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THE DIGITAL FUTURE OF COMMERCIAL CONTRACTS IN INDIA: A LEGAL ANALYSIS

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THE DIGITAL FUTURE OF COMMERCIAL CONTRACTS IN INDIA: A  
LEGAL ANALYSIS

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ABSTRACT

*Due to unpredictable appearance of Covid 19 in the business world, businesses realised they were operating in an era of "predictable unpredictability" in which contracts and contracting would not create certainty. There was unprecedented information-sharing in real time and a sharing of financial risk-taking in [a] time of uncertainty, all with a focus on a common purpose. For business relationships where outcomes are important yet uncertain, contracts have become more adaptive, with terms that emphasise problem solving, mutual objectives and a no-blame culture<sup>1</sup>.*

*This factual matrix is aptly applicable to the commercial contracts in this digital age. In order to assess the legal angle of digital future of the commercial contracts, the author herein has first attempted to define the commercial contract. Then, the author has outlined its types, key elements and key clauses. Further, the author has discussed the examples of commercial contracts in a descriptive way. In order to*

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<sup>1</sup> Bruce Love, *Pandemic rewrites the future for commercial contracts*, Financial Times, 27 October 2022, available at <https://www.ft.com/content/7bd74a72-d270-4a81-b24b-65a0dd911da5>, last seen on 05/11/2022

understand the practicality, the author has also dealt with the elements such as formation and management of commercial contracts in this digital era. The main crux of the paper lies in the analysis of Legal Architecture dealing with commercial contracts in India. In the light of these research inputs, the author has attempted to suggest a way forward to secure the digital future of commercial contracts in India.

**Keywords-** Digital Contracts, Commercial Contract, Contract Act

## INTRODUCTION

In today's new information age, the needs are the same; however, the ways in which the needs are demanded and fulfilled have become digital. Due to revolutions in the digital set up of businesses, businesses of all types have become digital themselves and their demands needs digital solutions. Commercial contracts among digital businesses are no exception to this digital transformation and this has created a challenge to the existing traditional legal system dealing with contracts in India.

Commercial contracting is so woven into everyday business activity at big companies that it is almost taken for granted. But, now, some businesses are looking to create value through better execution of commercial contracts, and analysing data gleaned from them. This interest in the potential for technology to improve contracting has been driven, in particular, by the Covid pandemic — as it forced organisations to work faster, differently and more wisely<sup>2</sup>. The author has taken the

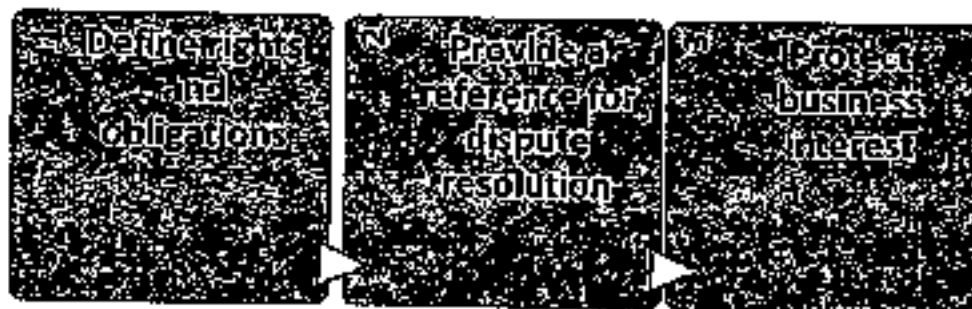
<sup>2</sup> Bruce Love, *Pandemic rewrites the future for commercial contracts*, Financial Times, 27 October 2022, available at <https://www.ft.com/content/7bd74a72-d270-4a81-b24b-65a0d3911da5>, last seen on 05/11/2022

overview of the commercial contracts being formed and executed by the digital businesses and have attempted to analyse the efficacy of the existing legal architecture in India to tackle the challenges posed by digitalization of commercial contracts to satisfy the business needs in this fast-transforming information age.

## Commercial Contracts- Conceptual Understanding

A commercial contract is a legally binding document that specifies what each party has to do or refrain from doing. This agreement lay out the parties' responsibilities and what they're entitled to receive in return<sup>3</sup>. Commercial contracts define and regulate business relationships, whether a standard employment agreement or more complex agreements like merger and acquisition contracts<sup>4</sup>.

