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BASIC ELEMENTS FOR CREATION A DRAFT OF CONTRACT

A. Background

Activities of human are the indispensable part of social life, where every member of society needs to interact with other members for the fulfillment of needs of life. A member of society may be a natural person, created of God or a fictitious person/ Legal Person, and created by policy of man. A theory on a fictitious person or Legal Person provided in *Salmond on Jurisprudence* is that "So far as legal theory is concerned, a person is any being whom the law regards as capable of rights or duties. Any being that is so capable is a person, whether a human being or not, and no being that that is not so capable is person, even though he be a man. Persons are the substances of which rights and duties are the attributes. It is only in this respect that persons possess juridical significance, and this is the exclusive point of view from which personality receives legal recognition. Persons as so defined are of two kinds, distinguishable as natural person and legal.

A natural person is a human being, Legal persons are beings, real or imaginary, who for the purpose of legal reasoning are treated in greater or less degree in the same way as human beings".¹

However, these needs are the bases for creating the relations between individuals/person. Sometime these relations are naturally created of God, like a relationship between two natural persons son/father etc, or where a person in sole proprietorship become the owner of his father's business after his death being an inheritor, it is a natural relationship because it has been created by natural law , sometime these relations are created by the society members voluntarily , like two persons intends to exchange their interest on some terms and conditions, i.e one party is interested in to hire the services of other Party and the other Party is interested to take the price in result of his/her services, this relationship may be created either verbally or in written form, whatsoever it is, every individual must like to explain or write such terms and conditions which may protect his/her interests. The form of a document which comes into being in result of the mutual understanding between the Parties and creates a relationship on a specific subject matter is called an agreement. In legal perspective an agreement has been defined that, "An agreement is made between the parties when one of them offers something and the other accept the same according to the terms of the offer. In

¹ Salmond on Jurisprudence (Pg 299) by P.J Fitzcerald, M.A

other words, when two parties willfully agree to transact their needs and desires, an agreement between them comes into existence. If their agreement is enforceable in law, the parties are bound to respect their respective commitments. In case, any one of them defaults his agreed undertakings or fails to do whatever he was supposed to do under the agreement, the law moves in to redress the other party aggrieved of the default".²

The contract Act 1872 provides the essentials of a contract which are that, i. the Parties to the contract should be competent ii. The agreement must have been made by the free consent of the Parties without undue influence iii. The agreement must be for the lawful consideration and lawful object iv. The Agreement must not have been expressly declared to be void v. an agreement must fulfill the requirements or formalities necessitated by any particular law. These are legal requirements which should be fulfilled prior to understating on any subject matter and for creating a valid agreement.

In some cases people get confused in usage of two words i. Agreement and Contract in a document. Generally both words are used in similar meaning in commercial practice. They have no legal impact on the validity of document where either of them has been used. However, very small technical difference between them has been ascribed that "The Term 'agreement' although used as synonymous with the word 'contract', is really as expression of greater breath of meaning and less technically. Every contract is an agreement; but not every agreement is a contract. In this colloquial sense, the term 'agreement' would include any arrangement between two or more persons intended to affect their relations (whether legal or otherwise) to each other. An acceptance invitation to dinner, for example, would be an agreement in this sense; but it would not be a contract, because it would neither be intended to create, nor would it in fact create, any legal obligation between the parties to it. Further, even an agreement which is intended to affect the legal relations of the parties does not necessarily amount to a contract in the strict sense of term. For instance, a conveyance of land or a gift of a chattel, though involving an agreement,... is not a contract; because its primary legal operation is to effect a transfer of property, and not to create an obligation.

An agreement, as the courts have said 'is nothing more than a manifestation of mutual assent' by two or more parties' legally competent persons to one another. Agreement in some respects a boarder term than contract, or even than bargain or promise. It covers executed sales, gifts, and other transfers of property.³"

² Business Laws (Pg 36) by Sajid A. Qureshi

³ Black's Law Dictionary (Ninth Edition) by Bryan A. Garner

The important area of a Contract is the creation of its draft, where two parties comes to final understandings they writes some terms and conditions under headings of some clauses. We discuss here some specific clauses of a contract which should be necessarily mentioned in a contract without considering the type of a contract and some other general clauses which helps to make comprehensive draft of contract.

B.

(i) There are five (05) Standard Clauses of the agreement which are called *Boiler Plates* of an Agreement. These clauses are incorporated in every type of agreement.

