

PANORAMIC

**COMMERCIAL  
CONTRACTS**

India



LEXOLOGY

# Commercial Contracts

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## CONTRACT FORMATION

### Good faith in negotiating

#### Is there an obligation to use good faith when negotiating a contract?

[The Indian Contract Act 1872](#) (the Contract Act), which is the primary law governing contracts in India, does not provide for any express statutory obligation to use good faith while negotiating a contract. There are only limited circumstances in which the Contract Act requires parties to act in good faith, for instance, the Contract Act requires an employer to indemnify an agent who does an act in good faith against any consequences resulting from such act. Further, the Hon'ble Supreme Court of India (SC) in *Vikram Greentech India Limited and Another v New India Assurance Company Limited* (2009) 5 SCC 599 observed that in a contract of insurance there is a requirement on the part of the insured to have good faith while disclosing all material facts to the insurer.

In the context of ensuring good faith, it is pertinent to note that the Contract Act also provides that any acts committed to induce a contract, basis a fact, that is not true by one who does not believe it to be true; or an act of active concealment of a fact by one having knowledge or belief of the fact; or a promise made without any intention of performing it; or any other act fitted to deceive a counterparty, would render a contract voidable at the option of the party whose consent was so caused to be obtained. Similarly, any contract entered into by parties, basis misrepresentation by a party is also voidable at the option of the party whose consent was obtained by such misrepresentation.

### 'Battle of the forms' disputes

#### How are 'battle of the forms' disputes resolved in your jurisdiction?

There is no consistent approach that has been followed by courts in India while resolving disputes in relation to counter-offers or battles of forms. Courts in India have relied on the provisions of the Contract Act and common law principles such as the mirror image rule (where the emphasis is on consensus ad idem) and the last shot rule (where the emphasis is on the conduct of the parties rather than explicit consensus ad idem).

The mirror image rule implies that no contractual relationship between the parties would be enforced if the promisee does not explicitly accept the offer as it was offered by the promisor, especially the material terms of the agreement. The last shot rule implies that where conflicting communications are exchanged, each being a counter-offer, even if a contract results at all, it must be on the terms of the party that performed the last shot and initiated the performance of the contract.

### Language requirements

#### Is there a legal requirement to draft the contract in the local language?

There is no legal requirement under the Contract Act to draft the contract in the local language and is left upon the discretion of the parties.

## Signatures and other execution formalities

In what circumstances are signatures or any other formalities required to execute commercial contracts in your jurisdiction? Is it possible to agree a B2B contract online (eg, using a click-to-accept process)? Does the law recognise the validity of electronic and digital contract signatures? If so, how are they treated in comparison to wet-ink signatures?

The Contract Act recognises 'oral' as well as 'written' agreements as legally enforceable contracts, provided they satisfy all requirements of a contract as stipulated under the Contract Act, ie:

- competent parties;
- free consent;
- lawful consideration;
- lawful object; and
- should not be void in terms of the provisions of the Contract Act.

[The Information Technology Act 2000](#) (ITA), which is the primary law governing use of cyber space in India, provides legal recognition to electronic records and contracts executed through electronic means. A contract is not considered unenforceable in India solely because it has been executed using electronic means. Further, the ITA recognises 'electronic signatures' and also lays down the framework, which governs their use. The ITA provides that electronic records or contracts can be authenticated by means of (1) electronic signatures; or (2) electronic authentication techniques that are considered reliable and are specified under the Second Schedule of the ITA. One such authentication technique currently contemplated under the Second Schedule is the Aadhaar e-KYC service. An electronic signature is deemed to be a secure electronic signature if the signature creation data is under the exclusive control of the signatory (and no other person) at the time of affixing the signature and such data is stored and affixed in the prescribed manner. An electronic contract authenticated using an electronic signature, will be considered a secure electronic record. In a proceeding involving a secure electronic record, Indian evidence laws require a court of law to presume that the contract has not been altered since the electronic signature is affixed by either of the parties and that such electronic signature was affixed with the intention of approving it.

