# UNDERSTANDING CONTRACTS FROM A BUSINESS PERSPECTIVE

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## ABSTRACT

Business models have been in existence ever since the beginning of time. Business has evolved from the traditional Barter system to today's intangible business models. It is pertinent to note that one integral principle that acts as a common ground for all of the business practices that ever existed, is 'Contracts'. Contracts find their presence in a wide range of applications, and one of it is business. The development of laws relating to contracts resulted in inclusion of various clauses in business agreements. The technicalities and nuances involved in each specific contractual clause have become very essential for respective type of business. Evolution of new types of contractual clauses is rather organic, as it is subject to changing human lifestyle and environment.

This manuscript deals with interpretation of contracts in the business world. It also discusses about influence and validity of oral contract. Different types of contractual clauses such as limited liability clause, confidentiality clause and its types are discussed in the manuscript. Further, procedure for termination of contracts and the remedies available for of breach of contracts is also highlighted. Moreover, emphasis has also been placed on international business agreements. The article also provides for reformative suggestions to the existing framework of business contracts.

The objective of this manuscript is to provide a cumulative understanding as to application of contracts in the business world. The authors have attempted to provide a wholesome coverage of contractual nuances involved in business agreements.

***Keywords:*** Business Contracts, oral contracts, confidentiality clause, limited liability clause, termination, non-compete, *force majeure*, *consensus-as-idem*

## INTRODUCTION

Agreements and understanding between parties are essential to build a relationship, be it professional or personal. Differences and disputes may prevail, but the only way to resolve them would be coming to a common consensus or standing. When two or more parties decide to enter into a formal agreement in order to prevent misunderstandings in the future or to draw out the dos and don'ts in order to protect them, it is called a contract. In other words, a better structured agreement is a contract.

When simple relationships could turn into formal ones by entering into a contract, isn't it possible that contracts and agreements are the most common form of pre-mature dispute resolution mode between businesses or corporates?

Contract law converges with every other law and administrative law or business law is no exception. Contracts is the only effective way to forecast and prevent disputes thus making it a pre-requirement for deals between parties entering into a business transaction or service. Running a business is a task of its own and involves a lot of legal formalities and compliance checks, starting from getting the director's identification number to getting the certificate of incorporation. This article is focused on viewing contracts from the eye of a business.

### *Where contracts meet business*

A contract is of utmost importance to a business as it is the document that clearly defines the relationship and sometimes it is the one that creates a relationship between parties and gives designations to the parties concerned such as investor-investee, owner-shareholder, partner - agent , employer-employee etc. This not only informs the parties about the positions they hold but also describes their roles and responsibilities in running the business.

Certain basic elements in a contract are of absolute necessity for the formation and functioning of an enterprise, thus making contract drafting a must. A business deal just like any other deal

is a two-way street and requires consideration and mutual consensus. When a contract is signed by both parties to the agreement, the consideration and the contribution made by each party to the completion of the deal is clearly laid down and agreed upon by both the parties. Secondly, a deal between two parties would include offers, counter-offers, negotiations and deal breakers. The only way to document the agreements and solutions would be a contract. Besides, contracts make it possible to prevent disputes in the future. Sometimes there are chances that the purpose for which a deal was entered into is forgotten leading to deviation in the roles and responsibilities, which is why it is extremely crucial to lay down the "purpose" of the deal in a contract. Contracts can only be enforceable if they have a legal purpose[i], thus providing a guarantee to businesses.

Further, contracts function as a detailed report of information and works as a complete record of negotiation. It spills out the exact legal information and background of both the parties and also throws emphasis on the terms of termination and closure in case the parties decide to end the deal. It provides confidentiality with respect to the sensitive information being shared by the parties and the protection of the same[ii].

## INTERPRETATION OF CONTRACTS

When it comes to businesses, contracts are an asset because they draw expectations from both sides, meet at an agreeable point and lock in the prices for the services rendered. Deals could be as simple as procuring materials , converting them, dispatching them for processing or selling products but if there's a contract in place, it could smoothen the process and pave way for the completion of the duties carved out for each party.

Negotiations are one of the most important pre-requirements for a contract. Business deals are nothing but negotiations that can have a huge impact on the business. Negotiations help build a relationship and convey requirements of the party to the other. While doing so, it could be understood that the duration and the nature of the meet is directly proportional to the outcome of the discussion. There could be potential for a win-win situation, if the negotiation is done the right way.

