

Contracting in India: Effectively Executing Commercial Contracts

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General principles of contracts

- India's legal system is largely based on the common law system.
- Principles governing contracts in India are generally similar to those prevalent in the United Kingdom.
- The Indian Contract Act, 1872 ("**Contract Act**") regulates all provisions relating to contracts in India.
- There are no statutory restrictions regarding choice of law of the contract.
- If one of the contracting party is a foreign national or entity, then the parties may expressly agree to any governing law, as long as the choice of foreign law does not violate India's public policy.
- Foreign law must be proved in Indian courts in the same manner as any other evidence. Therefore, if parties agree to have foreign law govern a contract, then that law must be proved before an Indian court to enforce the contract.
- Contracts may be written or oral, although oral contracts are difficult to prove.

General principles of contracts

- Under the Contract Act, the essential elements of a valid contract are as follows:
 - Free consent;
 - Parties competent to contract;
 - Lawful consideration; and
 - Lawful object.
- Contracts executed on the basis of consent caused by coercion, undue influence, fraud or misrepresentation are voidable at the option of the party whose consent is caused or taken by coercion, undue influence, fraud or misrepresentation.
- If both parties are mistaken as to an essential fact, the contract can be void.
- Agreements in restraint of legal proceedings are invalid.

Restrictive covenants

- Restrictive covenants can be used in employment contracts to prevent employees from:
 - Starting a competing business;
 - Working for a competitor;
 - Soliciting one's customers;
 - Recruiting one's current employees; and
 - Disclosing trade secrets or confidential information.
- Non-compete, non-disclosure and non-solicitation clauses are the most common restrictive covenants used in contracts in India.
- Generally, any agreement which restricts a person from carrying out a lawful profession, trade or business of any kind, is void to that extent under Indian law.

Restrictive covenants

- Non-compete clauses, especially in employment contracts, are generally enforceable during the term of the contract but may not be enforced post-termination.
- Non-compete clauses in employment contracts are still common in India in order to act as a deterrent to the employee.
- Non-solicitation clauses are generally enforceable during the term of the contract and as well as post-termination of the contract.

Protecting confidential information

- Although no specific law in India protects trade secrets or confidential information, Indian courts have granted injunctions to protect confidential information on the principles of equity and common law.
- To protect sensitive information including *inter alia* information concerning the business, intellectual property, technology, trade secrets, know-how, finance, concepts, ideas, designs, disputes, corporate data and customer data.
- Prevalent in employment contracts to restrain employees from disclosing confidential information to competitors.
- Prevalent in investment transactions and joint venture agreements where parties disclose sensitive commercial or proprietary information.
- Remedies can include either temporary or permanent injunctions to protect the information in addition to damages and other contractual remedies.

Protecting confidential information

➤ Excluded Information:

- Information which is in the public domain;
- Information which becomes available to the public without a breach of the contract; and
- Information which a party obligated to disclose pursuant to any law, regulatory regime or a judicial body.

Dispute resolution

- In India, court proceedings can get long-drawn and expensive. However, commercial courts in certain jurisdictions are prompt and commercially savvy.
- Nevertheless, parties should choose to resolve a majority of their disputes under the contract through binding arbitration.
- It is advisable for parties to retain the right of seeking injunctive relief a competent Indian court if its employee/consultant/agent breach confidentiality or similar obligations.
- Remedies for breach of contract
 - Litigation:
 - ✓ Injunctive relief - Interlocutory reliefs under the Code of Civil Procedure, 1908 while permanent reliefs under the Specific Relief Act, 1963; and
 - ✓ Damages - Governed by Section 73 and Section 74 of the Contract Act.
 - Alternate Dispute Resolution:
 - ✓ Damages; and
 - ✓ Arbitrators are empowered to grant interim reliefs and specific performance of contractual obligations.

