

FRAMEWORK AND ESSENTIALS OF CONTRACT



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SCOPE



① STRUCTURE

② ESSENTIAL CLAUSES

③ STAMP DUTY

STRUCTURE

- Title
- Name of the Parties
- Recitals
- Body of the Agreement
- Dispute Resolution
- Termination
- Boiler Plates



ESSENTIAL CLAUSES

- Non Compete
- Non Solicitation
- Confidentiality
- Indemnification
- Termination
- Dispute Resolution



NON COMPETE

- “Restraint to trade” – Section 27 of Indian Contract Act, 1872
- Exception: “Sale of Goodwill”
- Circumstances under which the clause is valid – test of reasonableness, situation of employment and fairness to both parties; protection of employer and right of employee.
- *Niranjan Shankar Golikari v. The Century Spinning And Mfg. Co*, the apex court held:

“non-compete clauses are not to be considered as ‘restraint of trade’ if they operate during the time period of employment as it was a step of the employer to protect its confidential information, hence valid”
- *Percept D'Mark (India) Pvt. Ltd. v. Zaheer Khan & Anr*: the apex court has confirmed that:

“the clause is not confined only to contracts of employment, but is also applicable to all other contracts”
- *FL Smidth Pvt. Ltd. vs Bappaditya Sarkar*, 2013, where a trainee terminated a contract after his training, the High Court of Madras held that:

“there should be a negative covenant to hold a non-compete clause invalid. If the non-compete clause is partial in nature and is justified to protect the interest of the company and its goodwill, then it cannot be held that the clause has a negative covenant and hence valid in nature and can be enforceable.”

NON COMPETE (CONT'D)

- Following is a sample non-compete clause:



“You agree that during the term of your employment and for further period of 12 (twelve) calendar months after separation from the Company, for whatever reasons, you shall not carry on or engage directly or indirectly in any business which competes directly or indirectly with any or all the business pursued by the Company in any territory, whether in India or overseas, at the relevant point of time or proposed to be pursued by the Company in the immediate future, in respect of which proposal you were aware of or likely to be aware of considering the nature of your duties, other than through the Company.”

NON SOLICITATION

- “restrictive covenants in contracts” – American Express Bank Ltd. v. Priya Puri
- In Wipro Ltd vs Beckman International, where the respondent was hired by petitioner as sole and exclusive distributor of its products and agreed upon a non-solicitation clause to be operative for two years after the termination of agreement, the Delhi High Court held that:

“as long as a non-solicitation clause is a restrictive clause and not a negative covenant, the clause is not void”



NON SOLICITATION *(CONT'D)*

- Following is a sample non-solicitation clause:

“First Party hereby undertakes that during the term of this Agreement and for a period of 1 (one) years thereafter, the First Party will not directly and indirectly employ, solicit, incite, canvass or attempt to employ or assist anyone else to employ any person who is in the employment with Second Party or was in the employment of Second Party at any time during the preceding 6 (six) calendar months.”

CONFIDENTIALITY

- In Faccenda Chicken Ltd. v. Fowler, the Court held that:

“An employer is thus entitled to protect confidential information which amounts to a “trade secret” or which prevents “some personal influence over customers being abused in order to entice them away”

- In the case of Schroeder (A) Music Publishing Co. Ltd. v. Macaulay the Court held that:

“A covenant that is reasonably necessary to protect an employer against the betrayal of trade secrets or confidential information is not void merely because it unavoidably protects the employer against competition.”

- In Escorts Const. Ltd v. Action Const, the Delhi High Court held that:

“restraining Escorts (respondent) from manufacturing, selling or offering for sale the Pick-N-Carry Mobile Cranes that were a substantial imitation or reproduction of the industrial drawings of the Plaintiffs, or from using in any other manner whatsoever, the technical know-how is valid and enforceable.”