In addition to the above, stamp duty needs to be levied on every 'instrument' specified in Schedule I [Indian Stamp Act 1899](#) (the Stamp Act). The Stamp Act does not separately deal with stamping of electronic instruments or agreements and there remains ambiguity on the stamping (and its manner) of electronic contracts. However, it is pertinent to note that stamp duty legislation enacted in various Indian states (for instance, Maharashtra, Karnataka, etc), 'electronic records' has been included in the definition of the term 'instrument'.

As electronic contracts should be treated at par with contracts that are physically executed, it is common for electronic contracts to be subject to the same stamp duty as contracts that are physically executed. This view is also supported by the aforesaid amendments made in various state-specific Stamp Acts to expressly include 'electronic records' within the meaning of the term 'instrument'.

There are certain agreements (such as an immovable property lease agreement for a term exceeding one year) that are necessarily required to be registered under the Registration Act 1908. The said registration process requires the submission of a copy of the agreement and physical presence of the contracting parties for authentication and verification. Consequently, these documents and transactions cannot be executed using electronic signatures and must be executed in a traditional manner (ie, physical handwritten signatures or 'wet ink') to be legally enforceable.

## STATUTORY CONTROLS AND IMPLIED TERMS

### Controls on freedom to agree terms

Are there any statutory or other controls on parties' freedom to agree terms in contracts between commercial parties in your jurisdiction?

The Contract Act prescribes certain prerequisites for a contract to be legally enforceable and binding. Such prerequisites include competency of parties to contract, offer and acceptance, free consent, lawful object and consideration.

The contract is *void ab initio* if the consideration or object of an agreement is forbidden by law; or is fraudulent; or restricts either party from exercising a lawful profession, trade or business of any kind; or is restricted absolutely from initiating legal proceedings; or is in violation of law or causes or intends to cause injury to the person or property of another or is regarded as immoral by a court or is opposed to public policy.

### Standard form contracts

Are standard form contracts treated differently?

The standard form contracts are not treated differently and are governed by the principles of the Contract Act. The Indian courts have largely upheld the legality of standard contracts if the prerequisites of a valid contract stipulated under the Contract Act are complied with.

However, in a few instances, the Supreme Court (SC) has formed an adverse opinion in cases where standard form contracts affecting the large public are unconscionable, unfair, unreasonable and/or injurious to the public interest. Indian courts including the SC may strike down contracts (on the grounds of unconscionability) that appear excessively onerous for one party and considerably beneficial for the other if it appears to the court that the dominant position of one party has been used by it to influence or coerce the other party to enter into the contract. That said, there have also been judicial precedents wherein courts in India have held that merely because contracting parties have disproportionate negotiating power does not automatically imply that the contracts are unconscionable, especially in day-to-day commercial transactions.

### Implied terms

What terms are implied by law into the contract? Is it possible to exclude these in a commercial relationship?



As a general rule, while there are no explicit terms that would be implied by law into contracts depending on the nature of the contract, certain terms are implied by law into the contract. For example, [the Sale of Goods Act 1930](#) prescribes certain implied condition or warranty for sales of goods contract: (1) the seller has a right to sell; (2) buyer will enjoy undisturbed possession of the product; (3) product is free from any charge or encumbrance; (4) the product is fit for a particular purpose that has been informed to the seller or is intended to be used by the buyer; and (5) the product is of merchantable quality when bought by description from the dealer of such products. Similarly, as regards the supply of services, the service provider has an implied warranty to perform the services as per industry standards and with reasonable skill.

While it is possible for a party to disclaim implied conditions or warranties by including express language to that effect in the contract, warranties provided under specific statutes cannot be contractually circumvented by contracting parties in India.

### **Vienna Convention**

#### **Is your jurisdiction a signatory to the United Nations Convention on Contracts for the International Sale of Goods (the Vienna Convention)?**

India is not a signatory to the Vienna Convention.

### **Good faith in entering and performing**

#### **Is there an obligation to use good faith when entering and performing a contract?**

While there is no express requirement under the Contract Act for parties to act in good faith when entering and performing a contract, there are limited circumstances in which the Contract Act requires parties to act in good faith, for instance, the Contract Act requires an employer to indemnify an agent who performs an act for the employer in good faith, against claims arising from injuries caused to third parties. Also, in the case of a contract of insurance, the insured is obligated to disclose all material information at the time of entering such a contract and act in good faith. Further, the parties to the contract may incorporate a provision in the contract requiring the parties to act in good faith.

