntary or involuntary, to sell, lease, transfer, securitise or otherwise dispose of any part of the Secured Assets or any undertaking of the Secured Assets or any revenue from the Secured

Assets on recourse terms or otherwise or securitise any revenue or receivables from the Secured Assets;

(iii) enter into a single transaction or a series of transactions (whether related or not) and, whether voluntary or involuntary, to sell, lease, transfer, securitise or otherwise dispose of any part of its Assets (other than the Secured Assets) or any undertaking of its Assets (other than the Secured Assets) or any revenue from such Assets (other than the Secured Assets) on recourse terms or otherwise or securitise any revenue or receivables from its Assets (other than the Secured Assets), save and except in the ordinary course of business;

(iv) no member of the Group and none of the Obligors shall incur, create, permit to subsist or have outstanding any Financial Indebtedness or enter into any agreement or arrangement whereby it is entitled to incur, create or permit to subsist any Financial Indebtedness other than the Permitted Financial Indebtedness;

(v) no Obligor shall provide any loans, advances, indemnity or guarantee to or for the benefit of any Person or otherwise voluntarily assume any liability, whether actual or contingent, in respect of any obligation of any Person or issue any bank guarantees or letters of credit to any Person, save and except the Permitted Financial Indebtedness;

(vi) enter into any arrangement, document, agreement or commitment with any Person in connection with the Properties and/ or any part thereof;

(vii) change the shareholding of the Promoters in the Borrower or any change in the class rights of shares (directly or indirectly or issuance of preference shares, convertible securities including any warrants and debentures, transfer or redemption of share capital);

(viii) change the shareholding pattern of the Obligors (other than the Borrower) where such Obligors are incorporated as companies pursuant to the Act, including any change in the class rights of shares (directly or indirectly or issuance of preference shares, convertible securities including any warrants and debentures, transfer or redemption of share capital);

(ix) create and/ or perfect a pledge over the shares of the Borrower held by the Promoters in favour of any Person;

(x) create, or permit to create, or subsist or register, any Security Interest over the shares of the corporate Obligors (other than the Borrower);

13.2 **Repudiation, Rescission, Termination and Transfer of Contracts**

(i) Any Obligor rescinds or purports to rescind or repudiates or purports to repudiate or evidences an intention to repudiate any Transaction Document to which it is a party;

(ii) Any Transaction Document to which any Obligor is a party is terminated prior to its specified term;

(iii) Any Obligor transfers or assigns its rights and/ or obligations under any Transaction Documents to which it is a party; or

(iv) Any diversion or misappropriation of funds from the Transaction Accounts, which is not authorised under the Finance Documents.

14. **ASSIGNMENT**

19.1 No Obligor may assign any of its rights or transfer any of its rights or obligations under the Finance Documents.

20. **SEVERABILITY**

Every provision contained in this Agreement shall be severable and distinct from every other provision contained herein. If, at any time, any provision of the Finance Documents is or becomes illegal, invalid or unenforceable in any respect under any law of any jurisdiction, neither the legality, validity or enforceability of the remaining provisions nor the legality, validity or enforceability of such provision under the law of any other jurisdiction will in any way be affected or impaired. Any invalid or unenforceable provision of this Agreement shall be replaced with a provision that is valid and enforceable and most nearly reflects the original intent of the invalid and unenforceable provision, and the provisions of this Agreement shall be modified suitably in accordance with the terms hereof.

21. **AMENDMENTS AND WAIVERS**

The terms of the Finance Documents may be amended only by way of a written instrument of amendment duly executed by all the parties to such Finance Documents.

22. WAIVERS

22.1 No implied waiver or impairment

No delay or omission on part of the Secured Parties in exercising any right, power or remedy accruing to the Secured Parties upon any Default shall impair any such right power or remedy or be construed as a waiver thereof or any acquiescence in such Default, nor shall the action or inaction of the Secured Parties in respect of any Default or any acquiescence by it in any Default affect or impair any right, power or remedy of the Secured Parties in respect of any other Defaults nor shall any single or partial exercise of any such right, power or remedy preclude any further exercise thereof or the exercise of any other right, power or remedy. The rights and remedies of the Secured Parties herein provided are cumulative and not exclusive of any rights or remedies provided by Applicable Law or equity or in any of the other Finance Documents.

22.2 Express Waiver

A waiver or consent granted by the Secured Parties under this Agreement will be effective only if given in writing and then only in the instance and for the purpose for which it is given.