CONFIDENTIALITY (CONT'D)

- In *Burlington Home Shopping Pvt. Ltd. v. Rajnish Chibber*, the Delhi High Court restrained carrying on of any business including mail order business by utilizing the list of clientele/customers included in the database of the petitioner.
- To determine if an information is confidential in nature or not, following are the points that the court considers:
 - Is the information in public domain?
 - The information must have involved some thought or effort.
 - The owner must believe that disclosing the information would cause them damage or would give advantages to their rivals or others.
 - **In deciding whether information is confidential in nature or not, a court considers** the common practice in the particular industry.

CONFIDENTIALITY (CONT'D)

- Following is a sample confidential clause:

"For the purpose of this Agreement, the term "**Confidential Information**" means and includes, without limitation:

any trade secrets, knowledge, data or other proprietary or confidential information relating to products, processes, know-how, intellectual property, designs, developmental or experimental work, ideas, innovations, computer programs, computer artwork, databases, other original works or authorship, customer and supplier lists, business plans, marketing plans and strategies, financial information or other subject matter pertaining to the Business of the Company or any of the Company's customers, suppliers, consultants or licensees, which may or may not be registered under any of the laws pertaining to protection of intellectual property rights in the country.

Personal data information and materials of the users of Application developed, collected or used by the personnel of the Company, information related to users of the Application or any information disclosed by third parties and all other proprietary information, methods and property of the Company whether in a tangible and/or intangible form.

The other party recognizes, acknowledges and accepts that during his engagement with the Company, it would be exposed to and may have access to a substantial amount of Confidential Information pertaining to the Company's Business.

The other Party shall use such Confidential Information only in connection with fulfilling its obligations under this Agreement and hold such Confidential Information in strict confidence and exercise due care.

The other party shall not and shall ensure that its Resources do not, either during the period of their engagement with the Company or thereafter except in the proper course of his duties, divulge to any person whomsoever and shall use his best endeavours to prevent the unauthorised use, dissemination, publication or disclosure of any Confidential Information.

The other party shall not and shall ensure that its Resources do not; either during the period of this Agreement or after expiry of the Agreement use the Confidential Information for their own benefit, or for the benefit of a third party, and will not permit such use, except with the prior, express written consent of the Company.

INDEMNIFICATION

- Section 124 of the Contract Act, 1872:

“A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a “contract of indemnity.”

- Section 125 of the Contract Act, 1872:

“The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor – damages, amount paid and/or costs.”

- In the case of State Bank of Saurashtra vs Ashit Shipping (2002), the Supreme Court held that:

“the question of making good the loss arises only when there is proof that loss is suffered.”

- In Jet Airways (India) Limited v. Sahara Airlines, State Bank of Saurashtra vs Ashit Shipping Limited and Ors (2011), the Bombay Court, keeping in mind the decision of Supreme Court held that:

“an indemnity holder is entitled to sue the indemnifier even before incurring any actual damage or loss and that an indemnity is not necessarily given by repayment after payment.”

- In Total Transport Corporation v. Arcadia Petroleum Limited, (1998), the Court held that:

“Indemnification does not restrict only to direct losses but also covers indirect losses.”

INDEMNIFICATION (CONT'D)

- Following is a sample Indemnification clause:

“You, hereby, agree to indemnify and hold harmless the First Party from and against any and all claims, charges, demands, damages, liabilities, losses, and expenses of whatever nature and howsoever arising (including but not limited to any legal or other professional fees and the costs of defending or prosecuting any claim and any loss of profit, goodwill, and any other direct or consequential loss) incurred or suffered by the First Party for any whatsoever reason.”



TERMINATION

- Important to draft a detailed and thorough termination clause.
- Should have an appropriate process to terminate the agreement.
- Should incorporate number of obligations that the parties must follow on termination.