## **LIMITING LIABILITY**

### **Prohibition on exclusions and limitations**

#### **What liabilities cannot be excluded or limited by a supplier in a contract?**

As per the Contract Act, the parties can contractually agree to limit their liability under the contract. However, the enforceability of exclusion or limitation of liability clauses is not absolute and cannot be arbitrarily applied and depends on the facts of the case.

As contracts that bar and disentitle a contractual party to claim damages or monetary entitlement to which such party is entitled, are void, there are various instances where courts have struck down contracts limiting the liabilities in relation to death, personal injury, fraud,

negligence or misrepresentation or where a supplier excluded its liability on account of defective product sold to the buyer.

Indian courts have also held that while an individual may waive the law that is made for individual benefit, in the event such law includes an element of public interest or public policy, such rights arising from the law cannot be waived – as the same becomes a matter of public policy or public interest.

### **Financial caps**

#### **Are there any statutory controls on using financial caps to limit liability for breach of contract?**

While there are no specific statutory controls prescribed on using financial caps to limit liability for breach of contract, the Contract Act provides that any damages claimed by a party on breach of a contract by the other party should be just and reasonable and such damages should have naturally arisen in the usual course from such breach.

The Contract Act also recognises the concept of liquidated damages (ie, where a sum is named in a contract as the amount payable by way of damages). In such cases, the party raising a claim for breach may receive reasonable compensation provided it is a genuine pre-estimate of damages fixed by both parties and not a penalty.

Parties may also contractually agree to limit liabilities and in such cases, the amount specified in the contract is the outer limit or cap on the damages that can be claimed, however, any claim has to be substantiated as the actual loss suffered and whether the same is reasonable. In *Bharathi Knitting Company v DHL Worldwide Express Courier Division of Airfreight Ltd* (1996) 4 SCC 704, the Indian Supreme Court enforced the limitation of liability clause in the terms and conditions printed on a consignment note for shipment of a package. The court limited the amount awarded to the consignor for deficiency of service, to the amount specified in the limitation of liability clause.

In addition to the above, there are also judicial precedents where the courts have struck down the limitation of liability in a contract because it is unreasonable, discriminatory or against public policy.

### **Indemnities**

#### **Are there any statutory controls on indemnities used to cover liability risks in contracts?**

There are no statutory controls or restrictions on the quantum of loss that can be claimed under indemnities in contracts.

Unlike the claim for damages for breach of contract under the Contract Act, the loss claimed under indemnity under the Contract Act is not caveated by the test of reasonability and causation. In fact, the courts in India have held that an indemnified person can seek the indemnifier to pay the liability directly, instead of first incurring such cost and then suing for indemnity.

### **Liquidated damages**

**Are liquidated damages clauses enforceable and commonly used in your jurisdiction?**

The clauses that obligate parties to pay liquidated damages are enforceable and commonly incorporated in commercial contracts executed in India provided the same must not be punitive in nature (for breach of contract). For a liquidated damages clause to be legally enforceable, the thumb rule to consider is whether the damages specified are a genuine pre-estimate of losses. Further, to enforce such a clause, a loss must be suffered by the party and the stipulated damages should be an effort to restore the affected party to the same position as if the contract had been properly performed.

## **PAYMENT TERMS**

### **Statutory time limits on payments**

**Are there statutory time limits for paying invoices? Is it possible to agree a different payment period?**

The Contract Act does not prescribe a statutory time limit for paying invoices. Typically, the timeline for payment of invoices is determined by mutual agreement between parties to a contract. However, if such an invoice is pursuant to any contract, the appropriate limitation period prescribed under the [the Limitation Act, 1963](#) will also need to be examined. Other pieces of legislation such as [the Micro, Small and Medium Enterprises Development Act 2006](#) also provide for specific timelines for making payments.

### **Late payment interest**

**Is statutory interest charged on late payments? Is it possible to agree a different rate of interest?**

While the Contract Act does not contain any requirement for imposing interest on late payments, it is common in India, for the contracting parties to impose interest as a deterrent vide contractual provisions.