23. FURTHER ASSURANCES

The Borrower shall, and shall ensure that each of the other Obligors shall, promptly upon receiving a request from the Secured Parties:

(i) execute such further writings and take all such further actions as may be necessary for creating Security over the Transaction Accounts or over any account established in place or in lieu thereof, any Permitted Investments made from the Transaction Accounts subject to Applicable Laws, any insurance proceeds, Authorisations or such other tangible or intangible Assets of the Obligors as are intended to be secured or charged under the Finance Documents; and

(ii) execute all transfers, conveyances, assignments, assurances and other instruments of security whatsoever and give all notices, orders, instructions and directions whatsoever which the Secured Parties may reasonably, by normal practice or by Applicable Law require, in relation to the Secured Assets or the Projects or in relation to the creation, perfection or enforcement of Security.

The Borrower shall cause and procure the other Obligors to comply with the provisions of this Agreement and the other Finance Documents.

24. COUNTERPARTS

Each Finance Document may be executed in any number of counterparts, each of which when so executed and delivered shall be deemed an original but all of which together shall constitute one and the same instrument and any Party may execute a Finance Document by signing any one or more of such originals or counterparts. The delivery of signed counterparts by facsimile transmission or electronic mail in "portable document format" shall be as effective as signing and delivering the counterpart in person.

25. GOVERNING LAW

This Agreement shall be governed by and construed in accordance with Indian law.

RENT AND LEASE AGREEMENT

1. **Definitions and Interpretations**

1.1. In this Agreement, the following words and expressions unless inconsistent with the context, shall bear the meaning assigned hereto:

"**Applicable Law**" means any applicable national, state, local or other law, statute, regulations, rules, by-laws, ordinances, constitution, principles of common law and includes notifications, guidelines, policies, directions, directives, judgment, decree and orders of any Authority, statutory authority, court, tribunal or recognized stock exchange, and having the force of law;

"**Authority**" means any national, regional or local government, or governmental, statutory, regulatory, administrative, fiscal, judicial, or government-owned body, department, commission, authority, tribunal, agency or entity, or central bank (or any Person whether or not government-owned and howsoever constituted or called, that exercises the functions of the central bank);

"**Person**" shall mean any individual, partnership, joint venture, firm, company, corporation, association, trust or other entity or any government or political subdivision or any agency, department or instrumentality thereof;

"**Transaction Costs**" means the aggregate of all the costs and expenses incurred, paid or payable, for or in connection with this Agreement, and the Ancillary Agreement, and includes:

(a) stamp duty, registration charges and other fees and costs payable to any Authority for this Agreement, and the Ancillary Agreement; and

(b) goods and service tax, if any, which may be applicable in relation to this Agreement and the Ancillary Agreement;

"**Transaction Documents**" means this Agreement and the Ancillary Agreement.

1.2. Except where the context requires otherwise, this Agreement will be construed as follows:

a. The term "*Clause*" refers to the specified clause of this Agreement;

b. The definition in clause 1.1 shall apply equally to both the singular and plural form of the terms defined.

c. Whenever the context may require, any pronoun shall include the corresponding masculine, feminine and neuter form.

d. The word *"include", "includes*" and *"including"* shall be deemed to be followed by the phrase "*without limitation*".

e. Unless the context otherwise requires, (i) all references to articles, sections, paragraphs, annexes, clauses and appendixes to this Agreement; and (ii) the term *"herein", "hereof", "hereto", "hereunder"* and words of similar import refer to this Agreement as a whole.

f. The recitals contained herein form an integral part of this Agreement.

g. Unless the context otherwise requires, references herein: (i) to an agreement, instrument or other document means such agreement, instrument or other document as amended, supplemented and modified from time to time to the extent permitted by the provision thereof and (ii) to a statute means such statute as amended from time to time and includes any successor legislation thereto and any regulation promulgated thereunder.

h. For the purpose of this Agreement, the word "*or"* is not exclusive.

i. The terms defined elsewhere in this Agreement shall, unless otherwise indicated, have the meaning so ascribed to them.

j. Any reference in this Agreement, to consent or approval or similar connotation, unless expressly stated otherwise, shall be in writing, and shall include facsimile communications.

1.3. The heading and subheading in this Agreement are included for the convenience and identification only and are not intended to describe, interpret, define or limit the scope, extent or intent of this Agreement or any provision hereof in any manner whatsoever.

1.4. This Agreement shall be construed without regard to any presumption or rule requiring construction or interpretation against the Party drafting an instrument or causing any instrument to be drafted.