While negotiations play a huge part in a business deal, it is also the contract itself that helps the parties in coming to terms and consensus with each other, for a smoother functioning of the deal. Different kinds of contract have different impacts. A contract with a broad operational content is used to manage the distribution processes of all sides, whereas a contract with a considerable technical content tends to be used to monitor the output activities of the group.

***Interpretation of contractual rules in business terms***

As according to Article 61 of the contract law of PRC, when a contract is drafted and is being executed, if certain situations and conditions pertaining to the deal such as buying and selling, pricing, product approval, quality changes etc are not laid down in it then the parties have the right to add such terms, thus making the contract executable. In case, the inclusion of such terms makes it an unfavorable process then the contract can just be interpreted as it is. Whereas according to Indian Contract Law, no party can unilaterally alter the terms of the agreement. Altering can happen only with the consent of both the parties.[iii]

Similarly, disputes regarding interpretation of certain clauses and terms are also determined by the general rule of interpretation, where the words are construed in the general sense and not in the literal[iv]. The words should depend on and be interpreted according to the intent of the parties. The general and broader meaning should be extracted and not otherwise.

In a case deciding whether a contract is ambiguous or not, the court sees whether it is capable of more than one meaning when looked at objectively by a reasonably prudent person who has understood the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.[v]

The concept of *ejusdem generis* also plays a pivotal role in interpretation of clauses. When certain specific terms in a contract belonging to a class, category or type are followed up by general terms, then the meaning of the words must be taken in such a way where the preceding technical or specific term is taken into consideration.

In certain cases where there is ambiguity and confusion regarding settlement of disagreements, courts refer to precedents. It gives a clearer understanding of the issue and specific guidelines on addressing the issue at hand. Factors that were taken into consideration while deciding the

case will help in the interpretation of the judgment. In certain situations, the court will recognize and declare the normal practice being followed in that industry.

## ORAL CONTRACTS

Oral Contracts are ones that are created by way of oral communications that are not written down in any form. When oral communications satisfy all the necessary requirements of a legal contract, they transform to become oral contracts that are legally binding and enforceable before the court of law, subject to the jurisdiction and type of such contract. Such oral communications may consist of words, gestures and symbols through which two parties enter into a mutual understanding wherein the promise made by one is accepted by another. Thus, just like any type of contract, oral contracts also root from the basis of promise, acceptance, and *consensus ad idem*.

### *Validity of Oral Contracts in India*

Oral Contracts have equal importance in India just as any written contract, provided they satisfy the legal requirements. Section 10 of the Indian Contract Act mandates five requirements for any agreement to become a Contract, and they are: Free Consent of Parties, Competency of Parties, Lawful Consideration, Lawful Object and that those agreements are not expressly declared as void. It is pertinent to note that none of these conditions require a formal writing to be made on the matter, thereby not prohibiting the validity of oral contracts.

Unless any law that regulates the content of the contract mandates it to be written, or the parties themselves contemplate the writing of such contracts, they need not necessarily be written.[vi]The Supreme Court of India in ***Alka Bose v. Paramatma Devi***[vii], propounded the same with respect to oral sale agreements. The Court declared an oral sale agreement to have the same enforceability as the ones that were written provided it is in tandem with the provisions of The Contract Act.

While oral agreements are treated no different than the written, the evidentiary value of the two differ. When the very existence of an oral agreement is in question, it becomes difficult to prove

its contents. According to Section 92 of the Evidence Act, when terms of a contract or the law itself, requires it to be written, and when such a document is proved before the Court, no oral agreements between the parties relating to such instruments can be proved. However, if there exists a separate oral agreement that either relates to matters that are silent in such documents or constitutes a condition precedent to any obligation attached, then such oral agreements can be proved.

Therefore, it can be observed that the internal laws of India have adequate acknowledgement towards the validity and evidentiary value of oral contracts by subjecting them to certain set of conditions.

***Gentlemen's Agreement***

The term 'Gentlemen's agreement' commonly refers to informal unwritten oral agreement between parties. These agreements are non-legally binding, yet are fostered by facets such as peer pressure, social integrity and mutual trust. It is usually sealed by mutually accepted social gestures, such as a handshake.

It is pertinent to note that, despite its informal nature, gentlemen's agreement was often used as a form of international agreements. One such example is the 1907 Gentlemen's agreement between the USA and the Empire of Japan that addressed the problem of mistreatment of Japanese immigrants in America. The Congress never ratified the agreement yet, Japan agreed to stop issuing passport to individuals seeking to immigrate to the USA for the purpose of work and in return, President Roosevelt agreed to nullify the San Francisco Statute that differentiated Japanese students from the white students, and other measures to stop the discrimination against Japanese immigrants in USA.