### **Civil penalties**

**What are the civil penalties for failing to comply with statutory interest rate or late payment of invoices?**

The Contract Act does not contain any requirement for imposing interest on late payments or delay in making payments, and therefore there are no corresponding civil penalties. This, however, does not prohibit parties from approaching courts for relief that may impose costs or penalties on the erring party, depending on the facts and circumstances of the case.

There are other statutes such as the Banking Regulation Act 1949, which has provisions that intend to keep a check on courts reopening transactions between banks and borrowers solely on the grounds of rate of interest being excessive. Some case laws have questioned

such provisions and upheld the powers of courts to intervene for excessive rates of interest. The Reserve Bank of India also has instructed financial institutions to not levy penal charges in loan accounts (which is to be made effective 1 January 2024). In addition, the Micro, Small and Medium Enterprises Development Act 2006 also mandates the party to pay interest for delayed payments to certain entities such as micro or small enterprises.

Further, there are also provisions in [the Arbitration & Conciliation Act 1996](#) (section 31(7)(a)) that give courts the power to award interest at a reasonable rate.

## TERMINATION

### Implied terms

**Do special rules apply to termination of a supply contract that will be implied by law into a contract? Can these terms be excluded or limited by including appropriate language in the contract?**

There are no special implied rules under Indian law that apply to the termination of a supply contract. It is common for parties to include clear, specific and situational-based termination rights in contracts in India. There is growing jurisprudence in India that even in the absence of a termination clause, in a private commercial transaction, the agreement can be terminated without assigning any reason by serving a notice. In such cases, if the termination is found to be bad in law for any reason, the remedy would be to seek compensation for wrongful termination, but there cannot be a claim for specific performance. However, courts have taken a divergent view on this. In some cases, courts have held that in a contract where termination was contingent on specific events unless such events have occurred, the contract cannot be terminated.

In addition, if a contract in India does not fulfil all the essentials of the contract as specified under the Contract Act, which includes that the contract should be for lawful object and consideration, such contracts are void ab initio. No clause for exclusion or limitation in a contract could make such void contracts valid and legally enforceable. Similarly, in case a contract is contingent on an impossible event, such contract is void, even if the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

### Notice period

**If a contract does not include a notice period to terminate a contract, how is it calculated?**

While the Contract Act generally does not prescribe any mandatory or any minimum notice period for termination of a contract, in the case of an agency, the Contract Act requires a reasonable notice to be given by either the principal or agent before revocation or renunciation of an agency. If such reasonable notice of termination is not provided, then the party who incurs damages as a result of such termination must be reimbursed by the other party.

The rent control and tenancy laws in certain states require landlords to give notice before increasing rent, making structural changes or before terminating the rent or lease agreement.

Similarly, if the tenant wishes to sub-let the premises, the tenant needs to provide a prior notice to the landlord.

It may also be relevant to note that for employment agreements, there are central and state-specific laws that prescribe the requirement for a notice period for termination of contracts.

### **Automatic termination on insolvency**

#### **Will a commercial contract terminate automatically on insolvency of the other party?**

There is no requirement under Indian law that provides for automatic termination of commercial contracts in case of insolvency. However, it is a common practice for parties to retain the rights to terminate the contract in the case of insolvency, liquidation and/or bankruptcy of the other party. Indian courts also recognise the clean slate mechanism under insolvency and bankruptcy laws where a party that has undergone a corporate insolvency resolution process is not bound by any previous obligations unless the same is retained in the resolution plan.

### **Termination for financial distress**

#### **Are there restrictions on terminating a contract if the other party is in financial distress?**

From a contract law perspective, there are no restrictions in terminating a contract when the other contracting party is in financial distress, provided such ground for termination is incorporated in the contract.

Having said that, the [Insolvency and Bankruptcy Code 2016](#), which is the primary law governing insolvency and bankruptcy proceedings, prohibits termination of contracts for goods or services that are critical to protect and preserve the value of the contracting party against whom insolvency petition has been admitted and to ensure that it continues to be a going concern, except in scenario where payment is not made to the supplier of such goods or services.

### **Force majeure**

#### **Is force majeure recognised in your jurisdiction? What are the consequences of a force majeure event?**

The concept of 'force majeure' is a well-established and recognised principle in India under the Contract Act and is an essential part of most contracts.