Commercial contracts play significant role in following terms-



<sup>3</sup> Avolando, *Commercial Contracts: What are they and how to automate them?* available at <https://avolando.io/blog/commercial-contracts/>, last seen on 04/11/2022

<sup>4</sup> *What are Commercial Contracts?* Incloud, available at <https://incloudapp.com/journal/articles/commercial-contracts/>, last seen on 04/11/2022



8. **Indemnification clause-** The extent of liability in the indemnity clause under any commercial contract depends majorly on the nature and terms of such contract. While there are certain protections and limitations provided under law for claiming liquidated and unliquidated damages, however, there is no such statutory restriction imposed on the quantum of loss that can be claimed under the indemnity clause due to which indemnity clauses in commercial contracts are subject to extensive negotiations. Under the indemnity clause, the indemnifying party focuses on limiting the scope of indemnity to the maximum extent possible whereas, the indemnified party focuses on widening the scope for indemnity. Further, the indemnity clauses can be drafted and structured in a way that they can also cover the liability for any past transactions along with future transactions<sup>10</sup>.

9. **The right to terminate the contract-** It is pertinent to note that there is no statutory restriction on terminating any commercial contract if the other party has been declared insolvent or is in financial distress if the parties have already agreed upon the ground for termination and have accordingly captured them explicitly in the commercial contract.

#### 10. Limitation of Liability

11. **Assignments of Rights-** A party under a commercial contract can assign its rights and obligations without obtaining prior written consent from the other party if the right of assignment has expressly permitted under the

copanw/uploads/2022/03/2021-Commercial-Contracts-India-digital-download.pdf, last seen on 10 November 2022

<sup>10</sup> Sneha Ogri and Khyati Bhatia, *Understanding the Effectiveness of Commercial Contracts*, available at <https://www.ahlawatassociates.com/blog/types-of-commercial-contracts-in-india/>, last seen on 10 November 2022

commercial contract. In the event a commercial contract is silent on the aspect of assignment then it shall be dependent on the intention of the parties<sup>11</sup>. Generally, for larger projects or engineering, procurement and construction contracts, the provision or clause for subcontracting is restrictive and either allows subcontracting only with the approval of the owner or allows only subcontractors from a pre-approved list of personnel<sup>12</sup>.

12. **Force majeure to remove liability for failure to perform contractual obligation caused by unforeseen and unavoidable circumstances<sup>13</sup>.** It has been seen that force majeure clauses are enforced by aggrieved parties on immediate notice of the force majeure event. The onus of the proof for establishing and proving that those circumstances have arisen lies on the aggrieved party. Another essential ingredient for the enforcement and pursuit of the effects under a force majeure clause is the establishment of the impossibility of moving forward under the current terms of contract. Further, unless agreed by a specific law, depending on the circumstances and terms of the contract, occurrence of a force majeure event may result in extension of the term of the contract, termination or extended force majeure, suspension or discharge of obligations<sup>14</sup>.

The limitation on the commercial contract is that if the subject matter of a commercial contract is illegal, it will be unenforceable. Parties also cannot agree to transfer their liability for an illegal act or restrain another person from performing a statutory obligation<sup>15</sup>.

<sup>11</sup> *Ibid*

<sup>12</sup> *Supra* 6

<sup>13</sup> *Supra* 4

<sup>14</sup> *Supra* 9

<sup>15</sup> *Supra* 4

**Examples of Commercial Contracts-****1. Employment contracts-**

A contract of employment is an agreement between the employer and employee. This type of commercial contract specifies the details of the employment relationship like the job description, salary, and benefits. There are times that it also includes provisions for the termination of the agreement<sup>16</sup>. It primarily captures the duration of employment, schedule, salary or wages, job responsibilities, confidentiality, intellectual property rights, grounds for termination, dispute resolution, etc<sup>17</sup>.

**2. Service agreements-**

Most often, digital businesses offer services. Thus, a service agreement is a commercial agreement that details a service to provide in exchange for payment. They're a way for businesses to outsource certain tasks or projects<sup>18</sup>.

**3. Loan agreement-**<sup>16</sup> Supra 3<sup>17</sup> Supra 10<sup>18</sup> Ibid

A loan agreement is a contract between a borrower and a lender that sets out the terms of a loan. It details the loan amount, the interest rate, the repayment schedule, and other terms that the parties have agreed to<sup>19</sup>.

**4. Partnership Agreement-**

If two or more people want to start a business together, it's necessary to have a partnership agreement in place. This contract outlines the expectations and duties of each partner in a business relationship including clauses like duty care and profit-sharing<sup>20</sup>.