TERMINATION (CONT'D)

- ***Rajasthan Breweries Ltd. vs. The Stroh Brewery Company (MANU/DE/0860/2000)***
- Two Agreements executed between the parties.
- Exclusive License was given to Party A for producing Stroh Beer in India for 9 years which may be renewed for successive period of 3 years each time.
- Party A – set up a computerized brewery at a cost of more than 20 million dollars and had also imported a number of costly equipments.
- Party B – terminated the contracts on the grounds of quality and standards, inconsistent production resulting in frequent product shortages in the market, late and insufficient payment of dues.
- Party A contended - there is no clause in the agreement, which permits Party B to terminate the agreements by giving a notice of a few days.

TERMINATION (CONT'D)

- The Court held that

“Even in the absence of specific clause authorizing and enabling either party to terminate the agreement in the event of happening of the events specified therein, from the very nature of the agreement, which is private commercial transaction, the same could be terminated even without assigning any reason by serving a reasonable notice.”



TERMINATION *(CONT'D)*

“The Parties may terminate this Agreement at will, at any time during the term of this Agreement, without cause, by written notice given to the other Party not less than one (1) month prior to the effective date of such termination.

Either Party may terminate this Agreement if the other Party is in material breach of any of its obligations under this Agreement and fails to remedy the breach for a period of 30 (thirty) days after a written notice by the other Party which specifies the material breach.

TERMINATION (CONT'D)

Consequences:

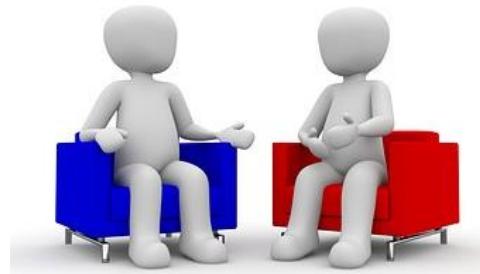
- I. any balances/amount lawfully due on termination shall be paid by either party to the other party within 7 (seven) days of termination of the Agreement.*
- II. all the confidential information shared by the Parties shall be returned to the respective Party.*
- III. shall immediately cease any use of the intellectual property.*



DISPUTE RESOLUTION

- Clear and unambiguous dispute resolution clause is very important.
- Should be drafted, specific to transaction at hand. Avoid boilerplate dispute resolution clause.
- In *SMS Tea Estates Pvt. Ltd. Vs. Chandmari Tea Company Pvt. Ltd.* (MANU/SC/0836/2011).

“A valid arbitration clause is separable from the main contract, and the invalidity of the main contract does not necessarily entail the invalidity of the arbitration agreement.”



DISPUTE RESOLUTION *(CONT'D)*

- In **Ashapura Mine-Chem Ltd ("Appellant") vs. Gujarat Mineral Development Corporation (2015 (5) SCALE 379)**, the parties entered into a MOU for setting up an alumina plant in Gujarat by way of a Joint Venture.
- The MOU provided for an arbitration clause in the event of parties' failure to settle disputes amicably.
- Subsequent to the signing of the MOU, the Respondent decided to approve the MOU subject to certain modifications. After considerable exchange of correspondence, the Respondent sought amendments to the original MOU due to major change in State policy. However, eventually the Respondent cancelled the MOU on the pretext that Appellant had failed to comply with the terms and conditions contained therein.
- Appellant sent a notice to resolve the dispute through arbitration but Respondent refused to concur.
- The Appellant filed an application under Section 11 of the Indian Arbitration & Conciliation Act, 1996 (**Act**) for appointment of Sole Arbitrator.

DISPUTE RESOLUTION *(CONT'D)*

- The Gujarat High Court dismissed the application for appointment of Arbitrator on the ground that the MOU never resulted in a complete contract, and accordingly held that no enforcement could be sought for the same. The Gujarat HC held that the MOU was "stillborn" as it did not fructify into a joint venture.
- The Supreme Court found that irrespective of whether the MOU fructified into a full-fledged agreement, the parties had agreed to subject all disputes, arising out of and in connection to the MOU, to arbitration. Such an agreement would constitute a separate and independent agreement in itself.