## BUSINESS LIABILITIES WITHIN CONTRACTUAL AGREEMENTS

The term contractual liability refers to the liability that a party assumes on behalf of another under a contract.[viii]The liability clause in a contractual agreement protects and prevents the parties and entities from over compensating or remedying an unfavorable situation posed by

the other party. Businesses and organizations enter into contractual agreements that sometimes take up the liabilities of third parties as well and act as a guarantee to the transactions entered into by the third parties. The main obligations of the parties or guarantees would include defending and covering the claims of the third parties in compliance with the terms in the indemnification agreement entered into by the parties.[ix]

Now how important is it for businesses and enterprises to put a cap on their liability clause? Businesses and start-ups especially prioritize customer satisfaction primarily because these entities cannot lose clients or deals or afford to gain a bad reputation in the market for the services rendered. Many other firms take advantage of that fact and use it to their disposal by demanding a high amount of compensation for defects or issues arising out of the service rendered or goods provided, whereas the issue or the problem in a lot of the cases would not be proportional to the damage being caused or the terms of the agreement thus causing a huge loss for these contracting parties providing services.

Setting bounds and lines for the liability is an effective way to prevent the happening of certain events that are unfavorable to the contracting party. The party that is restricting its liability could foresee the extent to which a deal could break the party and take measures to defend and protect itself. It is crucial to do the above to ensure that neither of the parties are subject to injustice and unfairness. The insurance that these contracting parties may enter into may involve risks to a great extent, but the inclusion of a limitation in liability clause would minimize their threats.

The limited clause limits not only the amount of damages but also the types of damages that the suing party can claim from the other party.[x]It is almost impossible for the service provider to cover or compensate for all the damages faced by the injured party in a contractual agreement especially when a lot of these defects faced are not directly attributable to the producer or provider.

The limitation of liability clause might backfire and cause trouble to the contracting parties if it's drafted well or is not drafted with the consent of both the parties. The court will only validate those clauses that both the contractual parties agreed to. Otherwise the contract becomes void.

When using this kind of clause, it's essential that it's made clear to any other party and agreed upon, as the court will only uphold clauses that both parties were aware of. The Unfair Contract Terms Act 1977 was created for precisely this reason – to limit how easy it is to use limitations and exclusions of liability in commercial contracts. There are a number of ways that the clause could be constructed without it affecting the parties business or legal complexities.

***Incorporation of the clause***

1. The provisions must be included in the contract in such a way that it clearly lays down the exclusion or the cap of liability that the party will be responsible for. The clause should comply with the rules meted out in the Unfair Contract Terms 1977 and should be fair and square leaving no scope for arbitrariness or inequity or prohibited trade.

2. The terms used in the clause must not give rise to misinterpretation or doubts in the understanding and execution of the clause. Instead of Wordings such as exclude "any loss however caused", it would be better to use clearer phrasing such as excluding "any loss arising from willful intent or negligence"[xi]. The words and the manner in which a clause is phrased plays a huge role in its inference.

3. Another way to minimize the liability is by mentioning the maximum amount up to which the party will be liable in numerical figures or words. Example of such a clause- The amount that party B will be liable to shall not surpass 'X' amount irrespective of the damages and the consequences that party A has to face unless the clause or clauses of the agreement has been breached or violated or when the party has omitted to perform an act, or has performed a negligent act or under any other situation expressly provided for in the agreement. However this clause shall not include the damages arising out of deceit, fraud or misrepresentation by either of the parties.

4. Liquidated damages are always a must in a contract and are almost present in every contract. While estimating the damages, a portion of the damages also includes an amount that could arise as a result of non-completion of the obligations for which the contract was entered into. This could be considered as a way of laying down the liability of the contracting parties provided no additional penalty or a penalty clause is also added to the agreement for the same purpose.

5. Certain classes or categories of liability could be completely avoided or set aside. For example, "party X shall not be liable for any extra losses arising from a circumstance that could not have been foreseen by either of the parties to the agreement such as indirect losses, charges or expenses.

6. Another way to reduce liability is to fix a term period before which a claim can be brought up. If a problem or a request for rectification has not been brought up by the required party before the specified time mentioned in the product or service bill also commonly known as warranty, then the party to whom the bill has been produced need not compensate the other party in need.