**5. Software License Agreement-**

Most software applications are licensed, not sold. A software license agreement is a contract between the user and the owner of the software that lets you use it under certain conditions such as license fee, restrictions the use, and duration of the usage<sup>21</sup>.

**6. Intellectual Property Assignment and Transfer Agreement-**

An Intellectual property agreement is used when one party wants to assign or transfer their rights to intellectual property to another party. This commercial agreement is typically used when companies work together since it's inevitable to share information<sup>22</sup>.

<sup>19</sup> Ibid<sup>20</sup> Ibid<sup>21</sup> Ibid<sup>22</sup> Ibid

### 7. Lease Agreement-

Lease agreements are contracts that grant the use of property, area, or equipment in exchange for rent. The owner of the property is called the lessor, while the tenant is called the lessee. A lease agreement specifies how long the lessee has the right to use the property and how much rent is due<sup>23</sup>.

### 8. Non-disclosure Agreement-

A confidentiality agreement (also known as NDAs) is used whenever sensitive information needs to be shared between parties. This ensures that the content remains confidential and can't be used without permission from the other party. NDAs are commonly used in business deals, employment contracts, and research agreements<sup>24</sup>. The Non-Disclosure Agreement (NDA) is basically executed to bind the employees, vendors, suppliers, service providers, consultants, and independent contractors with the purpose of restricting and restraining them from sharing any confidential information in relation to the business, including trade secrets, client details, business plans etc. of a company. The NDA can be either unilateral or mutual based on the requirements of the transaction between the parties<sup>25</sup>.

### 9. Data Processing Agreement-

In compliance with data privacy laws, a DPA is a commercial contract requirement for almost every company. A data processing agreement is a contract between a

<sup>23</sup> Ibid

<sup>24</sup> Ibid

<sup>25</sup> Ibid

company and a service provider that defines the terms of how the service provider will process a company's data so it's not misused or mishandled<sup>26</sup>.

### 10. Shareholders' Agreement-

While not required by law, a shareholders' agreement protects the interests of the parties involved in a company. This is a contract among shareholders that defines their rights and responsibilities. Usually, it states that the owner of a company agrees to a set of rules about how the company will be run<sup>27</sup>.

### 11. Distributor Agreement-

A Distributor Agreement is essentially an understanding between the provider of products and distributor of merchandise. The provider can either be the producer of the merchandise or the wholesaler exchanging another's products<sup>28</sup>.

### 12. Franchise Agreement-

A Franchise Agreement is basically an agreement which sets forth the rights and obligations of the franchisee as well as the franchisor. It is pertinent to note that there is no standard form of the franchise agreement as the terms, conditions and methods of operation of a franchisee depends on the type of business being carried out by the franchisor. The payment required to be made by the franchisee to the franchisor under the franchise agreement can either be one-time or periodical as per the terms and conditions agreed between the parties<sup>29</sup>.

<sup>26</sup> Ibid

<sup>27</sup> Ibid

<sup>28</sup> *Commercial Contracts in India: An Overview*, Legal Services India (E-Journal), available at <https://www.legalserviceindia.com/legal/article-8507-commercial-contracts-in-india-an-overview.html>, last seen on 10 Nov 2022

<sup>29</sup> *Supra* 10

### 13. Joint Venture Agreement-

A Joint Venture Agreement also known as a JV agreement is basically an arrangement between 2 (two) or more entities who have agreed to undertake either new or existing business together. Under the said arrangement, the parties pool their resources by way of contributing the equity and sharing the revenues, expenses and control of the new venture in proportion to the capital that the parties have contributed<sup>30</sup>.

#### Formation of Commercial Contracts

There is no strict prescription or mandate under the Contract Act 1872 (ICA) to use good faith when negotiating a contract; however, there may be other requirements under other laws that may cast an indirect obligation depending on the sector, such as under certain employer-employee relationships and insurance transactions. Many contracts use language admitting or casting obligations relating to good faith<sup>31</sup>.

There is no strict mandate for a specific language; however, contracts are usually drafted in English for the convenience of the parties. A contract may also be drafted in the vernacular language or a common language of the parties<sup>32</sup>.

It is possible to agree and execute a B2B contract online or any electronic contracts in accordance with the provisions of the Information Technology Act 2000. These electronic contracts may be in various forms, such as click-wrap contracts (e.g.,

<sup>30</sup> Supra 10

<sup>31</sup> Supra 9

<sup>32</sup> *Ibid*

requires clicking 'I agree' or 'I accept' or 'Ok') and shrink-wrap contracts (e.g., buyer or licensor agreement with a product or service availed)<sup>33</sup>. Indian law recognises and allows the use of electronic and digital signatures<sup>34</sup>.

