



Presentation on Drafting Commercial Contract – Term and Termination, Entire Agreement and Governing Law, Jurisdiction and Dispute Resolution

By:

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Topics

- Terms & Termination
- Entire Agreement
- Governing Law, Jurisdiction and Dispute Resolution



TERMS & TERMINATION

Term Clause

- Serves the simple, yet critical function of defining the period over which an agreement has legal effect.
- It establishes when the agreement begins to be effective and how long will the same last.
- It may include (i) renewal or extension rights, (ii) lock-in-period; (iii) termination rights, and/or (iv) rights that arise on or obligations that survive termination/expiration.

Key Points Under a Term Clause

(A) Start date and end date:

- This provision does not always specify an end date for the agreement's term, but they will always specify a start date.
- In some form of agreement, there might be contingency in determining the start date.
- For example, under the service agreement, there may be an effective date, however, the start date or the commencement date may depend upon the fulfilment of certain condition, for example – 'setting up the premises in accordance to the requirement for the provision of service'.
- In these cases, it is important to obtain copies of supporting documents, etc. that can confirm the exact start date-such as 'commencement date certificate'.

Key Points Under a Term Clause (*Cont'd*)

(B) Duration: Duration of the agreement can either be finite or infinite.

(a) Agreements having finite duration

- Specifies the length of the term in terms of months or years (or possibly even days or weeks).
- It is important to also note if any renewal language in the term clause or elsewhere in the agreement is present, including any automatic renewal language.

(b) Agreement having infinite duration

- Do not specify any end date
- The termination provisions to confirm when and how the contract can be terminated should that become necessary.

Negotiating 'Term' of the Contract

The factors to determine the 'Term' of the contract are as follows:

Trial
period

Investments and
Returns

Commencement
Date

Renewal:
Automatic or
in writing

Termination Clause

The provision allows for the contract to be terminated, or ended, under circumstances specified in the clause.

Modes of Termination must be included in a standard Termination clause:

1. Termination for convenience/mutual consent: by giving a reasonable advance notice;
2. Termination for cause:
 - ✓ due to Force Majeure Event;
 - ✓ due to Frustration of Purpose – Time Sensitive Agreement;
 - ✓ due to breach of Contract or inefficient performance;
 - ✓ due to fraud or misrepresentation.

Drafting Termination Clause (Cont'd)

Consequence of Termination:

It is very important to detail the consequence of termination under the 'Termination Clause'. The key points that may be kept in point to draft consequence of termination is below:

Penalty for earlier
termination

Monetary
damages for
breach of contract

Obligations with
regard to accrued
payments

Continuous
Obligations of
the parties

Treatment with
the confidential
information

Damages/penalty in lieu of Termination

- It is very important to incorporate a formula to calculate damages/penalty in lieu of termination for earlier termination or breach of contract that the defaulting party would be obligated to pay.
- The aggrieved party should be able to proof the damages and the loss of profits that it has incurred.
- *A.T. Brij Paul Singh v. State of Gujarat. – The Supreme Court held that “contracts undertaken only with an intention to earn profits, the party committing the breach would be liable for the contractor's loss in terms of expected profits.”*

Calculating penalty/damages

- *M.N. Gangappa v. Atmakur Nagabushanam Setty & Co. and Anr.* - The Supreme Court has held that the method used for computation of damages will **depend upon the facts and circumstances** of each case.
- In the assessment of damages, the court must consider only **strict legal obligations, and not the expectations**, therefore, the obligation of the parties shall be well written in the contract.



Tips to draft effective ‘Term and Termination’ clause:

- Effective Date / Start Date to be clearly defined;
- Period of the contract or its perpetual nature shall be clearly established;
- Mechanism of renewal, as applicable, must be clearly incorporated;
- Lock-In-Period, as applicable, must be incorporated
- Grounds of Termination shall be mentioned;
- Notice period for termination of the Contract must be clear;
- Consequences of Termination.

GOVERNING LAW, JURISDICTION & DISPUTE RESOLUTION

Governing Law

- The provision related to 'Governing Law' allows the parties to agree that a particular country's laws will be used to interpret the agreement, even if they live in (or the agreement is signed in) a different country.

While drafting the Governing Law clause, a party shall keep in mind the following:

Familiarity
with the law

Feasibility

Choose laws that will
work for business
benefit

Jurisdiction
clause

Jurisdiction

- Jurisdiction refers to where a dispute arising out of the agreement will be resolved.

While drafting the Jurisdiction Law clause, a party shall keep in mind the following:

Prime Location of business;

Cause of action takes place;

Place of business of the defendant;

Clearly express the intention to choose the jurisdiction of the court.

Jurisdiction: In Indian Contracts

- In India, the provisions of the CPC and the Indian Contract Act, 1872 have a bearing upon the enforceability of foreign jurisdiction clauses.
- Section 19 of CPC - Where a suit is for compensation for wrong done to the person or to movable property, subject to section 20 of CPC, the plaintiff has the option to institute a suit in either of the competent courts.
- Section 20 of the CPC stipulates that every suit that concerns a breach of contract is required to be commenced in the Court within whose jurisdiction the defendant resides or has place of business or the cause of action arises.

