



MODULE 1

BASICS OF CONTRACT DRAFTING

INTRODUCTION

The contract is that the most vital document to ascertain a legal relationship between parties, it contains terms and conditions which are framed by the individual to form a legal relationship. The contract is the document accepted by each party to realize the promise of a contract, it is deemed as a foundation of every legal relationship. Contract plays a very important role in avoiding mistakes, misunderstandings. To avoid such cases, drafting of the contract is needed by each party to abide by the consented rules, to prevent conflicts between the parties and forestall conflicts contract is very important. it includes the specific clauses, terms, and conditions that are expressed as per the needs of the parties to the contract.¹

After the contract is being drafted it must be affirmed and signed by the parties, and most importantly it must be registered. Any deviation of contract rules can cause breaching the contract.

After the completion of the contract, parties should give a pre-review to the contract in this both the parties review the contract, analyze the terms, condition, and clauses that are mentioned in the contract before signing the document and entering into the agreement, the importance of contract review is that it can help to solve many problems and issues at an early stage.

Contracts are of two types, oral and written, The oral contracts can be deemed as a system of understanding between the parties, in this both the parties agree to terms and condition orally, as nothing is in recorded form, therefore they are difficult to prove in the court and difficult for the party to get compensation. On other hand in the written contract, both the parties expressly write all the terms and conditions of the agreement. Hereby it is safer than the oral agreement.

¹ Kdaga, Basics of contract drafting, Legal Service India, <http://www.legalserviceindia.com/legal/article-3044-basics-to-contract-drafting-and-contract-review.html>



ALL INDIA LEGAL FORUM

DOCUMENTS

A document could be understood as a type of information provider, it can be written or electronic. It defines the basis of the contract and contains the duties, careful description, specifications, procedures, and alternative conditions. The document includes complete information about the work or service. It is a legally binding document that establishes an agreement between two parties and could be enforceable in a court. A document could also be wrongfully binding or not. A legal binding has named a contract. A document is created wrongfully binding once it's signed punctually by each party. While not the sign of a document, a document can not be binding above within the court of law.

CONTRACT

A contract is an agreement between two or more persons making rights and duties that is enforceable by law. As per Pollock, the contract is "Every agreement and promise enforceable at law could be a contract"². Salmond defines a contract as "A contract is An agreement making and process obligation between two or additional persons by that rights area unit non-heritable by one or additional to acts or forbearance on the part of others"³. As per Section 2(h) of the Indian Contract Act, 1872, An agreement that's enforceable by law is named a contract⁴.

ELEMENTS OF A VALID CONTRACT

The essential components of the contract area unit as under:

- **Proposal and Acceptance**- In order to make a contract there needs to be two or more parties. It is mandatory that the offer and the acceptance are legal, the term lawful means that the offer and acceptance must satisfy the requirements of Indian contract act 1872. Until and unless such legal conditions with regard to the offer and the acceptance are satisfied the agreement does not become enforceable.

² Vikas Kumar, Indian Contract Act, CCS University,
https://www.ccsuniversity.ac.in/ccsu/Departmentnews/2020-08-25_171.pdf

³ Vikas Kumar, Indian Contract Act, CCS University,
https://www.ccsuniversity.ac.in/ccsu/Departmentnews/2020-08-25_171.pdf

⁴ Indian Contract Act, 1872, Section 2(h) (India)



ALL INDIA LEGAL FORUM

The offer or proposal is defined under *section-2(a)* of the Contract Act. And *Section-2(b)* of the Act provides that when an offer is accepted then it becomes a promise.

The acceptance must be communicated in an express or implied mode. The offer may be express or implied but the intention to form a contract must be there and such offer must be communicated.

In the case of *Lalman Shukla v Gauri Dutt*⁵ it was stated that, Mere knowledge of the contract does not constitute acceptance, it must be expressed as was held in the case.

- **Lawful Object** – the opposite essential of a sound contract is that the lawful thought and object. Lawful object implies that the agreement ought to be created for a lawful purpose and therefore the objective that the parties are unit creating an agreement should not be fallacious, illegal, immoral, against public policy. Whereas, lawful thought suggests that one thing reciprocally. In alternative words, it's the value paid by one party for the promise of the opposite. AN agreement is enforceable only. The agreement contains lawful thought and object.

In the case of *Allen v. Rescous*⁶ it was held that, “The agreement made was actually of assault, which was illegal and fell in the domain of injury to a person. The court held the agreement void, as the object of the agreement was unlawful. The court dismissed the agreement due to its tortuous character

- **Lawful consideration** - Another essential of a valid contract is the presence of consideration, the section 2(d) of the contract act define consideration, as *When at the desire of the promisor, the promisee or any other person Has done, or abstained from doing something; Or Does or abstains from doing something; Or Promises to do, or to abstain from doing something; Then such act, abstinence or promise is called a consideration for the promise*⁷. it is something in return. An agreement is enforceable when both the parties get something and give something.