## CONFIDENTIALITY AGREEMENT OR CLAUSE

Confidential information is information or data that is strictly shared between two parties on an agreement to not disclose or share it with a third party or a party that is not involved in the agreement or transaction. A confidentiality agreement is a legal agreement that binds one or more parties to non- disclosure of confidential or proprietary information.

When two or more persons materialize a contract with a promise to not disclose the information shared between them to any third party, then there comes into a confidential relationship. In such types of formal oral agreements, one party shares a crucial piece of information to the other party beholding a trust on them that the shared material will not be shared to any third party. This makes the information dispenser vulnerable to different kinds of risks. It gives rise to a fiduciary relationship, imposing an obligation on both sides to only work in the best interest of the parties involved.

A confidentiality agreement is a legal agreement that binds one or more parties to non-disclosure of confidential or proprietary information. A confidentiality agreement is often used in situations wherein sensitive corporate information or proprietary knowledge is not to be made available to the general public or to competitor[xii].

A confidentiality agreement between businesses usually pertains to information relating to transactions, financial figures, trade secrets, Method of functioning, important details regarding the Company etc.

***How does a confidentiality agreement/clause usually work?***

A confidentiality clause usually is brought about to prevent the dissemination of important information pertaining to any one or all the of the parties that would in turn affect or harm the business or functioning of either one of the parties.

When a contract is formed containing clause of confidentiality, and then if there is a breach, the contract will stand as evidence against the breach. However, when a party has developed a confidential relationship without entering into a contract, the vulnerable party does not lose the right to claim damages for the breach of confidence. It is best for businesses to share important and confidential information to each other before starting to operate on the deal. If any of the information marked as "confidential" is disclosed or shared to third party then the party that disclosed the information will be liable to the injured party. This is especially true in the case of businesses because the nature of the work and the data shared would be ideas and inventions or strategies of a party, crucial for carrying out the business.

***Types of Confidentiality***

Confidentiality, as mentioned before could be both a clause and an agreement of it's own depending on the parties, their intention and the relevancy of the nature of business.

***A. Non-confidentiality agreement***

An NDA (Non- disclosure agreement) is a written agreement between two contracting parties that prevents the sharing of important information, crucial to the business on both ends. This kind of agreement is known by names such as confidential agreement, secrecy agreement or proprietary information agreement.

NDA's are of three different types:

i.Unilateral NDA- This is an NDA that is signed by two contracting parties, but has only one party sharing confidential information.

ii. Bilateral NDA- A bilateral NDA is one that is entered into between two contracting parties and has confidential information being shared by both the parties.

iii. Multilateral NDA-This agreement is entered into between many contracting parties. In such an agreement, only one of the parties disclose important data and the other parties are bound to preserve it.

### *B. Prolonged confidentiality agreement*

A prolonged confidentiality agreement is entered into between parties for the protection of confidential information beyond the term or period of the agreement or the period for which the business was to be conducted. Even though the validity of the confidentiality obligations of the receiving party is not bound by the invalidated contract, but by the non-disclosure agreement signed between parties independently, this kind of agreement protects not just the information, but also the business as a whole.[xiii]

***Components of the clause:***

***1. Identification of Parties***

This clause ensures that the parties to the agreement are clearly identified and the distinction and exclusion of those who aren't parties is clearly laid down. The party that is disclosing the information is the disclosing party and the party that is receiving the information is the recipient. It should be decided as to whether the party is allowed to share such confidential information to other parties related to the agreement such as a partner or third party that this party is working with in the execution of this agreement.

***2. Defining Confidential Information***

An agreement or transaction between businesses involves different kinds of information. Now, the distinction between the private, confidential one is to be made from other kind of information that is already in public domain or is to the knowledge of the recipient party. The

data that needs to be kept confidentially needs to be clearly communicated to the other party throughout this clause. The list must be exhaustive and must include every piece of information that is to be kept only between the parties to the agreement. While the disclosing party would want to draft this in as broad a manner as possible to bring all sorts of information under this purview, the recipient would want to ensure that the information is clearly identified and is not of a very broad nature such that the recipient is aware of what can be disclosed and what cannot be disclosed.[xiv]

Orally discussed data could be incorporated in the list or the clause provided it's also communicated by a written form to the other party within a reasonable period of time.