Limitation of liability

- Generally, liability for breach of contract would be attributed to the party committing the breach.
- It is a settled position under Indian law that parties to a contract may restrict the liability of the parties by including an express provision to that effect in the contract.
- While Indian courts have recognized the right of the parties to limit their liability in this manner, such clauses may be struck down if found to be unconscionable in nature.
- Additionally, where a loss is caused due to a fundamental breach of the contract, an exclusion of liability clause may not be held operable.

Indemnification

- Indemnity clauses often form a crucial part of the negotiation between parties.
- Features of an Indemnity clause:
 - Include claims arising from actions of third parties; and
 - May be claimed before the loss has actually been incurred but after the loss is suffered.
- Effective May 20, 2016, caps have been imposed on deferred consideration and indemnity pay outs in a cross-border share sale transaction.
- Reserve Bank of India (RBI) approval needed if the following limits are exceeded:
 - consideration amount deferred or escrowed exceeds 25% or a period of 18 months from the date of the transfer agreement; and
 - seller's indemnity exceeds 25% of the total consideration or a period of 18 months from the date of payment of the full consideration.

This warrants a thorough due diligence to be done on the seller entity backed with representations and warranty insurance.

Damages

- Types of damages include, liquidated damages (specific sums agreed upon by parties) and unliquidated damages (awarded by courts after assessing the loss or injury caused).
- A claim for damages must necessarily:
 - have a direct nexus with a breach of the contract;
 - be a foreseeable consequence of such breach; and
 - Arise in the usual course of things from such breach and usually, cannot be aggravated damages.
- Although specific liquidated damages may have been agreed, under the Contract Act, the extent of the claim is limited to the reasonable or actual compensation for the injury/ damage sustained.
- In certain situations, parties may also claim anticipatory damages on account of an anticipatory breach of the contract. An anticipatory breach is said to have been committed when a party refuses to perform, or has disabled himself from the performance of, the promise in its entirety.

Intellectual property law considerations

- Separate tribunals for registration and opposition of grant of IP have been set-up to ensure smooth and efficient regulation, including the Intellectual Property Appellate Board.
- Patents
 - Any patent created by an employee/independent contractor belongs to the employee/independent contractor;
 - Deed of assignment must be executed in writing and registered with the Patents Registry; and
 - Specify the nature of interest in the patent that is being assigned.
- Copyrights
 - Any copyright created by an employee/independent contractor belong to the employee/independent contractor.

Intellectual property law considerations

- Deed of assignment must be executed but need not be registered with the Copyright Board.
 - ✓ Clearly identify the underlying work and specify the rights assigned;
 - ✓ Specify duration and territoriality of assignment. If not specified, deemed to be assigned for five (5) years and to extend to the whole of India; and
 - ✓ Specify amount of royalty/consideration and terms of revision/renewal.
- Trademarks
 - Trademarks need not be mandatorily registered in India.
 - India recognizes the concept of a well-known trademark and the principle of trans-border reputation.
 - Deed of assignment, if any, for a registered trademark must be registered with the Trademark Registry.

Employment law - Key considerations

- Employment law of India includes Central laws and State-specific legislations – not consolidated in one statute. Mandatory requirements on leave, holidays, facilities to be provided by employer, maternity benefits, policy of prevention of sexual harassment.
- Factors to determine applicability of employment laws
 - Nature of business of the employer. Typically, compliance requirements for a factory differ from those of a commercial establishment;
 - Location of the employer and employee. Compliance requirements can vary from one state to another and also within different parts of a particular state;
 - Role, responsibilities and salary of employee. Mandatory annual bonus of 8.33% to be paid to employees earning less than INR21,000; and
 - Number of employees. It is mandatory to contribute towards the provident fund if an establishment has more than twenty (20) employees.
- “At will” termination of employees not in a managerial or supervisory capacity is not possible as law requires a mandatory notice period or payment in lieu of notice as well as a severance compensation for such employees.

