

# COMMERCIAL CONTRACTS

## India



# Commercial Contracts

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Quick reference guide enabling side-by-side comparison of local insights, including contract formation; statutory controls and implied terms; limitation of liability; payment terms; contract termination; subcontracting, assignment and third-party rights; dispute resolution considerations; enforcement; available remedies and recent trends.

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## CONTRACT FORMATION

### Good faith in negotiating

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

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.

*Law stated - 01 January 2022*

### 'Battle of the forms' disputes

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

Owing to awareness, the number of battle of forms disputes has seemingly reduced; however, it is still present in variant forms in businesses. Courts have used different mechanisms and relied on the provisions of the ICA and common law principles. Indian courts have also relied on several interpretations of international conventions, such as the United Nations Convention on Contracts for the International Sale of Goods, the UNIDROIT Principles of International Commercial Contracts and the United Nations Commission on International Trade Law.

*Law stated - 01 January 2022*

### Language requirements

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

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.

*Law stated - 01 January 2022*

### 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?

Indian contract law recognises written, executed and even verbal agreements as valid contracts; however, executed contracts provide evidential value in case of any future disputes. In cases of larger and high-value contracts, including commercial contracts, execution of the contract is highly recommended. Those contracts must pay a stamp duty under applicable stamp laws, which is calculated on the basis of various factors, as applicable.

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 (eg, requires clicking 'I agree' or 'I accept' or 'Ok') and shrink-wrap contracts (eg, buyer or licensor agreement with a product or service availed).

Indian law recognises and allows the use of electronic and digital signatures. It holds contracts formed through electronic means as valid and enforceable.

*Law stated - 01 January 2022*

## **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?

Commercial contracts are primarily governed under the Contract Act 1872 and the Specific Relief Act 1963, which lay down the essentials of a valid contract and the requirements for a contract to be legally enforceable. Those essentials are inclusive of offer and acceptance, intent of the parties, lawful consideration, competency of parties and 'free consent'. It is pertinent that the parties' freedom to agree to the terms of the contract is not curtailed by any unwarranted coercion, undue influence, fraud or misrepresentation.

*Law stated - 01 January 2022*

### **Standard form contracts**

Are standard form contracts treated differently?

Standard form contracts are valid contracts with a consistent set of terms formulated for generic parties. These are commonly used for ensuring equal bargaining strength among parties that ensures fairness, and often organisations with greater bargaining power use this process to incorporate favourable clauses. The treatment of a standard contract depends solely on the circumstances, nature and terms of the contract and dispute; however, albeit with certain exceptions, courts in India have generally affirmed the validity of standard contracts as long as the key ingredients of a valid contract are in compliance.

*Law stated - 01 January 2022*

### **Implied terms**

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

Generally, depending on the subject matter of the content of the contract being executed, whether commercial or otherwise, various terms may apply, including the provisions of law in the absence of specific mentions of particular terms or aspects.

In case of product-related sale-purchase contracts, manufacturers of those products must provide product warranties, whether implied or expressed in the sale contract. In a sale contract, unless a different intention is specified, the buyer has an implied warranty to enjoy the goods purchased and an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time the contract was made. Various other terms also apply pursuant to the Sale of Goods Act 1930.

When the buyer expressly or implicitly makes known to the seller the particular purpose for which the goods are required, there exists an implied warranty and implied condition that the goods shall be a reasonable fit for such purpose, free from any defects, whether manufactured or latent.

It is possible to exclude certain terms in a commercial relationship; however, they may have effect and apply even if they are not added in the contract, depending on the nature of the product, and owing to specific governing laws.

*Law stated - 01 January 2022*

## **Vienna Convention**

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

No, India is not a signatory to the Vienna Convention; however, on various occasions, Indian courts have relied on and referred to the provisions and articles of the Convention.

*Law stated - 01 January 2022*

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

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

There is no strict mandate for the parties to use good faith when entering and performing a contract, unless specified in any other applicable law. For example, insurance contracts in India are governed under the doctrine of 'utmost good faith', which binds the parties to the contract to disclose all material information at the time of entering into the contract; thus, it is advisable that parties to a contract use good faith when entering and performing a contract.