***3. Scope of the Confidential Information***

An NDA or a confidentiality clause must always highlight the purpose of the confidential agreement between the parties. There are two parts to it. The first part is that the recipient of the confidential information has to keep it secret. This usually means that the recipient has to take reasonable steps to not let others have access to it.[xv]The second part is that the parties to the agreement cannot use the information for their own benefit or for solicitation or for any other purpose apart from the mentioned purpose in the clause or agreement.

***4. Term of the Agreement***

A confidentiality agreement just like any other agreement has a term to it. The agreement usually lasts until the project or the purpose for which the parties came together is accomplished. However, a confidentiality clause or agreement can never completely come with time constraints. Certain aspects of an agreement such as copyright, solicitation, territorial restrictions, trade or business secret breach, etc last for a longer period or sometimes this kind of information cannot be shared at all with no cap on time. It depends on the nature of the industry, the type of business, clients and the importance of the information being shared.

## TERMINATION OF CONTRACTS

Termination of a contract refers to the process by which either both the parties or one of such parties to the said contract withdraw themselves from their contractual obligations along with any responsibility, benefit or right conferred by such contract. A termination clause mentions the terms and conditions under which the contracts terminate, if such a situation should occur. Termination of a contract can be initiated even before the performance of such contract becomes due. On a very broad note, parties terminate contracts for two reasons:

i. Termination for convenience, wherein, the parties mutually agree to terminate the contract subject to the terms and conditions mentioned in it.

ii. Termination for cause, which is the reaction to any material breach of an agreement. What amounts to a material breach, depends upon the terms and conditions of the agreement.

***Modes of Termination under the Indian Contract Act***

The Indian Contract Act acknowledges the following modes of termination of a contract

***i. Termination by Performance***

A contract automatically terminates at the instance of performance of all the required contractual obligations, both expressed and implied in the contract, by the parties. Such performance should be complete to a degree of perfect precision without any room for ambiguity regarding such completion.

Business contracts drafted for the purpose of delivery of goods and service, predominantly concentrates on the fulfillment of the objective of the contract. In the case of ***Bolton v. Mahadeva***[xvi], the contract in question was with the objective to heat the house for which the contractor was specified with the obligation to install a heating system in the house. While the contractor installed the heating system, it failed to work. The contractor was denied payment on the grounds that his performance failed to satisfy the objective of the contract.

***ii. Termination by Frustration***

Frustration of contract refers to non-performance of the contract due to impossibility of performance. A contract terminates by frustration when the circumstance that prevailed during the drafting of contracts has changed to an extent that it renders the performance of a contract to be impossible. In such cases the parties are relieved of their contractual obligations. However, the change in circumstance should be substantial enough to change the very nature of the obligation.[xvii]

Certain instances wherein this doctrine of frustration applies are as follows:

a. Destruction of subject matter on the basis of which the contract was drafted

b. Change in law that renders the contract illegal

c. Death or severe incapacitation of a person, who entered into the contract in his individual capacity

d. Failure of the commercial objective for which the contract was drafted

e. Cancellation of the event for which the contract was drafted

However, the doctrine does not apply in cases where there is no change in nature of contract but there exists mere delay, increased expenditure or other such inconvenience in performance of the contract. Similarly, the doctrine does not apply to cases where the frustration is self-induced by one party upon another.

Parties include a *force majeure* clause in contracts wherein they anticipate circumstances that might render the performance of the contract to be impossible. In such instances, whether the contract will be frustrated or not, in such eventualities will depend upon the terms mentioned in the *force majeure* clause.

***iii. Termination by breach of contract***

For a valid breach of contract the underlying condition is to ensure that such breach is repudiatory. The conduct of a party is said to be repudiatory breach when it deprives the

innocent party of the whole or substantial benefit intended to be received by the performance of the contract.

Thus repudiatory breach is serious enough to affect the 'root' of the contract. They include breach of a condition or intermediate clause which intends to provide the substantial or whole of the benefit to a party upon performance of the contract.

***Anticipatory breach***

Anticipatory breach of a contract refers to those circumstances wherein one party expresses its intention of non-performance of the contractual obligation, or performs it in a way that is inconsistent with the original terms of the contract. It entitles the other party to terminate the contract. Anticipatory breach can be either expressed or implied. It need not be specified by words or writing, and it can be inferred from the conduct of the breaching party.

When one party commits an anticipatory breach, the innocent party may either wait for performance by another party after which the right to terminate is lost, or may sue the other party for damages without waiting for performance.