2. Lease

2.1. V hereby grants the Premises to X on lease for the Term mentioned in this Agreement.

3. Term

3.1. This Agreement will commence and become effective from the Execution Date and will, unless terminated in accordance with Clause 11 of this Agreement, continue in accordance with the terms mentioned herein for a period of [●] months.

4. Rent

4.1. X shall pay V a monthly rent of INR 100,000/- (Rupees One Lakh Only), inclusive of electricity charges and water charges ("**Rent**").

4.2. The advance Rent for the first month has to be paid by X to V today, simultaneously with the execution of this Agreement. V acknowledges due receipt of the same.

4.3. The balance Rent shall be payable by X to V in advance throughout the Term and will be due on the 1st (First) day of each succeeding month.

4.4. In the event of delay in payment of Rent beyond the [●] day of each succeeding month, the Rent will become overdue, and V is entitled to levy interest at the rate of [●] per month for the delayed period ("**Late Charge**"). The Parties acknowledge that Late Charge, over and above the Rent for the delayed payment is in the nature of liquidated damages and the Late Charge represents a fair and reasonable estimate of the likely loss that V will incur on account of delayed payment. X undertakes to not challenge the same, in any manner, whatsoever.

4.5. The Parties acknowledge that the Late Charge shall not constitute a waiver of X's default with respect to the overdue amount, nor prevent V from exercising any of the other legal right or remedy available under Applicable Law.

5. Security Deposit

5.1. X has paid a non-interest-bearing security deposit of INR [●] to V today, simultaneously with the execution of this Agreement. V acknowledges due receipt of the same.

5.2. The said security deposit is to be returned to X by V at the expiry of the Term or prior termination of this Agreement, whichever is earlier. V is entitled to use part or all of the security deposit by X for any loss or damage to the Premises in the Ancillary Agreement to this Agreement.

5.3. The said security deposit shall unconditionally be forfeited in favour of V in case of any breach of the terms of this Agreement.

6. Alterations in Premises

6.1. X may install its own Tea and Coffee vending machine for its staff, agents, and authorized representatives' use within the Premises.

6.2. X shall make no alterations, decorations, additions, or improvements such as building more floors to the existing building, layouts, design, colour, etc., in or to the Premises without V's prior written consent, and only by contractors or architects, etc. approved by V. X shall bear the cost and expenses of any and all such alterations to the Premises.

6.3. All alterations, additions, or improvements upon the Premises, made by either Party, shall become the property of V and shall remain upon and be surrendered with said Premises, as a part thereof, at the end of the Term hereof.

7. Utilities

7.1. V shall pay only the water and electricity charges in connection with the Premises.

7.2. V shall not be responsible for the utilities and other services in connection with the Premises such as Garbage, Trash Disposal, Telephone, and other utilities and services.

7.3. X acknowledges that V has fully explained to X the utility rates, charges, and services for which X will be required to pay (if any), other than those to be paid directly to the utility company furnishing the service. X is not entitled to claim any abatement or diminution of the Rent due to any such services.

8. Obligations of X

8.1. X is under obligations in accordance with this Agreement:

8.1.1. To keep the Premises clean;

8.1.2. To take reasonable care of the Premises (and any other items belonging to V in the Premises);

8.1.3. To protect the Premises from any damage and destruction; and

8.1.4. To carry out its duty of maintenance or repair (if any) from time to time.

8.2. X shall be solely responsible and liable for the consequences arising out of its work or by any of its staff, agents, and representatives.

8.3. During the Term of this Agreement, X is prohibited from:

8.3.1. Taking any loans or any financial aid with respect to the Premises;

8.3.2. Creating any mortgage, charge, interest, or third-party rights over the Premises, in any manner whatsoever;

8.3.3. Using the Premises for any other purpose apart from X;

8.3.4. Creating any sub-lease, assignment, lease, etc. of the Premises.

8.4. V shall not provide its Uniform to X or to any of its staff, agents, or authorized representatives, but X or its agents or authorized representatives shall abide by Vanasque [*needs to be defined*].

8.5. Notwithstanding anything contained in this Agreement, the staff, agents, or authorized representatives of X shall not be considered to be agents, employees, staff, representatives etc. of V, under any circumstances whatsoever.