⁵ Lalman Shukla v Gauri Dutt 1913 40 ALJ 489

⁶ Allen v Rescous (1676) 2 Lev 174

⁷ Indian Contract Act, 1872, Section 2(d)



ALL INDIA LEGAL FORUM

The consideration should be real and substantial, it does not need to be adequate. One of the main element in consideration is that it should be lawful nature. Section-25⁸ states that any contract without consideration is void as it is considered the essence of a contract.

In the case of *Currie v Misa*⁹ court defines consideration as ‘a valuable in sense of the law it may consist either some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other part. If the proposal is not supported with any money such proposal will be nudum pactum (a bare promise) and is not enforceable by law.

- **Free Consent** – Sec. 13¹⁰ of the contract act, it defines consent as ‘*Two are more persons are said to consent when they agree upon the same thing in the same sense*’. This is also called as Consensus ad idem. For a valid contract it is necessary that the consent of parties to the contract must be free. In the case of absence of free consent, the contract is void. As per Sec. 14 of the Indian Contract Act, free consent is the consent which is not obtained by coercion, undue influence, fraud, misrepresentation and mistake¹¹

*Janakiamma v Raveendra*¹² in this case, it was held that “ the provision related to a mistake has been mentioned from section 20 -22¹³ of the Act. there are two types of mistake one is the mistake of facts and the other one is a mistake of law. The mistake of law is prohibited and in case of mistake of facts, the court generally declares the contract void

- **legal document**- According to the Contract Act, The contract can either be oral agreements or written agreements. The contract act does not require that a contract must be in writing to be valid, The act has specified that the agreement must be made in writing. Although in practice, it is always in the interest of the parties that the

⁸ Indian Contract Act, 1872, Section 25,

⁹ *Currie v Misa* (1875) LR 10 Ex 153; (1875-76) LR 1 App Cas 554

¹⁰ Indian Contract Act, 1872, Section 13

¹¹ Indian Contract Act, 1872, Section 14

¹² *Janakiamma v Raveendra*, AIR 1981 Ker 205

¹³ Indian Contract Act, 1872, Section 20-22,



ALL INDIA LEGAL FORUM

contract should be made in writing so that it may be convenient to prove in the court. However, a verbal contract if proved in the court will not be considered invalid merely on the ground that it not in writing¹⁴

In the case of *Sheela Gehlot v. Sonu Kochar & Ors Delhi High*¹⁵ Court observed that “oral agreements are valid and enforceable and there could be no dispute about it, unless there is anything which needs to be written. Further as in a contract, there has to be some proposal and acceptance necessarily. The validity of an oral agreement cannot be questioned. A written agreement is considered important because an oral agreement cannot be produced as an evidence before the court. The burden of proving the oral agreement lies upon the party who claims to consider such agreement in existence

- **Capacity** - Each party must be fully able or have the legal capacity to enter into the contract in order for it to be considered valid. For instance, you cannot enter into a legal contract with a three-year-old. Both parties must be of their right mind in order to form a contract, so a valid agreement could not take place if one of the parties is under the influence of any mind-altering substance.

PURPOSE OF CONTRACT LAW

The purpose of legal philosophy is to produce a framework inside that people will freely contract. The contract binds the parties of the agreement and provides the remedy just in case of breach of contract. It provides info regarding the aim, parties, and nature of the contract. Hence, the fundamental purpose of the contract is to shield the interest of parties and assure justice, once any wrong happens.

INCOMPLETE CONTRACT

An incomplete contract could be a contract that fails to complete the total conditions of the contract. it does not specify actions and payments, this happens once catching parties leave gaps and ambiguity within the terms, like once parties fail to specify their rights, duties, and

¹⁴ Vinayak, All contract are agreements but all agreements are not contract, <https://www.lawyersclubindia.com/articles/all-contracts-are-agreements-but-all-agreements-are-not-contracts-10307.asp>

¹⁵ Sheela Gehlot vs. Sonu Kochar & Ors 2006(92) DRJ 498



ALL INDIA LEGAL FORUM

broken quantity. This can help to fill the gaps by negotiation, convention, or formal dispute resolution procedures such as courts and arbitration.

OVERVIEW OF INDIAN CONTRACT LAW, 1872

The Indian Contract Act, 1872 acquire existence on Sep 1, 1872, within the whole of Asian country except Jammu and Kashmir. The Indian Contract Act, 1872 occupies the foremost necessary place in law. While not legal philosophy, it would not be doable to hold on to trade, business, and any activity which has provided and thought. The Indian contract Act, 1872 is split into major elements like from Section 1 to 75 the overall Principles of contract, Section 124-147 deals with Contract of Indemnity and Guarantee, Section 148-181 is regarding the contract of delivery and Pledge, Section 182-238 deals with Agency.