It is to be noted that a contract does not automatically terminate after breach. It has to be initiated by the party that has the right to terminate, by notifying the default party. The contractual obligations cease to exist only after the completion of termination. However, secondary obligations such as confidentiality, payment of damages in case of breach etc, continue to prevail despite termination.

***Wrongful termination***

Termination for breach of contract can be exercised only when the breach is repudiatory in nature. If the innocent party terminates the contract for a breach that is not repudiatory in nature it would amount to wrongful termination. This entitles the other party to treat the contract to be terminated and claim damages for the same.

***iv. Termination by agreement***

It is at the discretion of the parties to terminate a contract by drafting a subsequent agreement, wherein both the parties consent to terminate the original contract. The objective of the subsequent agreement should be to relieve the parties of their outstanding contractual obligation in the prior contract. The termination agreement should contain a fresh consideration and a deed releasing the parties from their pre-existing contractual obligations.

Sometimes, the terms of the contract can be formulated into a separate termination contract. This clause is known as the condition subsequent. The condition stipulates the events or series of events that would result in releasing the parties of their contractual obligations.

***Remedies for breach of contract***

The innocent party affected by the breach of the contract can file a suit against the defaulting party seeking remedies such as damages, rescinding of the contract, making the other party perform the contract, compensation for losses etc.

i. Damages

The innocent party affected by the breach of contract has the right to claim compensation in the form of damages as per Section 73 of the Indian Contract Act. While the liquidated damages are pre-determined by the parties itself while drafting the contract, unliquidated damages are decided by the court itself after considering the facts, circumstances and the degree of loss suffered by the innocent party. Such damages may be pecuniary or non-pecuniary. The objective of awarding damages for breach is to restore the position of the innocent party as it was before the formulation of the contract.

ii. Specific performance

The Court or other appropriate forum is entrusted with the discretion to compel the defaulting party to perform its contractual obligation. It is an equitable remedy that comes into operation when the contractual obligation is difficult to assess.

iv. Injunction

An order of injunction issued for breach of contract usually compels the other party to either performs an action or expressly prohibits it from performing an action. This remedy is also subject to the discretion of the court and it can be ordered on an interim basis or final basis.

## INTERNATIONAL AGREEMENTS

An international contract in simple terms refers to an agreement between two or more countries or entities from two different countries. The contracts are considered "international" when the parties concluding the agreement come from two or more different countries.[xviii]

An International Commercial Contract must answer the questions of where the Jurisdiction would be, in case of any disputes and the legislations that govern the agreement.

The United Nations Commission on International commercial contracts released a guide on international commercial contracts in 2021, that had a broad perspective of contracts, it's definition, constituents, the aspects covered by the instruments and contracts.[xix] Some of the most common and prevalent international agreements include the sales contract, distribution contract, agency contract, supply contract, manufacturing contract, services contract, joint contract, alliance/franchise contracts.

Insurance contracts and contracts transferring or licensing intellectual property rights between professionals also fall within the compass of International contracts, as the agreement is between parties from two different states.. For example, a contract between a German entrepreneur and a Pakistani commercial agent constitutes an international trade contract.[xx]

### *Constituents of an international contract*

An International Contract must have to consider various aspects and dimensions of an agreement between the binding nations or entities. Some of the most important constituents of an international agreement would be determining a common jurisdiction for both the parties and including a separate, specific clause for it. The clause mentioned must also include details pertaining to the Alternative Dispute Resolution Mode being adopted by the parties.

The mode of resolution chosen requires the application of a set of rules and norms that govern the resolution process. The laws and regulations may vary for every resolution depending on the nature of the issue and the parties. It is thus essential to clearly define the acts, statutes and its provisions in order to carry out the resolution process.

Next, the agreement must include a specific clause or additions to clauses for the ramifications, in case of breach by any party or must include the possibility of the happening of certain events and the different ways of dealing with such issues. These kinds of resolution methods are very conditional upon the occurrence of the event, but it is very important to predict and forecast the happening of the event.

When international parties and bodies come into play, the terminology used may differ and the parties may tend to misinterpret or misunderstand the clauses due to these terms and the context they are being used in. Sometimes there are definitions or a dictionary of a separate kind for specific agreements. For example, the *incoterms* rules are world's essential terms of trade for sale of goods whether it's for filing orders or other legal procedures.[xxi] The definitions and interpretations clause in such agreements must be crystal clear in order to avoid disagreements and battles.