The limitation period for breach of contract claims is three years. The commencement of the limitation period depends on the nature of the contract and the number of the breaches, among other things. Accordingly, the limitation period for breach of contract starts from the time of occurrence of a single breach. In case of successive breaches, the limitation period will start from the time of occurrence of the relevant breach. Where the breach is continuing, the limitation period will start from the time of cessation of the breach<sup>35</sup>.

#### Management of Commercial Contracts

The commercial contracts are entered between the businesses or between the individual and the businesses. All types of businesses have different departments and each department enters into different type of commercial contract. It is not always necessary that these departments store all the commercial contracts at one place or online location in today's digital era. These departments may not work in sync as well. Although some commercial contracts are within the domain of specific departments, other departments may also need to be involved. For instance, a purchase agreement is a Procurement department contract, but Legal and Finance departments may need to approve the contract before it can be sent out. When

<sup>33</sup> *Ibid*

<sup>34</sup> *Ibid*

<sup>35</sup> *Ibid*

departments in the organization don't have access to contracts that affect them, it slows down contracting process<sup>26</sup>.

In such scenarios, it really becomes difficult to manage the commercial contracts at each and every step starting from the negotiation till their final execution. Therefore, the digital businesses are using the software for contract lifecycle management. This software assists the businesses in managing the commercial contracts through I.T. enabled solutions and save their time and money. Earlier the physical management of the commercial contracts was easy as the nature of businesses was simple and jurisdiction of their operations was limited. However, digital business environment in India and reach of business across the globe has increased the complexity of commercial contracts and hence, the software for contract lifecycle management have become an essential need of today's digital businesses. This software provides all in one solution and transparency into the entire process.

Ideally, following are the steps for contract lifecycle management-

<sup>26</sup> *Supra* 4



#### Legal Architecture dealing with Commercial Contracts in India

The basic laws governing commercial contracts are "The Indian Contract Act, 1872" and "The Specific Relief Act, 1963". There is no prohibition in India pertaining to the execution of e-contracts. However, it is pertinent to note that e-contracts should be in compliance with the necessary pre-requisites provided under the Contract Act. Further, the e-contracts are legally recognised under section 10 of the Information Technology Act, 2000 and their evidentiary value is recognised under section 65A of the Indian Evidence Act, 1872<sup>27</sup>.

<sup>27</sup> Akhwal & Associates, *Commercial Contracts in India and Their Legal Issues*, available at <https://www.lexology.com/library/detail.aspx?l=64997ed-0123-4f82-9176-dce1044b954>

The courts in India recognise and respect international commercial contracts governed by foreign law if the choice of foreign law is bona fide and legal, not offensive to public policy and not isolated from the purpose of the contract entered into between the parties. Additionally, for dispute resolution, parties may opt for alternative mechanisms, such as mediation and arbitration, and may also opt for international arbitration forums such as the Singapore International Arbitration Centre, the London Court of International Arbitration and the International Chamber of Commerce<sup>31</sup>.

The Arbitration and Conciliation Act 1996 provides interim and urgent relief to parties to a contract over their jurisdiction and related issues of dispute. If there are two Indian parties, choice of jurisdiction is not available. In accordance with *Modi Entertainment Network and Anr v WSG Cricket Pte Ltd*<sup>32</sup>, parties can choose, in respect of commercial contracts, any court of natural jurisdiction or foreign court of their choice as a neutral forum<sup>33</sup>.

Depending on the circumstances of a suit, the court or adjudicator may grant some or more of the following remedies:

- i. Damages, Which Are Awarded for Any Loss or Harm That Occurs in The Ordinary Course of Business. Unless Shown Otherwise, If the Contract Stipulates the Amount of Liquidated Damages, The Amount Will Be Regarded to Be the Damages Due in The Event of a Breach of Contract;
- ii. Grant Of Injunctions (Temporary or Permanent);

<sup>31</sup> *Supra* 9

<sup>32</sup> (2003) 4 SCC 341

<sup>33</sup> *Supra* 9

- iii. Cancellation, Revocation or Rectification of The Contract;
- iv. Specific Performance of The Contract, Instructed by The Court If No Alternate Remedy Is Available;
- v. Specific Relief for The Enforcement of Individual Civil Rights or The Recovery of Immovable or Movable Property;
- vi. Punitive Damages in Special Circumstances Where the Court Is of The Opinion That the Loss That Has Occurred Is Outrageous, And the Award for Damages Shall Be Granted.