1. Force Majeure
2. Confidentiality
3. Severability (Savings)
4. Waiver or No- Waiver
5. Arbitration

1. Force Majeure

It literally means "greater force". This clause excuses a party from liability if some unforeseen event beyond the control of that party prevents it from performing its obligations under the contract. Typically, *force majeure* clause covers natural disasters or other "Acts of God", war, or the failure of third parties such as suppliers and subcontractors to perform their obligations to the contracting party. It is important to remember that *force majeure* clause is intended to excuse a party only if the failure to perform could not be avoided by the exercise of due care by that party.

When negotiating *force majeure* clause makes sure that the clause applies equally to all parties to the agreement not just the one party. Also, it is helpful if the clause sets forth some specific examples of acts that will excuse performance under the clause, such as wars, natural disasters, and other major events that are clearly outside a party's control. Inclusion of examples will help to make clear the parties' intent that such clauses are not intended to apply to excuse failures to perform for reasons within the control of the parties.

2. Confidentiality

This clause provides that a Party that receives the information pursuant to a project/service/work or the subject matter of the agreement, will protect the information with the highest possible level of confidentiality which, at a minimum, should provide that the information will be treated with the same level of confidentiality as its own information of the Party it collects.

The primary purpose of this clause is to provide protection to of the information related to disclosing Party except the disclosure is required under domestic laws and regulations governing the confidential treatment of information. The confidentiality requirements, however, vary by country.

3. Severability or (Savings)

This clause basically is a statement that guards the entire agreement from becoming invalid if a portion, clause or any part of any clause of the agreement is invalidated. This protects that if any part of the agreement be rendered or declared invalid by a court of competent jurisdiction of the country/state such invalidation of such part or portion of the agreement shall not invalidate the remaining portions thereof and they shall remain full in force.

4. Waiver or No-Waiver

A waiver is the voluntary relinquishment or surrender of some known right or privilege. The heading of this clause may be either Waiver or No-waiver, the purpose of this clause is to preserve a party's rights and remedies if that party fails, whether intentionally or by oversight, to take action in respect of a breach of contract. It provides that if a party fails to insist, in one or more instances, upon the performance of any of the terms or conditions of the Agreement, or to exercise any right it shall not be construed as a waiver or relinquishment of the future performance of any such terms or conditions or the future exercise of such right, and the obligation of the Parties with respect to such future performance but it shall continue in full force and effect.

Generally such clause will provide that:

- a failure or delay in enforcing an obligation, or exercising a right or remedy, does not amount to a waiver of that obligation, right or remedy
- a waiver of a breach of a term does not amount to a waiver of a breach of any other term in the agreement
- a waiver of a particular obligation in one circumstance will not prevent a party from subsequently requiring compliance with the obligation on other occasions.

Advantages of arbitration are – (i) Quick decisions (b) Minimum legal technicalities and formalities. Hence decisions are fast and costs are lower, (iii) Flexibility regarding procedures, venue, language etc. (iv) Arbitrator is usually expert in the subject matter and hence, can understand the dispute quickly and thoroughly. A judge in the court may not be able to fully appreciate the problem, if it is of intricate technical nature, (v) Cost of court fees and other expenses can be quite high.

An arbitration clause is a commonly used clause in an agreement that requires the parties to resolve their disputes through an arbitration process. It always binds the parties to a type of resolution outside of the courts, and is therefore considered a kind of forum selection clause. It is most often used to settle contractual or commercial disputes. Rather than going to court or mediation, the parties can agree in advance (in the agreement) that Arbitration will be used to settle any disagreements.

5. Arbitration

In addition to above boiler plates/standard clauses, some parties with their consent add some other clauses as for their satisfaction and for making an agreement more comprehensive. It depends on the nature of agreement, intention of parties and circumstance in which they are executing an agreement. In this regard following clauses generally can be added, even any other clause with any heading can be inserted.

The purpose of Arbitration is to provide quick redressal to commercial dispute by private Arbitration. Quick decision of any commercial dispute is necessary for smooth functioning of business and industry. Internationally, it is accepted that normally commercial disputes should be solved through arbitration and not through normal judicial system. An arbitrator is basically a private judge appointed with consent of both the parties. He is expected to give his decisions quickly as he is not bound by the technical formalities of a court.

(ii) Following clauses are optional they depend on the type of agreement and understandings of the parties. The quantity of these clauses can't be fixed they may be increased and decreased, following clauses can be considered as major clauses for a draft of contract.

1. Scope of Agreement
2. Construction of Agreement
3. Interpretation/ Definition /Glossary
4. Relationship of the Parties/ Non Agency
6. Disputes Resolution

7. Taxes and Duties
8. Entirety
9. Amendment / Variation
10. Permits and Authorizations
11. Liquidated Damages
12. Parent Company Relationship
13. Counterparts
14. Assignment
15. Representations and Warranties
16. Intellectual property
17. Indemnity
18. Limitation of Liability
19. Governing Laws
20. Notice
21. Suspension of Contract
22. Term and Termination

1. Scope of Agreement

This clause provides a gist about whole agreement. In this clause both parties define and widely explain the purpose of agreement and subject matter upon which they agree, for which the agreement is being executed.