Governing Law and Jurisdiction (Cont'd)

- Choosing Governing Law and Jurisdiction:

Case	Choice of Governing Law and Jurisdiction	Impact	Absence of clause
Both the parties, (Party-A from Kolkata and Party-B from Hyderabad) to the contract are Indian	Laws of India; Jurisdiction: Hyderabad / Kolkata	Permitted	Choice of the aggrieved party, pursuant to section 19 of CPC.
	Laws of India; Jurisdiction: Karnataka	The jurisdiction would not be legal pursuant to CPC.	
Where one of the parties to the contract is Indian (Hyderabad) and the other is a foreigner (USA).	Laws of India; Jurisdiction: India	Permitted	Choice of the aggrieved party, pursuant to section 19 of CPC.
	Laws of USA; Jurisdiction: India	It's a grey area. However, it is advised to have the governing law subject to the jurisdiction of courts.	
Where both are foreign parties (Party-A from USA and Party-B from Australia)	Laws of India; Jurisdiction: India	Permitted. (Modi Entertainment Network v. W.S.G. Cricket Pte. Ltd (2003))	NA

Enforcement of Foreign Judgement In India

- Section 2(6) of the CPC defines “foreign judgment”.

Two situations for enforcement:

Incase of:

A reciprocating country (Aden; Bangladesh; Federation of Malaya (now Malaysia); Fiji Colony; Hong Kong; New Zealand, Cook Islands and Western Samoa; Papua New Guinea; Republic of Singapore; Trinidad and Tobago; UAE; United Kingdom of Great Britain and Northern Ireland.)

The enforcing party is required to file execution proceedings in India.

A non-reciprocating country

A fresh suit has to be filed before the relevant court in India for a judgement based on the foreign judgement.

Parameters for a foreign judgement to be enforced in India

- If it has been pronounced by a Court of competent jurisdiction;
- If it has been given on the merits of the case;
- If it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable;
- If the proceedings in which the judgment was obtained are in accordance to natural justice;
- If it has been obtained in good faith or by fraud;
- If it sustains a claim founded on a breach of any law in force in India.

Dispute Resolution Clause

- Litigations are not only costly but time-taking as well.
- Alternative Dispute Resolution Mechanism is important for the following reasons:
 - ✓ Maintenance of privacy;
 - ✓ Shorter time compared to litigation.
- However, it is not advisable to have alternate dispute clause in such agreements, where the breach of the obligation requires immediate relief, such as injunctive relief for breach of a Non-Disclosure Agreement.



Dispute Resolution Clause (*Cont'd*)

It is advised that the flow of dispute resolution clause be as follows:

- Amicable settlement: Must be time-bound;
- In the event of failure of amicable settlement, the dispute shall be referred to arbitration;
- Choice of arbitrator: Ad-Hoc or Institutional;
- Process of appointing arbitrator in case of Ad-Hoc;
- Seat of arbitration;
- Language of arbitration.

Dispute Resolution Mechanism: Arbitration

- In India, arbitration process is governed by The Arbitration and Conciliation Act, 1996 ("Act"), along with its rules.
- Stages involved in Arbitral Process:

Stage	Particular	Points to be noted
Stage 1	Arbitration Clause / Arbitration Agreement.	
Stage 2	Number of arbitrators – sole arbitrator or panel of arbitrators.	According to section 10 of the Act, the number of arbitrators must not be in even number.
Stage 3	Issuance of arbitration notice and the commencement of arbitration process. (Section 21 of the Act).	The arbitration notice has to be issued within 3 years from the date on which the cause of arbitration occurred.
Stage 4	In the event that the Parties fail to appoint arbitrators, the parties shall be required to move an application before High Court.	
Stage 5	Statement of Claim and Hearing	
Stage 6	Passing of Award	The awards passed by the arbitrators shall have binding effect to the parties, pursuant to section 35 of the Act.

Appeal to Arbitration Award

- An arbitration award may be appealed by the aggrieved party within 90 days' from the date of award passed under section 34 of the Act.
- The Court has the power to set aside the arbitration award if convinced for either of the following grounds:
 - ✓ The party was under some type of incapacity.
 - ✓ The arbitration contract is not valid under the law to which parties have been subjected to.
 - ✓ The party making the application for invoking the arbitration has not given proper request to the other party for the appointment of the arbitrator.
 - ✓ The award deals with the disputes not falling or comes under the submission of the arbitration or contains matter beyond the scope of arbitration.

Dispute Resolution: International Contract

It is advised to keep the following principals in mind while drafting Dispute Resolution Clause for international contracts:

- Feasibility;
- Clear intention to submit the dispute to arbitration;
- Agree with off-shore arbitration process, if feasible where court interventions are less, unlike in India;
- Identify the off-shore arbitration option – SIAC, ICC, LCIA, etc.
- If off-shore arbitration process is not feasible, opt for institutional arbitration in India.

International Arbitration: Indian Jurisprudence

- The enforcement of the foreign award is given under Part II of the Arbitration and Conciliation Act, 1996.
- India is the signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("NYC") as well as the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 ("GC")

Requirements of enforcing foreign awards:

- Original award or a duly authenticated copy in the manner required by the country where it is made.
- Original agreement or duly certified copy.
- Evidence necessary to prove the award is a foreign award, wherever applicable.