Similarly, another potential issue would be the non- compliance with the legal formalities. Each state may have its own set of regulations that has its own mechanisms and formalities. For example, the manner in which a suit is filed in India may be very different from the way in which it is filed in Saudi Arabia. Notarization is also another way of dealing with such diverse regulations. The purpose of the notarial act is to provide authentication in the form of documentary evidence that will be acceptable in the receiving jurisdiction.[xxii]

The particular type of arrangement in question and the additional issues require consideration when entering such transaction in a multi-jurisdictional context.[xxiii] Thus an agreement when being drafted must carefully examine such special situations and circumstances.

***Importance of international contracts***

1) Protection

The laws and regulations governing these states may be different from one another and if they are not looked into thoroughly, disputes may arise due to misunderstanding and misinterpretation of the provisions of the acts and statutes. Sometimes this is so oblivious that the actions of one party may be considered as a contractual breach by another party and the breaching party may be sued for the same, even though the party was totally unaware of the situation. Thus, an in-in-depth negotiation and analysis of the laws between the states is necessary to prevent legal complications.

2) Insurance

Insurance is crucial for international contracts as there is greater risk that the goods will be lost or damaged in transit. Insurance against goods and property is best because it reduces risk and would come handy if some danger or harm arises to the property and the goods.

Product Liability insurance defends the owner of a product in case, any other consumer or user is injured through the usage of the product. Product liability provides protection from this risk including the monetary expenses and costs.

Cargo Insurance is another type of international insurance that is important for parties that are involved in deals and businesses with international actors and players. This insurance is usually acquired just to prevent any transit related damage to the goods or the parties involved in the process.

Similarly Professional indemnity insurance covers the parties engaged in international commerce in case one provides negligent or sub-standard services or advice that caused injury and led to consequences in some or the other way.

Trade Insurance is another type of insurance that covers a party for any bed debt or fraud. While these clauses are being drafted and added to the contract, it's implementation and enforcement becomes a smoother process.

3) Transit Regulations

Responsibility for ensuring the smooth transport of goods should be specified in an international contract for sale and purchase that will be provided by one or a number of modes of transportation i.e sea, air, land or a combination. Each mode of transportation is governed by international transport conventions enacted into domestic law, setting out the rights and obligations between the buyer, seller and carrier. For instance, the major conventions relating to the international carriage of goods by sea are: The Hague Rules, and SDR Protocol scheduled to the Carriage of Goods by Sea Act 1971.

***Determining jurisdiction and applicable laws***

When parties enter into a deal concerning cross-border parties, it is important for them to know which law will be applicable for their legal redressal, as provisions governing contractual obligations can differ substantially among countries, and differences in domestic laws may have a negative impact on the resolution of a dispute. However, an established rule is that an agreement entered into between parties from different states pre-determines the legislations that it will be applying and enforcing as the "proper law".

The parties have the discretion to decide the proper law for the contract by determining the law that has the most proximate connection to the parties and the nature of the contract. This proximity is determined through various factors. A few of the most important influencing factors include the parties nationality, domicile, the contracting state (state where the contract was signed), the state where the contract is to be executed, the party that receives the payment, and the currency in which the payment is made. The proper law of contract is the system of law that is the basis of the applicable governing law for international agreements and contracts.[xxiv] Determining the appropriate legislation by this proximity principle for choosing a suitable resolution mechanism is an implied way of preventing disputes regarding finding out the governing laws and regulations.

The court may imbibe the explicit choice of validating law by reason that the parties had intended their contract to be valid from the beginning and not void, when an agreement or a particular clause in an agreement is valid on one nation and invalid in another. For example, in ***re Missouri S.S.Co,***[xxv], there was an exemption clause in a contract that was void under the law of Massachusetts, however, the same was valid in English law. Thus, it was held that the

English law was the proper law, as the parties must have intended that their contract as well as the exemption clause in question must be valid.[xxvi]

Parties may also abide by existing sets of norms developed primarily by the international business conventions itself, based on custom, practice and commonly accepted legal principles. Such is the case when parties come to a consensus that their agreement is to be governed by the *lex mercatoria* (i.e. law of merchants) or by general principles of law. This approach is termed as *Lex Mearcatorio*.

The parties in conflict have the right to decide the applicable regulations and also the forum that will be hearing the case. In the circumstance, where the party has not determined the suitable law for redressal, *elegit judicem elegit* comes into play.[xxvii] The principle states that the tribunal chosen speaks of the law being chosen i.e. once the forum for resolution has been chosen, the governing legislation is implied.