In order to enforce a force majeure clause, the party seeking discharge of its obligations must demonstrate circumstances have arisen that make it impossible for it to perform on account of such event, even after putting reasonable and practicable efforts to resolve or mitigate the effect of the force majeure event.

Generally, in the event parties are unable to perform under a contract due to a force majeure event, parties may, unless otherwise provided under law, agree to suspend the performance of obligations, extend the term of the contract, or even terminate the contract if such force majeure event continues beyond a period.

## SUBCONTRACTING, ASSIGNMENT AND THIRD-PARTY RIGHTS

### **Subcontracting without consent**

**May a supplier subcontract its obligations under the contract without seeking consent from the other party?**

While the Contract Act does not prescribe any requirements or restriction on subcontracting obligations, it is very common for contracting parties to impose requirement within the contract for obtaining consent before subcontracting the obligations.

### **Statutory rules**

**Are there any statutory rules that apply to subcontracting in your jurisdiction?**

The Contract Act or any other statutes do not prescribe any mandatory legal requirements regarding subcontracting in India and is a subject matter of contract between the parties.

### **Assignment of rights and obligations**

**May a party assign its rights and obligations under the contract without seeking the other party's consent?**

In India, it is a settled position of law that rights under a contract are assignable, unless the contract is personal in its nature, or the rights are incapable of assignment either under the law or under an agreement between the parties.

### **Assignment of rights and obligations**

**What statutory controls apply to the assignment of rights or obligations under a supply contract?**

In India, there are no statutory controls for the assignment of rights or obligations under a supply contract, unless specifically required for personal engagement of a specific contract or under the law.

For instance, it is mandatory under law that the transfer of rights over unsecured debts (ie, not secured by any collateral) can only happen by way of duly executed written instrument by the assignee, and not otherwise.

## **Enforcement by a third party**

### **How may a third party enforce a term of the contract?**

In India, generally, a third party (ie, a non-signatory) to a contract does not hold the locus to enforce the terms of a contract in India. India follows the doctrine of privity, which entails that if a party is not signing the contract, they do not have the right to enforce any terms of such contract or claim rights and remedies in respect thereof.

However, there are certain exceptions to the general rule. For instance, contracts pertaining to trusts allow the beneficiary of the trust to enforce his or her rights, even though he or she is not a signatory. Similarly, a third party may make a claim under tort law, giving rise to a civil cause of action.

Courts in India have also expanded the scope of bringing non-signatories to a contract under the privity of contract by well-established doctrines of group companies or doctrine of composite contracts. The Supreme Court is currently reviewing the doctrine of group companies in the Indian context.

## **DISPUTES**

### **Limitation periods**

#### **What are the limitation periods for breach of contract claims? Is it possible to agree a shorter limitation period?**

In India, the Limitation Act 1963 provides for different limitation periods for different kinds of claims. For claims relating to breach of an ordinary contract, the limitation period is three years, which will be calculated from the date of breach of the contract. In the case of successive breaches, the limitation period will start from the time of occurrence of the relevant breach or where the breach is continuing, the limitation period will commence when it ceases.

As limitation periods are statutorily defined, it is not possible to agree to a shorter limitation period in a contract as the same is statutorily barred and would lead to an agreement for relinquishment of a remedy.

### **Choice-of-law clauses**

#### **Do your courts recognise and respect choice-of-law clauses stipulating a foreign law?**

Indian law generally recognises the freedom of parties to a contract to choose the proper law of the contract. Indian courts on numerous instances have held that as long as parties conform to the requirements of contract law, they have the power to choose matters under contract including but not limited to the governing law of the contract.

Indian law allows contracting parties to agree to a foreign law as the governing law of the contract if there is some nexus or at least one of the parties to the contract is an overseas entity. Indian courts have also recognised and enforced choice of law clauses in contracts provided that the parties have expressly agreed to the said choice of law, such choice is bona

fide, not oppressive, unfair or inequitable and the application of that law is not in conflict with the fundamental principles of public policy of the *lex fori* (law of the forum).