9. Termination

9.1. This Agreement may be terminated at any time:

9.1.1. By the Mutual written consent of the Parties; or

9.1.2. By the Parties, without giving cause, by giving 30 (thirty) days written notice to each other;

9.1.3. By V, if there has been a breach, or failure to perform terms and conditions or breach of any undertaking made by X under this Agreement.

9.2. All rights, obligations, dues, etc. of both the Parties are to become due and payable on the date of the termination notice.

10. Effects of Termination

10.1. Upon termination of this Agreement, the Parties shall be relieved and discharged from all obligations, liabilities, or claims under this Agreement except for rights and liabilities accrued under this Agreement prior to the termination thereof or which expressly survive termination of this Agreement.

11. Taxes

11.1. X shall pay all sales, excise, GST, or any other local taxes that may be imposed on either Party as a result of this Agreement.

12. Indemnity

12.1. X shall indemnify, defend and hold V and its agents, authorized representatives, harmless from all losses, liabilities, actions, suits, judgments, obligations, fines, penalties, claims, costs and expenses, including reasonable attorneys' fees and costs, arising out of, or in connection with all acts and omissions related to the performance and execution of this Agreement.

13. Representations & Warranties

13.1. V hereby represents and warrants ("**V Warranties**") to the other Parties, as on the Execution Date, as follows:

13.1.1. it validly exists under the laws of India;

13.1.2. it has the power and authority to execute and deliver this Agreement and the Ancillary Agreement. The execution and delivery of this Agreement and the has been duly authorized and approved and does not require any further Authorization;

13.1.3. upon execution, this Agreement will be a legal, valid and binding obligation of X, enforceable in accordance with its terms;

13.1.4. it has not taken any action, and no other steps have been taken or legal proceedings started by or against it for declaring it as insolvent or the appointment of a receiver, trustee or similar officer of any or all of its assets.

14. Ownership

14.1. The Premises which are given on lease is and shall at all times be and remain, the sole and exclusive property of V and X shall not have any right, title or interest therein or thereto except as expressly set forth in this Agreement.

15. Governing Law & Dispute Resolution

15.1. This Agreement shall be governed by and construed in accordance with the laws of India, including all the amendments till the time of the dispute.

15.2. That if any dispute arises between the Parties hereto during the subsistence of this Agreement or thereafter, in connection with the validity, existence, interpretation, implementation or alleged breach of any provision of this Agreement ("**Dispute**"), the Party raising the Dispute shall issue a written notice for settlement of the Dispute to the other Parties through amicable discussions between V and X.

15.3. That if the Dispute is not resolved by an amicable settlement within 15 (fifteen) days from the date on which the written notice for settlement of such Dispute has been served by one Party on the others, then any of the Parties may within 15 (fifteen) days after the first 15 (fifteen) days referred to above, by written notice to the other Parties refer the Dispute to arbitration, to be conducted in accordance with the Arbitration and Conciliation Act, 1996.

15.4. That the arbitral tribunal will comprise of a single arbitrator to be appointed by mutual consent by the Parties within 7 (seven) days of the request of the notice to start arbitration proceedings. If either Party does not respond to the request for mutual appointment of an arbitrator within the aforesaid 7 days, the Party issuing such a request shall be at liberty to nominate such an arbitrator, subject such nomination not being in contravention of Schedule 5 and 7 of the Arbitration and Conciliation Act, 1996.

15.5. That the arbitration proceedings will be conducted in English, at Dehradun within a period of 6 months from the date of first hearing before the Sole Arbitrator.

15.6. That the arbitration award will be final and binding on the Parties. The award rendered by the arbitrators will be in writing and will set out the reasons for the decision.

15.7. The seat of arbitration will be Dehradun, and the courts at Dehradun will have exclusive jurisdiction.

16. Assignment

16.1. Except as permitted or required by this Agreement or as otherwise agreed in writing between the Parties:

16.2. This Agreement may not be assigned, novated or transferred; and

16.3. Neither Party shall create or permit to subsist any encumbrance over all or any of its rights and benefits under this Agreement.

17. Severability

17.1. If any part or parts of this Agreement shall be held unenforceable for any reason, the remainder of this Agreement shall continue in full force and effect. If any provision of this Agreement is deemed invalid or unenforceable by any court of competent jurisdiction, and if limiting such provision would make the provision valid, then such provision shall be deemed to be construed as so limited.

18. Entire Agreement

18.1. This Agreement (including all attached or referenced exhibits, addenda and schedules) is intended by the Parties as the final and binding expression of their agreement and as the complete and exclusive statement of its terms. This Agreement cancels, supersedes and revokes all prior negotiations, representations and agreements between the Parties, whether written or oral, relating to the subject matter of this Agreement. This Agreement may be amended only in writing duly executed by all Parties.