The contract and its dispute resolution mode i.e. arbitration in the case at hand would not be considered valid, if the parties had chosen to go through the court system. Thus, it is easy to construe the contract in the language which could be used as an indication that the contract or that term of the contract was to be governed by the law of a particular country.

When the question of whether the parties to a dispute are allowed to choose to be governed under any legislation, of their choice, it was stated that the choice of proper law must be bonafide and legal. It must also not be against public policy .However, it was later upheld and stated that there is no business for another law to be applied when the governing law is clear and is explicitly mentioned.

## CONCLUSION

Business Contracts have evolved over time around the globe and India is no exception to it. The Indian Contract Act, though one of the oldest, is known for its extensivity. In recent times, with the world being struck with the Covid-19 Pandemic, the *force majeure* clause has become the limelight. Every agreement includes a *force majeure* clause thereby indicating the pandemic

to be an unforeseeable circumstance preventing the fulfillment of the contractual obligations. The inclusion of the clause also pinpoints the gradual transformation of contracts with changing circumstances.

However, the existing system regulating contracts requires a revisit to fit the contemporary times. Creation of contracts through digital communication is rather a new arena that the existing law does not specifically acknowledge. Effectuating of E-contracts and E-signatures also opens paths for other technological inclusions in contracts. Therefore, the Indian Contract Act, should include provisions for regulating digital contracts.

Further, after the enactment of the said Act, there are other laws that regulate various aspects of contracts, such as the Information Technology Act, Negotiable Instruments Act, The Companies Act, The Partnership Act etc. Yet, there is a need to create a cumulative and comprehensive contract law that encompasses the contractual facets involved in other laws as well.

Another reformative suggestion would be that a contract could be ambiguous if the terms and the conditions of it are not interpreted in the manner implied by the drafting party. This may lead to confusions and disputes and may not satisfy the principle of *consensus ad idem*. Thus, it should be mandated that when any word with multiple meanings is added to a contract, the drafting party must also specify the intended meaning of the said word.

Lastly, reasonable recognition of non-compete clauses is necessary. Section 27 of the Indian Contract Act, declares a contract to be null and void if it contains a non-compete clause. However, IT Businesses and companies seek to enforce the clause to protect their proprietary rights and confidentiality. Therefore, only a reasonable restriction and not an absolute restriction could be conferred in this regard.

## ENDNOTES

[i] Available at https://www.upcounsel.com/legally-enforceable-contract
[ii] Available at https://www.mondaq.com/india/privacy-protection/720496/confidentiality
[iii] Available at https://www.lexology.com/library/detail.aspx?g=fa2fb547-5828-419a-bd3b-4ef01b612643
[iv] Available at https://blog.ipleaders.in/rules-interpretation-statutes/

[v] In re MOTORS LIQUIDATION COMPANY and Ors v. United States Department of the Treasury and Export Development Canada., 460 B.R. 603 (2011).

[vi] Nanak Builders and Investors Pvt. Ltd. v. Vinod Kumar AIR 1991 Delhi 315

[vii] Alka Bose v. Paramatma Devi & Ors. 2009(2) SCC 582

[viii]Available at https://www.thebalancesmb.com/what-is-contractual-liability-462636

[ix] Available at https://www.nolo.com/legal-encyclopedia/indemnification-provisions-contracts.html

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[xv] Available at https://www.forbes.com/sites/allbusiness/2016/03/10/the-key-elements-of-non-disclosure-agreements/
[xvi] Bolton v. Mahadeva, [1972] 2 All ER 1322

[xvii] National Carriers Ltd v. Panalpina (Northern) Ltd [1981] AC 675

[xviii] Article 1(1) of the United Nations Convention on contracts from the international sale of goods
[xix] Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/tripartiteguide.pdf
[xx] Available at https://www.giappichelli.it/media/catalog/product/excerpt/9788892114838.pdf
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[xxii] Available at https://www.lexisnexis.co.uk/legal/guidance/notaries-notarisation-notarisation
[xxiii]Available at https://www.lexisnexis.com/uk/lexispsl/commercial/document/391297/5GBR-K7F1-F186-6084-00000-00/International_contracts_overview
[xxiv] Bonython Vs Coomonwealth of Australia , [1951] AC 201; [1951] ALR 37
[xxv] In re Missouri S.S. Co., (1889) 42 Ch.D 321
[xxvi] Available at https://blog.ipleaders.in/choice-laws-international-contracts-indian-jurisprudence/
[xxvii] Available at https://www.scconline.com/blog/post/2021/03/09/commercial-contracts/