*Law stated - 01 January 2022*

## **LIMITING LIABILITY**

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

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

When the customer has paid consideration for delivery of the goods, a supplier under a contract cannot restrict its obligation for defaults, defects or manufacturing defects in the products provided. When the buyer expressly or implicitly makes known to the seller the particular purpose for which the goods are required, there exists an implied warranty and implied condition that the goods shall be reasonably fit for such purpose, free from any defects, whether manufactured or latent.

*Law stated - 01 January 2022*

### **Financial caps**

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

There are no specific statutory controls for indemnity that are used in covering risks in particular contracts; however, this depends on several factors, such as the nature of the transaction or contract, the terms and conditions between the parties and negotiations between the parties, among other things. This is generally one of the most negotiated clauses; however, similar contracts are seen to have a settled position on liability caps.

*Law stated - 01 January 2022*

## Indemnities

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

While the statute provides the rights of an indemnity holder when sued, there are no strict mandates or specific statutory controls on indemnities being used to cover liability risk in a contract. When drafting a contract, the indemnity clause is an integral aspect that is often hotly disputed and negotiated. Close attention must be paid to the language of the clause, and the clause must be worded in a way that determines the parties' indemnifying obligations and the extent of damages in the case of direct or indirect losses.

*Law stated - 01 January 2022*

## Liquidated damages

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

Yes, liquidated damages clauses are enforceable and commonly used in India.

A party may be eligible to claim liquidated damages if it establishes that a loss or damage that is significant enough to claim compensation has occurred. Indian courts have often emphasised that liquidated damages in a contract should be a fair and bona fide estimate of the damages arising from the breach, not a mere penalty for a breach.

In some cases, actual liquidated damages awarded by the court have been less than the fixed amount agreed by the parties to the contract.

*Law stated - 01 January 2022*

## PAYMENT TERMS

### Statutory time limits on payments

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

There is no prescribed statutory time limit for the payment of invoices, nor is there a prescription for the manner of payment; the method of payment is determined by mutual agreement and specified in the contract.

However, there may be provisions and mandates under various provisions – such as taxation law, banking and insurance law, the bank rate of the Reserve Bank of India, etc – that need be checked and verified for the payment of invoices. In the event that an entity is registered as a micro-, small or medium-sized enterprise, it will receive certain advantages on invoices raised by them on third parties for making payments.

*Law stated - 01 January 2022*

### Late payment interest

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

There is no statutory mandate for interest on late payments for a contract under contract law; however, other legal provisions may apply for such interest, such as taxation law.

Generally, interest is charged at a rate of anything between 12 to 18 per cent. It is essential that this interest rate is

reasonable and within the limits of interest rates prescribed by banks. To ensure the same, the courts have struck down excessively high and unreasonable interest rates charged by parties in a contract and have also stated that this chosen rate of interest shall be same for both parties.

*Law stated - 01 January 2022*

### **Civil penalties**

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

There is no statutory mandate or penalty for failing to comply with the statutory interest rate or late payment of invoices in cases of contracts between parties, unless the parties approach the court for a resolution to a dispute. In such a case, the court may analyse and decide the relevance, applicability and amount or severity of the penalty, depending upon the nature, facts and circumstances of the case.

*Law stated - 01 January 2022*

## **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 rules for termination of a supply contract, and depending on the underlying articles of the contract, the Sales of Goods Act 1930 may apply; however, general rules that may lead to termination of a contract are fraud, coercion, undue influence and impossibility of performance, and in the absence of a specific rule, the same would also apply to supply contracts. Sometimes, factors such as insolvency and force majeure are also considered in those circumstances.

*Law stated - 01 January 2022*

### **Notice period**

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

In case of the absence of a notice period, the court may give a decision and advise the parties on the basis of various factors, such as the nature of the contract, the terms and conditions of the contract, the implication of a contract and the circumstances of the case.

*Law stated - 01 January 2022*

### **Automatic termination on insolvency**

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

There is no strict mandate that enforces automatic termination of a contract on insolvency of the other party, and such automatic termination is usually subject to the language and terms of the termination clause in the contract. The insolvency law and the courts are vested with the decision-making power to adjudge the course of termination –

whether to provide termination on insolvency – on the basis of the facts and circumstances of the insolvent party and matter.