2. Construction of Agreement

This type of clause provides the detail of the Parts of the Agreement that, which type of other documents, i.e. Annexures, Appendixes etc, shall be deemed be read and construed as part of the Agreement. Further it provides the sequence of the document i.e in the event of any inconsistency between the main body of the Agreement and the Annexures; it gives the order and precedence that which shall prevail to other.

3. Interpretation /Definition/ Glossary

We may add definition clause in agreement/ contract which may include the simple terms words that commonly used or specifically used in industry terminology or common abbreviations etc.

Some organizations include the definition clause at the outset, some prefer to define the words as they appear in an agreement draft on top, some include it at the end of draft and some even take the abundant caution to create an appendix for the definition clause. Companies, whose corporate legal teams are having ample time or who use standard templates for drafting

agreements, use the later option, i.e creating Appendix/Annexure for definitions. This clause is recommended for the purpose that as long as the definitions are written clearly, in first sight a reader of contract becomes able to interpret the meaning which is given to words /phrases in the contract.

4. Relationship of the Parties/ Non Agency

Under this clause both parties explain their relationship that both parties are independent and that they have only relationship to the extent of duties and responsibilities under the agreement. They clarify that the Agreement shall not be interpreted or construed to create an employer-employee relationship, joint venture, partnership or special agency between the parties or to impose any partnership obligation or liability upon either party. Further provides that neither party shall have right, power, or authority to enter into any agreement or undertaking for, to act on behalf of, to act or be and agent or representative of, or to otherwise bind, to other Party.

6. Disputes Resolution

Under this clause both Parties gives a dispute resolution procedure. In case of any conflict, at the first step they try to resolve through negotiations between the responsible or authorized representatives, in case of failure they refer it to their higher management where the representative of both parties tries to resolve the matter. This clause basically gives the procedure for resolving the disputes through internal efforts.

6. Taxes and Duties

Both Parties clarify that, which party shall be responsible for the taxes and duties applicable under the applicable laws of the country.

7. Entirety

Under this clause parties shows their intention that the agreement is intended by the parties is a final expression and understanding and this is a complete and exclusives statement of the terms of their agreement with respect to their relationship and all related matters discussed under the agreement. This clause provides the exclusivity to the terms and conditions of the agreements and restricts the liabilities of the parties in the contents provided therein.

9. Amendment / Variation

This clause provides that no change or amendment in the agreement shall be accepted by one party without the consent of other party. All addition amendments and variations to the agreement shall be binding only if these are in writing and signed by the both Parties or their duly authorized representatives.

10. Permits and Authorizations

Under this clause both parties warrant and represent that each party is full competent under the applicable laws and has full power and undisputable authority to enter into and perform the agreement and to grant the rights conferred and take obligations therein.

11. Liquidated Damages

Under this clause both Parties fix an amount which one will pay to the other upon breaching (breaking or backing out of) the agreement. A party to an agreement promises to pay to the other, in case he shall not fulfill some primary or principal engagement into which he has entered through agreement. Parties to the contract, with their mutual consent, can fix on their discretion, sometimes the liquidated damages are the amount of a deposit or a down payment, or are based on a formula (such as 10% of the contract amount. etc).

12. Parent Company Relationship

In case either party of the contract is a subsidiary of any other company or it is holding company. This clause provides the limits of relation and interference of the holding or subsidiary in the agreement.

13. Counterparts

Parties to the contract make the copies of document in accordance to the number of parties. They may be two or more than two, so for the clarification purpose they explain under this clause that the agreement may be executed in two or more counterparts all of which shall be considered one and the same agreement and each of which shall be deemed an original.

14. Assignment

Under this clause parties ensure that the agreement shall be deemed as personal to the Parties to the contract unless otherwise agreed in writing by both parties and no rights, benefits or obligations under the agreement may be assigned or transferred, in whole or in part.

15. Representations and Warranties

Under this clause both parties specifically write their responsibilities, rights and obligations which they have to perform under the agreement. Rights and obligations of each party are different so each party takes responsibilities and explains its rights on other party as per their understandings. Each party mentions clearly that what one party have to do for other. -So rights of one party become the duties/obligations of other party and vice versa.

16. Intellectual property

This section addresses the protection of rights in the following five areas: (1) rights in patents, trade mark and inventions generated or used in the performance of the agreement; (2) data rights, if any shared under the agreement; (3) publication of resulting data; (4) handling of data; and (5) release of general information to the public, which have been exchanged between parties in relation to the Agreement.