CORE PROCESS OF CONTRACT

A catching method could be a series of tasks and activities, outlined otherwise by every individual company. thus whereas catching, sure steps ought to be followed:

1. Perceive the catching downside
2. Complete analysis and establish necessities. this could embody specifications, drawings, statements, or documents.
3. Complete analysis of patrons or sellers.
4. Perceive terms and conditions, future necessities.
5. Agreement on final value and terms, and finalized the contract
6. Handle, manage and talk terms any claims of contracts.
7. Brace oneself for proceedings, if necessary.

IMPORTANT CLAUSES IN COMMERCIAL CONTRACT

A commercial contract may be a lawfully binding agreement between two or a lot of parties. The industrial contract could also be oral or written, however a lot of preferred may be a written contract. An advert contract explains what all parties are obligated to try and do so as for the contract to stay valid and what the repercussions parties ought to fits.



ALL INDIA LEGAL FORUM

Important clauses within the industrial contract are-

- **Confidentiality** – once two or a lot of businesses enter into a contract. the most clause is that individuals ought to maintain confidentially regarding the contract. This clause prevents the outpouring of necessary info regarding the contract.
- **Force Majeure** – The phrase 'Force Majeure suggests that 'a bigger force'. This clause's importance is that it protects parties from circumstances that arise on the far side of everyone's management. This clause is very important to confirm that associated failure to perform thanks to such an unpredictable disruption isn't thought of as a breach of contract.
- **Jurisdiction** – these days, cross-border transactions are fairly routine, each within the domestic and international sense. once the parties to a contract are situated in additional than one state or additional than one country, there's ambiguity concerning jurisdiction. Thus industrial contract ought to specify the state which can have jurisdiction over the agreement.
- **Dispute Resolution** – these days disputes that arisen in contracts are solved by arbitration. It's currently common to follow for companies to incorporate associate arbitration clauses. This is often less expensive also as the most used methodology to resolve disputes.
- **Damages** - these days industrial contracts embody clauses associated with damages. within the liquidated damages clause, the planned quantity is enclosed, issues arise wherever there are disputes arise thanks to unliquidated damages.



ALL INDIA LEGAL FORUM

WHAT IS DRAFTING

Drafting is an outline of a document or of something that needs to be done, it refers to the act of writing legal documents. Drafting present a brief knowledge of the situation and the issue.

There are some basic sections to be mentioned while drafting, it is a step by step inclusion of specific clauses, terms and conditions that are expressed as per needs and wants of the party to the contract. while forming a draf of a contract one must include various issues related to the subject of contract, goods to be manufactured, amount of consideration, indemnity and dispute resolution clause.

WHY AGREEMENTS ARE DRAFTED?

Agreements square measure was written to suppose and communicate well. it's vital to acknowledge the aim that a legal instrument needs to serve. An agreement ought to be written in such the simplest way that it unconditionally specifies the legal issue and also the remedies wanted. An agreement contains the principles, orders, and damages by the breach of the contract; it's vital to draft an agreement that contains legal problems, statements of the shopper, and also the remedies wanted if any.

HOW CONTRACTS ARE DRAFTED?

Contracts square measure written by a professional person having support skills. The written contract should be original, free from plagiarism because it creates a decent impression on the shoppers. The written contract ought to contain each detail regarding the contract. There square measure some steps that require to be unbroken in mind whereas drafting a contract.

The foremost vital purpose for drafting a contract is to determine |to spot} the aim or identify what the item of the contract is. hear the shopper fastidiously and verify with him to check what he precisely needs.

Whereas drafting contact, it's vital to draft a contract-free of loopholes. Each clause has to be weighed and measured and extremely emended.



ALL INDIA LEGAL FORUM

The language has to be consistent, precise, simple, and free from error. It should conjointly use correct punctuation. This makes the parties and the authority decide a dispute concerning the contract perceive the terms of the contract.

Attempt to cover all the attainable circumstances that will affect the contract. This can facilitate safeguarding the client's interests.

Continuously review the contract for any errors, punctuation errors, info errors, reference errors. It's constantly judicious to own a second set of eyes to do proofreading and mental health check of any documents.

POINTS TO REMEMBER WHILE DRAFTING

- **Preamble** This clause of the part describes the identities of the parties, the dates of the agreement, the time, and the place of the formation.
- **Recital**
This part is a declarative statement of facts and intention, it provides the basic text, structure, and context of the transaction.
- **Subject matters of contract**
This part of the contract defines all the matters on which the contract is being made between the parties.
- **Definitions of Sections**
This defines the different sections which governed the contract.
- **Date of making, time of completion, and validity of the contract**
The time of effect and completion needs to be mentioned, as it defines the time when the contract is signed and contractual rights and obligations begin. The time of completion helps the parties to finish the contractual liability within a stipulated time. Whereas the validity period determines the time interval in which the contract will apply.
- **Consideration and payment terms**
This section provides the consideration, amount to be paid, and the terms in which the payment has to be made by the parties.