19. Force Majeure

19.1. No Party shall be liable to the other if, and to the extent, that the performance of any of its obligations under this Agreement is delayed, prevented, restricted, prejudiced or interfered with due to circumstances beyond the reasonable control of such Party including without limitation, legislations, fires, floods, explosions, epidemics, accidents, acts of God, wars, riots, strikes, lockouts, or other concerted acts of workmen, acts of government and/or shortages of materials. The Party claiming an event of force majeure shall promptly notify the other Parties in writing, and provide full particulars of the cause or event and the date of first occurrence thereof, as soon as possible after the event and also keep the other Parties informed of any further deVopments.

20. Counterparts

20.1. This Agreement may be executed only in two counterparts, each of which when executed and delivered will be deemed an original, but all of which will constitute one and the same instrument and any Party may execute this Agreement by signing any one or more of such originals or counterparts.

21. No Third-Party Beneficiaries

21.1. This Agreement is solely for the benefit of the Parties and no provision of this Agreement shall be deemed to confer upon any other Persons any remedy, claim, liability, reimbursement, and claim of action or other right in excess of those existing without reference to this Agreement.

22. Notices

22.1. Any notice or other communication given or made under this Agreement shall, except where expressly stated otherwise, be in writing. The relevant addressee and address of Parties for the purpose of this Agreement is:

(i) To V- [●Name●] [●Address●]

(ii) To X- [●Name●] [●Address●]

The Parties would not be at liberty to change their postal address with prior notice to the other Party.

23. Amendment

23.1. No variation, amendment, modification, alteration, or addition to this Agreement shall be effective or binding on either of the Parties unless set forth in writing and executed by them through their duly authorized representatives.

24. Survival

24.1. The terms, covenants, agreements and warranties contained in or made pursuant to this Agreement together with all indemnities, undertakings and dispute resolution clause contained herein shall survive for 5 years from Execution Date.

25. Waiver

25.1. No failure or delay by any Party in exercising any right, power or remedy under this Agreement shall operate as a waiver thereof. No single or partial exercise of any right, power or remedy under this Agreement by any Party shall preclude any further exercise thereof or the exercise of any other right, power or remedy by that Party. Without limiting the foregoing, no waiver by any Party of any breach by any other Party of any provision hereof shall be deemed to be a waiver of any subsequent breach of that or any other provision hereof. The rights and remedies of any Party provided for in this Agreement shall be in addition to the rights and remedies in law or in equity.

SCHEDULE

[Description of Premises]

PURCHASE AND SUPPLY AGREEMENT

1. SUPPLY OF PRODUCTS

1.1 During the term of this Agreement and any extension hereof, the Seller shall sell and supply the products as set out in SCHEDULE 1 *("***Products***")* to ABC and ABC shall buy from the Seller such Products on a non-exclusive basis.

1.2 The specifications of the Products are set out in SCHEDULE 2.

1.3 Seller shall provide to ABC the technical information and material in regard to the Products as set out in SCHEDULE 3.

2. ORDERS

2.1 Each purchase and sale between ABC and Seller shall be evidenced by an order placed by ABC ("**Order**") to Seller in accordance with the terms and conditions of this Agreement and the Seller Company shall accept such Orders in writing within 2 working days after receipt of the Order.

2.2 If the Seller Company does not send a written order confirmation within 2 working days after receipt of the Order, the Order shall be deemed to be accepted by the Seller Company.

2.3 Orders will be placed by ABC to Seller in writing (including, without limitation, by e-mail, fax, letter). Each Order will contain:

(a) the Products and the quantity of each Product ordered by ABC;

(b) the price; and

(c) the destination (address) of delivery ("**Destination of Delivery**").

3. PRICE

3.1 The price ("Price") for the Products on the basis of Destination of Delivery as determined in the Order, is specified in SCHEDULE 4.

3.2 The price remains fix for the period of the contract.

4. INVOICING AND PAYMENT

4.1 ABC shall pay to Seller the Price for the Products ordered within 30 days of receipt of invoice.

5. DELIVERY AND STOCK

5.1 The date for delivery will be as specified in the order. The minimum delivery time is 3 weeks.

5.2 Seller shall give notice to ABC of any likely delay in delivery of which it becomes aware and shall provide ABC with prompt and reasonable notice of the re-scheduled delivery date.