*Law stated - 01 January 2022*

### **Termination for financial distress**

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

Unless otherwise specifically agreed between the parties, there is no statutory restriction on terminating a contract if the other party is in financial distress. Business contracts usually provide for contract termination not only for liquidation but also for probable liquidation, winding-up (compulsory or voluntarily), amalgamation, merger, reconstruction, etc, as well as for a change in composition for the benefit of creditors.

*Law stated - 01 January 2022*

### **Force majeure**

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

Yes, force majeure events are recognised in India. 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 on extended force majeure, suspension or discharge of obligations.

*Law stated - 01 January 2022*

## **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?**

Unless specified or expressly denied by the terms of the contract, a supplier may subcontract its obligations under the contract without seeking consent from the other party; however, it is recommended that the subcontractor enter into the agreement specifying the details of the work to be performed, the rights and duties of the supplier and the subcontractor, consideration, termination, etc, to avoid any future legal issues or disputes.

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.

*Law stated - 01 January 2022*

## Statutory rules

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

There are no statutory rules or provisions that apply to subcontracting in India; however, if the subcontracting is restrictive of the rights of the parties in any way or violates any specific law, the courts may intervene to adjudicate the matter on the basis of its merits.

*Law stated - 01 January 2022*

## Assignment of rights and obligations

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

Unless explicitly permitted by the terms of the contract, a party may assign its rights and obligations under the contract without seeking the other party's consent. Typically, in the case of a dispute owing to the absence of such specific terms or clauses, the consent, intention, facts and circumstances of the case and the contract are considered.

*Law stated - 01 January 2022*

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

There are no statutory controls for assignment of rights or obligations under a supply contract, unless specifically required under the law to enter in an additional contract or if directed by the courts.

*Law stated - 01 January 2022*

## Enforcement by a third party

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

A third party to a contract cannot enforce the terms of a contract, and the courts in India have attempted to clarify ambiguities by applying the doctrine of privity. The doctrine of privity has been well recognised, albeit with certain exceptions, such as the possibility of a beneficially entitled third party to have a right to enforce the agreement, thus allowing such third party to enforce the terms of the contract.

Additionally, the courts of higher jurisdiction in India may allow writ petitions or public interest litigation if there arises a question affecting public interest or where a party is directly affected. Likewise, a claim by a third party may also be enforced under tort law, giving rise to a civil cause of action.

*Law stated - 01 January 2022*

## DISPUTES

### Limitation periods

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

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.

The courts have observed that a contract may be rendered void if the limitation period agreed is shorter than that provided by the Limitation Act 1963, and in consideration of the facts, issues and circumstances of the case.

*Law stated - 01 January 2022*

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

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

Yes, 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.

*Law stated - 01 January 2022*

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

Yes, the courts in India recognise and respect international commercial contracts governed by foreign law and allow parties the flexibility to decide their choice of jurisdiction, only if there is one Indian party and the other party is a foreign party.

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* [(2003) 4 SCC 341], parties can choose, in respect of commercial contracts, any court of natural jurisdiction or foreign court of their choice as a neutral forum.

*Law stated - 01 January 2022*

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

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

The Indian judicial system is vast and has several branches that specialise in dispute resolution. While courts in some countries are often overwhelmed with cases, India has a highly divided and organised structure of courts that reduces the burden and increases the efficiency of decision-making.

There has been a substantial rise in the number of young judges adjudging matters in India at both lower and higher levels, therefore solving the problems arising from having less infrastructure.

For any party to a dispute, the dispute and legal system may seem efficient and cost-effective owing to several factors, such as proper legal guidance, different routes and approaches to the courts. Owing to these steps, resolving

commercial disputes through the local legal system is efficient and advisable.

*Law stated - 01 January 2022*

## **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?

Yes, India has signed and ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

In the event of domestic contracts, any disagreement between the parties is usually resolved by ad hoc arbitration conducted in line with the norms of Indian arbitration law (the Arbitration and Conciliation Act 1996). In international business transactions, however, parties often choose institutional arbitration governed by norms established by globally recognised forums such as the ICC, LCIA, and SIAC.

*Law stated - 01 January 2022*

## **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?

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

- 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;
- grant of injunctions (temporary or permanent);
- cancellation, revocation or rectification of the contract;
- specific performance of the contract, instructed by the court if no alternate remedy is available;
- specific relief for the enforcement of individual civil rights or the recovery of immovable or movable property;
- 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 Cerglass Technics Private Limited and Anr [Criminal Appeal No. 2128 of 2011], 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.