ALL INDIA LEGAL FORUM

- **Risk allocation**

The two parties form an agreement on different scenarios and if one party finds that the other party has breached the contract then this clause provides the party's right to indemnification.

- **Confidentiality**

According to this clause, both parties can agree on keeping the terms and conditions of the contract confidential.

- **Termination clause**

This provision of this clause helps the parties to terminate the contract due to failure to fulfill it, this clause helps the party to reduce ambiguity.

- **Miscellaneous provision**

Certain provisions are kept at the end and are useful in case of disputes.

WHAT IS AGREEMENT

An Agreement may be mutual consent for the completion of the in agreement task between the parties. it's the meeting of the minds of parties to try to to a selected act or omission of the act. It may be written or oral, however, an official document is additionally desirable. In an agreement, it's not necessary that the item Associate in Nursing thought ought to be legal; parties will create an agreement for amerciable objects and thought. there's a standard confusion between agreement and contract, however each area unit different. Section 2(e)¹⁶ of the Indian Contract Act, 1872 defines agreement as "Every promise and each set of guarantees, forming the thought for every different, is Associate in Nursing agreement", and Section 2(h)¹⁷ of Indian Contract Act, 1872 defines a contract as "An agreement enforceable by law may be a contract".

An Agreement is typically an off-the-cuff document between parties to try to do or to refrain from doing a selected act. there's no want for thought in the Associate in Nursing agreement. Agreements aren't wrongfully enforceable. Whereas, Contracts area unit formal documents

¹⁶Indian Contract Act, 1872, Section 2(e)

¹⁷ Indian Contract act, 1872, Section 2(h)



ALL INDIA LEGAL FORUM

between parties for the completion of a task or omission of a selected act. Contracts are unit enforceable in law.

VALIDITY OF AGREEMENT

All agreements aren't enforceable by law; solely valid agreements are unit enforceable by law. An agreement in a Nursing agreement may be command valid solely when:

1. Lawful object and consideration-
2. Parties should be competent to enter into an agreement
3. Free consent
4. should be created for thought
5. Not expressly declared to be void

Drafting in an exceedingly easy sense means that the writing of legal documents. It refers to the act of writing legal documents. It presents a piece of short information regarding the numerous facts of truth or issue. The drafting needs tons of skills. A properly written document aims at accuracy and truth. Drafting of legal documents states the facts, law in question regarding the case.

TYPES OF CONTRACT

As per Section 2(h)¹⁸ of the Indian Contract Act, 1872, the contract is an agreement that is enforceable by law. A contract is an agreement between two or more persons creating rights and duties which is enforceable by law.

Types of contract –

1. **Express contract** – Section 9¹⁹ of the Indian Contract Act, 1872 defines, when proposal or acceptance of any promise is made in words, the promise is expressed.
2. **Implied Contract** – According to Section 9 of the Indian Contract Act, 1872, when proposal or acceptance is made otherwise than in words, the contract is said to be implied.

¹⁸ Section 2(h), Indian Contract act 1872

¹⁹ Section 9, Indian Zcontract Act 1872



ALL INDIA LEGAL FORUM

3. **Void Contract** – A void contract is a contract that is unenforceable from the starting of the contract. It is treated like it was never created and becomes unenforceable in court.
4. **Valid contract** – Valid contract is the contract when all the elements of a valid contract as per the Act. Elements of a valid contract are offer and acceptance, lawful consideration and object, free consent, written agreement and not expressly declare to be void.
5. **Voidable contract** – Section 2(i)²⁰ of the Indian Contract Act, 1872 defines, voidable agreement which is enforceable by law at the option of one or more parties but not at the other or others' option voidable contract. Generally, when consent is taken by coercion, misrepresentation, fraud the agreement is voidable.
6. **Illegal contract** – Those contracts which are forbidden by law. All unfair contracts are void also. They are illegal and cannot be enforced by any court of law.
7. **Employment contract** – An employment contract is an agreement that covers the working relationship of a company and an employee. The contract covers the working relationship between the employee and the company, such as salary or wages, schedule, duration of the employment. Future benefits etc.
8. **Non-disclosure of Agreement** – As the name suggests nondisclosure of agreement means an agreement that establishes a confidential relationship between the parties. The parties signing the contract agree that sensitive information obtained will remain confidential.
9. **Memorandum of understanding-** A MOU is used in commercial partnerships, which is not legally binding to establish mutual goals and expectations. It sets out the rights and obligations of each party, which incorporate into a formal contract.

²⁰ Section 2(i), Indian Contract Act, 1872