DISPUTE RESOLUTION (CONT'D)

“The laws of India shall govern the validity, performance and construction of this Agreement. The Agreement is subject to the exclusive jurisdiction of the courts of Hyderabad, India.

The Parties agree to use all reasonable efforts to resolve any dispute, controversy, claim or disagreement of any kind whatsoever between or among the Parties in connection with or arising out of this Agreement, including any question regarding its existence, validity or termination and this Clause, expediently and amicably to achieve timely and full performance of the terms of this Agreement.

If, the Parties fail to amicably resolve the Dispute within the 30 (thirty) days period, such dispute shall be finally determined and settled by arbitration under the Arbitration and Conciliation Act, 1996 along with the rules thereunder and any amendments thereto. Arbitration shall be conducted by a sole arbitrator. The sole arbitrator shall be decided and appointed mutually by both the Parties. The arbitral award shall be in writing and shall be final and binding on each party and shall be enforceable in any court of competent jurisdiction. The place of arbitration shall be Hyderabad, India. The language to be used in the arbitral proceedings shall be English. If, after such efforts, the Parties are unable to resolve such dispute, a Party may seek any remedy available under applicable law.”

DISPUTE RESOLUTION (CONT'D)

“Any disputes or differences which may arise between the parties out of, in relation to or in connection with this Agreement, or for the breach thereof shall be settled by arbitration. Each Party hereto shall be entitled to appoint 1 (one) arbitrator and the 2 (two) arbitrators so appointed shall appoint the presiding arbitrator. The Arbitration and Conciliation Act 1996 or any statutory modifications shall govern the arbitration thereof. The venue of arbitration shall be decided by the presiding arbitrator considering the dispute and convenience of both the parties. The language of arbitration shall be English language.”

STAMP DUTY

- Without adequate stamping a document cannot be given legal effect to and therefore does not have any evidential value.
- In case if there is any dispute or any legal case in court then the question of your answer will be in a hand of Magistrate that whether they will consider it valid or not. Magistrate can make it valid while applying Stamp Duty on your Agreement.
- In ***Om Prakash vs. Laxminarayan & Ors. (Civil Appeal No. 9032 of 2013)***, Plaintiffs filed a suit for specific performance of contract, possession and permanent injunction in respect of un-irrigated land.



STAMP DUTY *(CONT'D)*

- Plaintiff – properties in question were delivered to them on payment of the part consideration money in pursuance of the agreement to sell.
- Defendant – no agreement to sell was ever executed and possession given.
- During Trial – the agreement to sell was admitted in evidence by the plaintiff.
- Defendant – questioned the admissibility of the agreement on the ground of not duly stamped as per Article 23 of Schedule I of Stamp Act.
- The trial court held the agreement to sell to be inadmissible in evidence as it had not been sufficiently stamped.

STAMP DUTY (CONT'D)

- The Supreme Court held that

“an authority to receive evidence shall not admit any instrument unless it is duly stamped. An instrument not duly stamped shall be admitted in evidence on payment of the duty with which the same is chargeable or in the case of an instrument insufficiently stamped, of the amount required to make up such duty together with penalty.”

CONCLUSION

- A contract is not a compilation of standard terms, but a considerate replication of the understanding of the parties with regard to the purpose of the agreement, nature of services, form of performance, kind of consideration, obligations of both the parties and type of industry.

CONCLUSION

Type	Non Compete	Non Solicitation	Confidentiality	Indemnification	Termination	Dispute Resolution
Commercial Agreements	Depends	Yes	Yes	Depends	Yes	Yes
Employment Agreements	Depends	Very Important	Yes	Yes	Yes	Yes
Transaction Agreements	Depends	Yes	Very Important	Yes	Yes	Yes



Thank You!

Disclaimer

The content of this presentation is intended to provide a general information on the subject matter. This presentation shall not be treated as any legal advisory.