The purpose of this clause is to provide a cover and protection to its all intangible rights i. e copyright and related rights (i.e. the rights of performers,; trademarks including service marks; geographical indications including appellations of origin; industrial designs; patents including the protection of new varieties of plants; the layout-designs of integrated circuits; and undisclosed information including trade secrets and test data. Etc. these rights may be different as per nature of company/organization etc.

17. Indemnity

This is important clause of a contract/agreement, it is a promise, usually as a contract provision, under which one party undertakes to protect other party from loss, sometime the type of loss are specified i.e financial loss, sometime it is kept general, which may include any type loss. Primarily, an indemnification clause in a contract addresses that in the event any issue arise which becomes the cause of loss to a party than affected party shall be identified by other party. No doubt that this is a most bewildering clause in a contract, many times, due to the complexity of an indemnification clause, it should be properly reviewed and analyzed. Generally this clause may include various types of indemnifications, such as an indemnity for, breach of contract, breach of fiduciary duties, violation of law, conflict of interest, confidentiality violations, privacy violations, general liability, and intellectual property infringement etc. However, the most

common two indemnifications in a contract are indemnifications for (a) general liability and (b) intellectual property infringement etc.

18. Limitation of Liability

Limitation of liability clause allows a company to limit its exposure to an agreed upon amount. If a company is not aware about this than it may possible to face as unenforceable indemnity to other party.

A limitation of liability clause is a contractual provision that restricts the amount of damages which a client company/customer can claim from a company. Properly drafted, and where enforceable, it can provide protection against contractual breaches and negligence and is a valuable tool for allocating service risk.

19. -Governing Laws

The purpose of this clause is clarification for both contacting parties that which law shall be applicable in case of conflict or dispute between them. Generally The Agreement shall be interpreted and construed according to, and governed by, the laws of Jurisdiction convenient to All Parties, excluding any such laws that might direct the application of the laws of another jurisdiction.

20. Notice

This clause provides proper information about the source of communication between the parties i.e office address, home address, email, phone numbers, fax numbers etc. Either type of notice or document sent by one party to other is basically is a documentary proof or evidence for future reference. Hence the accurate address for receiving the same is responsibility of all contracting parties. As per principal any document/notice sent through provided address in agreement shall be deemed to be received by the addressee. The change in address is the responsibility of the Party which changes the address to notify other Party.

21. Suspension of Contract

In case of breach of any term or condition of the agreement, this clause at first step threatens to breaching party, which means that affected party, shall stop to perform its obligations by suspending the service if other party does not rectify the breach and does not stop from infringements. This is first step, for efforts to maintain the relation and manage the matters otherwise continuously suspension results into the termination of the agreement under

termination clause. Most probably terms and conditions for suspensions and termination are same, in suspension only a breaching party are given a time to rectify the infringements and stop violations, however many time the order of a regulatory body may become the result for suspension .

22. Term and Termination

This clause provides the time period of the agreement. All contracting parties provide their consent about the effective date of an agreement and time period for which the agreement shall be valid.

Further this clause determines the right of termination of the agreement that which party shall reserve this right of termination of the agreement. Generally this right holds all contracting parties equally.

C. Conclusion

The Contract Act 1872, provides the Fundamental concepts about the contract which includes to Formation of contract, essentials of valid contract, types of Contract, performance of contract, discharge of contract, breach of contract, Damages, Indemnity, Guarantee, Bailment, Agency, etc.. Basically it provides the pre-requirements of a contract which are necessary to be fulfilled by parties before enter into a contract. Further it provides rights obligations of the Parties and consequences in case of breach. The Contract Act does not specify the terms and conditions of a contract, the Terms and conditions of a contract wholly depend on the mutual understanding of the Parties and their consent.

This article gives a gist about two types of clauses which are major clauses of a contract. First type of clauses should necessarily be inserted in every type of contract, but it is not legal obligation, and second type of clauses just helps to draft a comprehensive contract. The quantity of clauses depends on the nature of contract, which basically depend on the nature of business of company and quality of the contents provided under the clauses depends on the understanding of the drafting person. The headings of the clauses do not provide the protection to the interest of either party; it is the language of a clause which clarifies the interests, rights and obligations of the parties. The headings of clauses and the language may be different and the number of clauses may be increased or decreased and wordings may also be different for headings of same clauses. This Article itself neither a law which impose the obligations nor an advice in view of the provisions of law. It is a picture of practical approach which only guides to the basic elements for creation a draft of a contract on the bases of mutual understanding of the Parties.