### **Choice-of-law clauses**

#### **Do your courts recognise and respect choice-of-jurisdiction clauses stipulating a foreign jurisdiction?**

The courts in India have honoured the right of the parties to agree to resolve disputes in their choice of foreign courts, provided the same is expressly agreed by the parties in the contract. The courts have recognised conferring exclusive jurisdiction on foreign courts in cases where one of the parties resides in such jurisdiction or in a case where such jurisdiction is a 'neutral' jurisdiction for the contracting parties. However, such a clause cannot be such as to restrain a party from availing legal remedies, causing grave hardship or causing absolute restraint on a party from exercising legal rights causing grave injustice to a party.

### **Efficiency of the local legal system**

#### **How efficient and cost-effective is the local legal system in dealing with commercial disputes?**

In India, in the past decade, significant steps have been undertaken to set up mechanisms in place to efficiently resolve commercial disputes to improve the Ease of Doing Business in India. For instance, [the Commercial Courts Act 2015](#) (the CC Act) was enacted to streamline and expedite the resolution of commercial disputes in India by constituting commercial courts. The purpose and objective behind enacting the CC Act was to provide an effective, efficient and expedited resolution of commercial disputes of specified values (not less than 300,000 Indian rupees) as well as, to promote the Ease of Doing Business in India. This has helped in reducing the time taken to dispose of commercial cases of low value significantly.

Recently, a major step has been taken by the government of India by notifying the Mediation Act 2023. The Mediation Act aims to promote and facilitate mediation as a means of dispute resolution in commercial and other contracts, enforcement of mediated settlement agreements, and to provide for a body for registration of mediators.

### **New York Convention**

#### **Is your jurisdiction a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Which arbitration rules are commonly used in your jurisdiction?**

India is a signatory to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention 1958).

Typically, arbitration in India is governed by the Arbitration and Conciliation Act 1996 and the rules made thereunder. Depending upon the nature of the arrangement, the cost and the timelines involved, the parties prefer referring domestic arbitration rules in case of domestic disputes, such as the rules adopted by the Delhi International Arbitration Centre or Mumbai



International Arbitration Centre disputes to Singapore International Arbitration Centre and London Court of International Arbitration.

## REMEDIES

### Available remedies

**What remedies may a court or other adjudicator grant? Are punitive damages awarded for a breach of contract claim in your jurisdiction?**

In India, the court or adjudicatory bodies grant remedies in the form of damages (for the actual loss suffered), an injunction (permanent or temporary) or specific performance. The grant of such remedies is dependent on the terms of the contract, the nature of claims and the facts surrounding the dispute. For instance, if the contract stipulates damages in the form of liquidated damages, the court will grant actual damages or losses not more than the ones stipulated in the liquidated damages. Similarly, the temporary injunction is granted in scenarios where a prima facie case is established that the continuing action by the defendant may dissolve the plaintiff's right. Having said that, in India, no damages are awarded for any remote or indirect loss.

Further, the Contract Act does not provide for punitive damages. The jurisprudence followed in India is restorative (ie, that it intends to put a party in the same place as if the breach of a contract had not occurred). The principles under section 73 of the Contract Act ensure that only reasonable damages that have been caused to a party in the usual course of business can be granted. Similarly, liquidated damages (ie, a predetermined sum in the contract in the case of a breach thereof has to be proved to have been caused and cannot be in the nature of a penalty). Punitive damages have been granted in limited cases of intellectual property infringement and awarded only if actual damages are insufficient to compensate a party.

## UPDATE AND TRENDS

### Recent developments

**Are there any other current developments or emerging trends that should be noted?**

In 2018, an amendment was introduced to [the Specific Relief Act 1963](#), a law that provides remedies for contractual or civil right breaches, by way of necessitating performance of the obligations, where the monetary compensation or damages may not be an adequate relief.

Pursuant to the amendment, 'specific relief' has shifted from an equitable, discretionary remedy to a statutory remedy. Section 10 of the Act, which remained in the realm of the courts' discretion, was converted into a mandatory provision, prescribing a power the courts had to exercise when the ingredients were fulfilled. This was a significant step in the growth of commercial law as the sanctity of contracts was reinforced with parties having to comply with contracts and thereby reducing efficient breaches.

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