Importance of employment contracts in India

- Contracts are pertinent as they lay down the structure of the hiring arrangement. There are three (3) forms of hiring arrangements on the basis of which contractual terms differ:
 - Employment arrangement
 - ✓ Parties enter into a contract of service and the employer-employee relationship is comparable with a master-servant relationship.
 - ✓ The employer is required to comply with employment laws, such as laws in respect of provident fund, state insurance, gratuity, severance payouts etc.
 - Independent contractor arrangement
 - ✓ Parties enter into a contract for service and the employer-independent contractor relationship is comparable with a principal-agent relationship.
 - ✓ The employer is not required to comply with any employment laws.
 - Outsourcing arrangement
 - ✓ The employer and a contractor/ agent enter into a contract for hiring personnel and there is no direct contract between the employer and employee.
 - ✓ The employer is required to comply with the Contract Labour (Regulation and Abolition) Act, 1970.

Importance of employment contracts in India

- Contracts lay down extensive confidentiality obligations.
- Contracts are extremely important in the case of employees engaged in managerial and supervisory roles as India's employment laws usually do not provide for mandatory and statutory benefits/ pay-outs for such employees. Only "workmen" category of employees are entitled to such benefits.
- Contracts provide for the assignment of intellectual property developed by the employee upon termination of employment.
 - Under Indian law, the creator (in this case, the employee) of patent rights is the owner, and therefore, it is important to have specific deeds of assignment to ensure the valid transfer of ownership of patent and other the intellectual property rights from the employees to the employer.
 - There is no specific legislation in respect of trade secrets and know-how in India, and therefore, protection of trade secrets and know-how are only by way of contractual rights.
- Contracts provide for non-compete clauses. Such clauses are generally enforceable during the term of the contract but may not be enforced post-termination.

Anti bribery compliance

- The Prevention of Corruption Act, 1988 (“**POCA**”) is the key legislation on anti corruption. POCA covers only government officials (public servants).
- Some differences between POCA and Foreign Corrupt Practices Act, 1977:
 - POCA criminalizes giving and accepting a bribe;
 - No requirements on due diligence and compliance programs to mitigate violations under POCA;
 - No concept of grease money under POCA; and
 - Financial penal implication not very significant - imprisonment between six (6) months and five (5) years, and a fine.
- On a regular basis examine employees’ understanding of anti-bribery issues:
 - Adopt manuals/ guidance notes on anti-bribery compliances and reporting.
 - Educate and encourage employees to report any breaches of anti-bribery policies/laws.
 - Conduct post training assessment to check violations and validate the understanding of the employees, business partners and associates, agents, distributors related to anti-bribery laws.

Execution formalities

➤ Electronic Signatures

- An electronic record can be authenticated by using a digital signature certificate, which are issued by certifying authorities in India and are different from electronic signatures.
- A digital signature certificate is only valid for electronic records and not for scanned or printed copies of the agreement.
- Electronic signatures other than digital signature certificates cannot be used to authenticate documents. Parties generally use handwritten signatures to execute agreements.
- Signatures can be exchanged by facsimile, followed by original signatures, if the agreement so provides. Parties can also exchange scanned copies of the signature pages of an agreement on e-mail, followed by originals.

➤ Stamp Duty

- Stamping of documents is a process through which the Indian government collects tax on commercial and non-commercial transactions in India.

Execution formalities

- The amount of the stamp duty payable on an instrument is typically determined as per the laws applicable in a particular state.
- To ensure that parties do not evade this tax, Indian law disallows the admissibility of documents as evidence which have not been adequately stamped.

➤ Registration

- Registration of documents is a process by which certain documents are presented before an Indian authority to enable such authority to create a public record for such documents.
- As a general rule, registration of documents is mandatorily required only for documents that create or extinguish rights in respect of an immoveable property.
- Typically, registration requires all signatories and witnesses to an agreement to be personally present for the registration process.

Thank You

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