5.3 If Seller is late with any delivery of Products, ABC will have the right to cancel the Order for such Products at any time before delivery of relevant Products is effected.

5.4 In order to ensure punctual deliveries, Seller shall hold during the term of this Agreement a minimum stock of [•].

7. WARRANTY AND PRODUCT LIABILITY

7.1 The Seller warrant that the Products will:

(a) conform to the technical and quality standard and specifications as set out in SCHEDULE 3;

(b) be safe, of good quality and free from any defect in manufacturing or material; and

(c) correspond strictly with any and all representations, descriptions, advertisements, brochures, drawings, specifications and samples made or given by Seller.

ABC shall inspect the received Products within 14 days after receipt of the delivery and shall inform the Seller within a further period of 3 working days of any apparent defect. Non-apparent defects will be informed to the Seller within 14 days after they have become apparent.

7.2 If the Products are defective and/or do not conform with the warranty given in Art. 7.1 above ("Defective Products"), the Seller shall, at the option of ABC

(a) replace the Defective Products with Products in accordance with the warranty set out in Art. 7.1 above as soon as possible without any additional cost to ABC, or

(b) repair the Products without any additional cost to ABC, or

(c) reimburse ABC the Price paid for the Defective Products.

7.3 Seller shall indemnify and hold ABC harmless from and against all claims, actions, damages, losses, liabilities (including, without limitation, product liability claims) and other expenses (including lawyer´s and other legal fees) which ABC may suffer or incur as a result of the delivery of Defective Products or a breach of the obligations set out in this Agreement by Seller.

7.4 Any claim made under the breach of the warranty obligation as defined in Article 7.1 and 7.2 above shall endure for a period of 24 months after the date of delivery of the Products and any claim made under Art. 7.3 above shall endure until the expiration of the relevant statutes of limitations.

9. TERM AND TERMINATION

9.1 This Agreement shall come into force and effect on [•] (“Effective Date”) and shall remain effective for a period of one (1) year. It will be automatically renewed for subsequent periods of three (3) months each, unless

(a) any party gives to the other party a written notice not to renew this Agreement at least one (1) month prior to the expiration of the initial term or any such subsequent term of this Agreement, or

(b) this Agreement terminates in accordance with 9.2 below.

9.2 Notwithstanding Art. 9.1 above this Agreement may be terminated at any time by each party on written notice with immediate effect in the event that:

(a) proceedings in bankruptcy or insolvency are instituted by or against the other party or a receiver, trustee, administrator or liquidator is appointed in respect of any part of the other party´s assets or any similar relief is granted under any applicable bankruptcy or equivalent law;

(b) one party (the defaulting party) shall be in breach, non-observance or non-performance of any of its obligations in this Agreement and does not remedy the same within 14 days of notice of such failure or breach being served upon it by the other party (the non-defaulting party).

10. **FORCE MAJEURE**

10.1 In this Section "Force Majeure" shall mean any event beyond the reasonable control of ABC or Seller, and which is unavoidable notwithstanding the reasonable care of the party affected, and will include but not be limited to war, insurrection, riot, civil unrest, sabotage, boycott, embargo, explosion, fire, earthquake, flood, unavoidable accident, epidemic, act of God, action or inaction of any governmental official or agency (civil or military) and refusal of any licences or permits, if properly applied for.

10.2 If either Party is prevented from or delayed in performing any of its obligations under this Agreement by an event of Force Majeure, then it shall notify the other in writing of the occurrence of such event and the circumstances thereof within fourteen (14) days after the occurrence of such event.

10.3 The Party who has given such notice shall be excused from the performance or punctual performance of its obligations under this Agreement for so long as the relevant event of Force Majeure continues and to the extent that such Party's performance is prevented or delayed. The occurrence of any event of Force Majeure affecting either party will not give rise to any claim for damages or additional costs and expenses suffered or incurred by reason of Force Majeure.

10.4 If the performance of the work by ABC is substantially prevented or is delayed for an aggregate period of more than sixty (60) days on account of one or more events of Force Majeure during the currency of this Agreement, ABC and/or Seller may terminate this Agreement by giving written notice to Seller and / or ABC as the case may be.

SCHEDULE 1: LIST OF PRODUCTS

SCHEDULE 2: SPECIFICATIONS OF PRODUCTS

SCHEDULE 3: TECHNICAL INFORMATION AND MATERIAL

SCHEDULE 4: PRICES OF THE PRODUCTS