*Law stated - 01 January 2022*

## **UPDATE AND TRENDS**

## Recent developments

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

Owing to the impact of the covid-19 pandemic, India has seen an immense evolution in the legal field as the impact on several businesses and organisations created an immediate need for evolution.

### Digitisation

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.

### Applicability of force majeure clause and other clauses

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.

### Insolvency and financial distress

With the onset of the pandemic, the central government suspended the initiation of any fresh insolvency petitions against companies for one year and kept all covid-19-related debt outside the purview of the Insolvency and Bankruptcy Code 2016 .

Restructuring schemes for individuals, small businesses and micro-, small and medium-sized enterprises holding significance for financial institutions were reintroduced.

*Law stated - 01 January 2022*

## Coronavirus

What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The Indian government has granted a number of relaxations in light of the pandemic.

### Ministry of Corporate Affairs

The Ministry of Corporate Affairs allowed companies to spend their corporate social responsibility (CSR) funds on the

pandemic-related affairs and also inserted a provision to the Companies (Corporate Social Responsibility Policy) Amendment Rules 2020 stating that a company engaged in research and development activity of a new vaccine, drugs and medical devices in their normal course of business may undertake research and development activity of a new vaccine, drugs and medical devices related to covid-19 in collaboration with any institute or organisation.

## **Taxation and income tax filing**

The Ministry of Finance, during the budget sessions and other departmental discussions, extended the final dates for filing income tax returns, reduced the rate of interest for delay in filing, removed the late fee or penalty for goods and services tax payments of companies with a turnover of 50 million rupees or more.

## **RBI**

In March 2020, the Reserve Bank of India (RBI) reduced the repo and reverse repo rates by 115 and 155 basis points (bps) to 4.0 and 3.35 percent, respectively, and announced liquidity measures across three measures comprising long-term repo operations, a cash reserve ratio cut of 100 bps and an increase in marginal standing facility to 3 per cent of the statutory liquidity ratio.

The RBI created a facility to help the state government's short-term liquidity needs and relaxed export repatriation limits. It also announced a resolution plan for corporate and personal loans that were classified as 'standard' as of 1 March 2020 but that were stressed owing to the pandemic.

Several extensions were granted for due dates for the issue of notices, notifications, approval orders, sanction orders, filings of appeal, returns, return statements, applications, reports and other documents by taxpayers, including investments on savings instruments or investments for rollover benefits of capital gain, under various acts.

## **Labour and employment**

The government announced relief for daily wage workers and construction workers of 1000 rupees per person for all states and union territories. Such amounts shall be made via direct benefit transfer from the cess pool under the Building and Other Construction of Workers (Regulation of Employment and Conditions of Service) Act 1996 .

## **Real estate**

The Real Estate Regulatory Authority recognised the covid-19 pandemic as a force majeure event and granted an extension for registration and completion of registered projects, and allowed the release of partial bank guarantees for ease in cash flows.

Owing to the aforementioned relief and emergency legislation, the legal advisers of these parties must implement new legal strategies and measures for risk analysis. Businesses can take the following steps:

- implement policies on a regular and thorough basis for contract verification and risk evaluation of legal duties;
- review contracts on a regular basis to assess a party's rights and obligations – there must be enough flexibility in the contracts to accommodate changing circumstances; and
- encourage mediation and alternative dispute resolution clauses in the event of a disagreement between the contractual parties.

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.

*Law stated - 01 January 2022*

## Jurisdictions

	<b>Australia</b>	Baker McKenzie
	<b>Canada</b>	Baker McKenzie
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	<b>India</b>	HSA Advocates
	<b>Italy</b>	Mazzeschi
	<b>Japan</b>	TMI Associates
	<b>Philippines</b>	Quisumbing Torres
	<b>South Africa</b>	Garlicke & Bousfield Inc
	<b>South Korea</b>	Yoon & Yang LLC
	<b>Spain</b>	Baker McKenzie
	<b>Sweden</b>	Advokatfirman Fylgia KB
	<b>Switzerland</b>	Bratschi AG
	<b>Ukraine</b>	Asters
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