Parameters to enforce foreign awards in India

The enforcement of a foreign award may be refused if either of the following condition is proved:

- The parties to the agreement were under incapacity.
- The agreement in question is not in accordance with the law to which the parties have subjected it, or under the law of the country where the award was made (especially in case of foreign awards).
- There is a failure to give proper notice of appointment of arbitrator or arbitral proceedings or the party against whom the award was rendered was otherwise unable to present his case.
- Award is ultra vires the agreement or submission to arbitration.
- Award contains decisions on matters beyond the scope of arbitration.
- Composition of the arbitral authority or the arbitral procedure is ultra vires agreement.
- Composition of the arbitral authority or the arbitral procedure is not in accordance with the law of the country where the arbitration took place.
- The award (specifically a foreign award) has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which that award was made.
- Subject matter of the dispute is not capable of settlement by arbitration under Indian law.
- Enforcement of the award would be contrary to the public policy of India.

ENTIRE AGREEMENT

Components

1. Recitals

Provides the background of the parties and purpose of entering into the agreement

2. Purpose / Objective Clause

Focuses on providing the purpose for executing the agreement and also describes the engagement between the parties.

3. Obligation Clause

Provides the roles and responsibilities that each party will undertake under the agreement.

Components (*Cont'd*)

4. Consideration / Payment Clause

Consideration can be monetary or it may take the form of a promise to carry out a particular act (such as services, money, etc.). It also provides duration of payment (as following) and modes of payment (Cash, cheque, netbanking) :-

Duration

1. Time based payment – monthly, quarterly, yearly;
2. Progressive payments – on completion of milestone and receiving results;
3. Full payment on the entire work done.

Components (*Cont'd*)

5. Representation & Warranties Clause

Provides an underlying statement of fact by the parties, where if found misrepresented, the party has the right to seek compensation from the breaching party in future.

6. Indemnification Clause

In case breach of any provision by one party resulting in loss to another party, the defaulting party has to make good the losses caused to the non-defaulting party.

7. Confidentiality Clause

States that the confidential information exchanged between the parties cannot be shared with a third party. Also provide with the exceptions to it.

Components (*Cont'd*)

8. Intellectual Property Rights Clause

The parties state that the IP rights are sole and proprietary rights of one party and cannot be used by the other party as its own right or without prior consent of the former.

9. Term and Termination Clause

This provision provides duration of the agreement. It also provides on how the termination may occur in this agreement.

10. Survival Clause

It mentions the provisions which survives the termination. For example, confidentiality clause, indemnification clause, dispute resolution clause etc.

Bird's Eye-View

Clauses	Do's	Don't
Term	Clearly define the 'Term' – definite or perpetual	Missout incorporating the renewal mechanism.
Termination	Incorporate: <ul style="list-style-type: none">- Notification period;- Mechanism to terminate the contract;- Clearly define the causes of termination;- Consequence of termination	Incorporate: <ul style="list-style-type: none">- Unreasonable notification period;- Any cause against the public policy.
Entire Agreement	Clearly define: <ul style="list-style-type: none">- Purpose of the Agreement;- Obligations of the parties;- Payment Terms;- Inclusion of SOWs;- Overriding effect of previous negotiations.	

Bird's Eye-View (Cont'd)

Clauses	Do's	Don't
Governing Law and Jurisdiction	Choose the governing law and jurisdiction for the contract	<ul style="list-style-type: none">- Forget to establish the exclusivity of court's jurisdiction;- In case of Indian contract, choose courts against the provisions of CPC.
Dispute Resolution	Incorporate: <ul style="list-style-type: none">- Choice of governing rules;- Mechanism of appointment of arbitrator – Ad-Hoc or Institutional;- Seat of arbitration;- Language of arbitration.	Forget to: <ul style="list-style-type: none">- Incorporate time bound amicable settlement process;- Include alternate dispute resolution mechanism where immediate relieve is required to be sought in case of breach.

Few Issues Resolved

- **What if there is no 'Term' clause?**
 - The start date of the Contract would be determined by the date of signing of the Contract.
- **What if there is no 'Termination' clause?**
 - It is well settled that if a contract does not have a termination clause, the contract may still be terminated by giving reasonable advance notice to the other party.
- **What if there is no clause on 'Governing Law' and 'Jurisdiction'?**
 - The aggrieved party may choose to file in any court for damages, provided that the court must have jurisdiction based on the following parameters:
 - ✓ Place of business of the either party;
 - ✓ Place of residence of either party; and
 - ✓ Place where cause of action has arisen.

Few Issues Resolved (*Cont'd*)

- What if there is no 'Dispute Resolution' clause?
 - In the event that Dispute Resolution clause is incorporated, it is **mandatory** for the parties to abide by it, otherwise, the parties may **choose, at its option**, to refer their dispute to alternative dispute resolution mechanism.

THANK YOU

Disclaimer:

The content of this article is intended to provide a general guide to the subject matter and that the same shall not be treated as legal advice.