The courts rarely award punitive damages. The Supreme Court, in the case of *International Advanced Research Centre for Powder Metallurgy and New Materials (ARCI) and Ors v Nirma Ceramics Private Limited and Anr*<sup>34</sup>, observed that only punitive damages as relief can be granted for breach of commercial contracts as they are civil in nature; however, criminal liability can be imposed if it is established that the intention of the accused was dishonest at the time he or she made a promise and entered into a transaction with the complainant to part with his or her property or money.

During the pandemic, the business workplaces have gone digital and this has given impetus to digital or electronic commercial contracts. The law is there in the form of recognition of e-contracts but the data protection is totally absent in terms of e-contracts. Whenever digital commercial contracts are made, they are present in virtual space which doesn't know territorial boundaries and hence, more laws that recognize them will not prevent the frauds or any other criminal activities connected with them. India withdrew the Data Protection Bill, 2019 in the August 2022 and

<sup>34</sup> Criminal Appeal No. 2128 of 2011

now, there is no law which will protect the data created through commercial contracts. Most of the contracts are transboundary in nature and hence, India has to follow international legal architecture like GDPR to protect the data in commercial contracts.

#### Way Forward-

There has been a digital transformation, and organisations are now adopting electronic signatures. Many organisations are using contract management software, which assists in streamlining contract creation, review, execution and management. Force majeure clauses garnered huge recognition, especially with regard to the assessment of implications and effects over a contract. Many contracts were not fulfilled or delayed owing to those clauses, and the courts upheld that the pandemic should be considered under force majeure clauses. A force majeure clause releases the contracting parties from carrying out their obligations in the event of a defined set of events that are beyond the parties' control. The clause must be specifically stated in the contract to apply. Other important clauses that have been added or adopted include those in relation to dispute resolution, choice of law, indemnities and termination<sup>43</sup>.

Businesses can suffer huge losses if commercial contracts are not thoroughly examined. Following the pandemic assessing professional dangers has become

critical to ensuring continued operation and profit<sup>42</sup>. In the light of this current pandemic, few safeguards to be resorted in commercial contracts are<sup>44</sup>:-

1. Re-assess and review the contract in which the force majeure clause exists and analyse the relevant factors and incidents mentioned to initiate the 'rule to excuse'.
2. Ensure 'all' or 'any' notification procedure as prescribed in the conditions of the contract. Comply strictly with the conventional 'notice' formalities.
3. Mutually (along with the other parties to the contract) analyse the impact of the outbreak of COVID-19 on the contract and its performance.
4. Initiate a chance to perform the contract in a possible alternative way; a failure will safely rule out a future 'defence' with respect to an alternative method of performance.
5. Collect evidences to accord non-performance of the obligation to the sole force majeure event, in the current scenario, the pandemic.
6. Keep a strict record of the various notifications and orders by government and administrative bodies. The same may be evidenced during the litigation/arbitration stage.
7. All records with respect to unavoidable additional expenditure incurred must be maintained.

<sup>43</sup> Ibid at 16

<sup>44</sup> Madhu Sweta and Shilpaagi Khanna, *India: Impact Of COVID-19 On Indian Commercial Contracts*, Monday, 4 Apr 2020, available at <http://www.ponddq.com/india/litigation-contracts-and-force-majeure/912876/impact-of-covid-19-on-indian-commercial-contracts>, last seen on 10 November 2022

<sup>45</sup> Supra 3

All these rules will safeguard the digital future of the commercial contracts. India needs to strengthen its data protection regime in order to protect the data of commercial contracts so that internationally, India can develop as secure digital economy protected by sound and effective data protection regime.

#### References

- Bruce Love, *Pandemic rewrites the future for commercial contracts*
- Avokaado, *Commercial Contracts: What are they and how to automate them?*
- Ironclad, *What are Commercial Contracts?*
- Dipti Lavya Swain & Mishthi Soth, *Commercial Contracts-India*, Lexology GTDT - Commercial Contracts, 02 March 2022
- Shreeta Ogra and Khyati Bhatia, *Understanding the Effectiveness of Commercial Contracts*
- Legal Services India (E-Journal), *Commercial Contracts in India: An Overview*
- Ahlawat & Associates, *Commercial Contracts in India and Their Legal Nuances*
- Madhu Sweta and Shivangi Khanna, *India: Impact Of COVID-19 On Indian Commercial Contracts*, Mondaq, 4 Apr 2020,