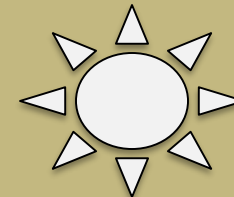


PRESENTER



Adv. BHARAT AGARWAL
Managing Partner

ON

NEGOTIATION AND DRAFTING

ACELEGAL

D-201, 2ND FLOOR, TOWER No. - 3,
INTERNATIONAL INFOTECH PARK,
VASHI STATION COMPLEX,
NAVI MUMBAI – 400703.
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NEGOTIATIONS



NEGOTIATION

“Discussion aimed at reaching
consensus ad idem”

POINTS COVERED

Elements

Process

Influencing factors

Good practices

Do's and don'ts

ELEMENTS OF NEGOTIATION

BEHAVIOUR

- Relationship among the parties
- Communication between them
- Style they adopt

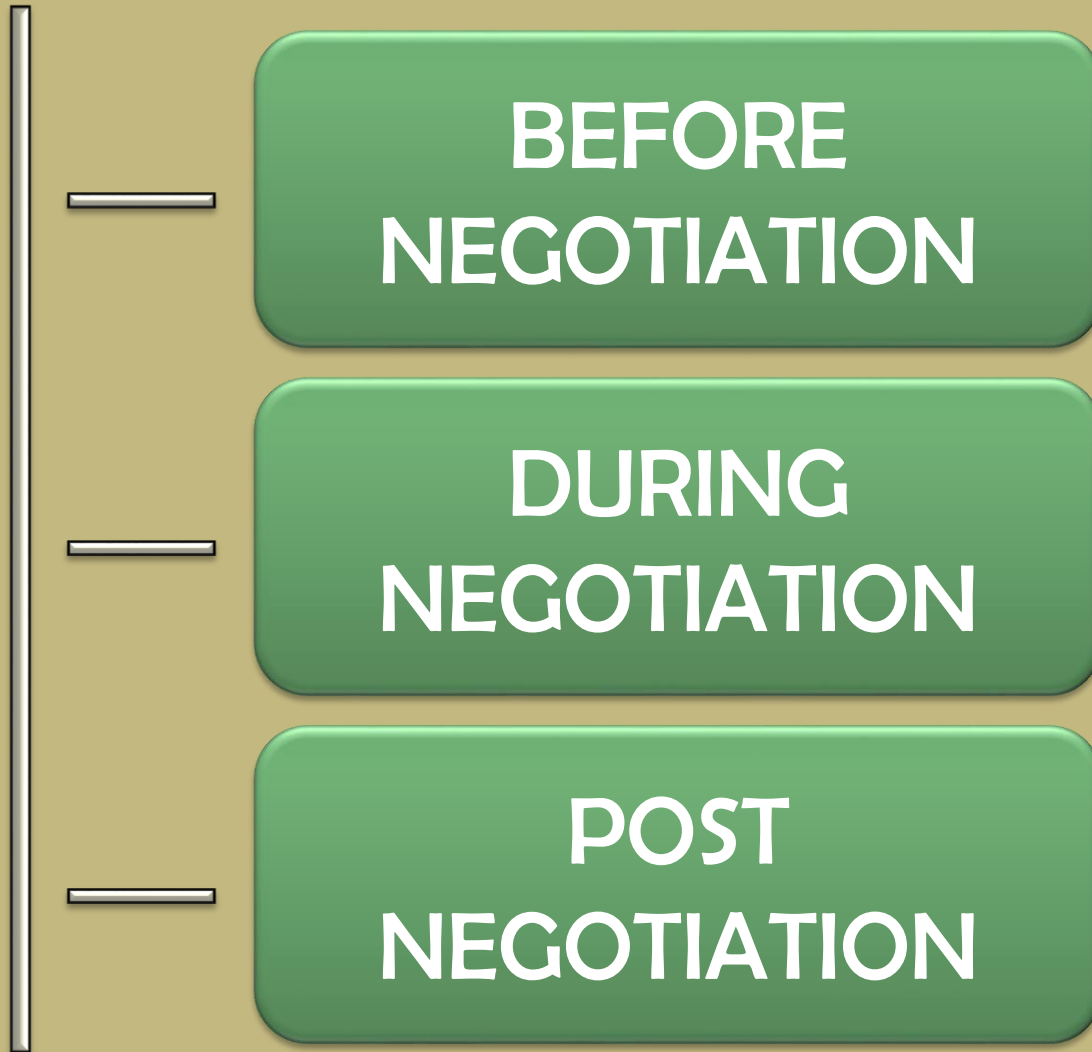
PROCESS

- Context of the negotiation
- Sequence and stages
- How the parties negotiate
- Tactics used

SUBSTANCE

- Agenda
- Issues
- Options

PROCESS OF NEGOTIATION



BEFORE NEGOTIATION

Gather benchmark data

Enhance your BATNA'S

Discuss with clients to understand the specific need

Know the counter party and their counsels

Assess the need of other party

BEFORE NEGOTIATION

Focus on critical issues

Determine the mode of communication

Study business environment

Analyze deal breakers

Don't think other party is fool

BEFORE NEGOTIATION

Identify and prioritize the objective



ISSUES	NATURE	BATNA	DEAL BREAKER
--	COMMERCIAL		
--	LEGAL		
--	HYBRID		

DURING NEGOTIATION

"Good agreement is not one with maximum gain but optimum gain"

Initiate

Critical issues
first

Listen to
other party

Have
positive
approach

Give more
time to
important
points

Think of
alternatives

Address all
relevant
terms

Avoid
argument

Avoid deal
breakers

Bargain

Compromise

Use parking
lot

POST NEGOTIATION

WIN - WIN SITUATION

- ❖ Summary of negotiation
- ❖ Follow up
- ❖ Schedule next meeting

FACTORS INFLUENCING PROCESS OF NEGOTIATION

TIME

**COMMUNICATION
SKILLS**

PLACE

CULTURAL FACTORS

**RELATIONSHIP AND
CONTEXT**

LANGUAGE BARRIERS

STYLE

PERSONAL RELATIONS

LEGAL SYSTEM

DO'S

KEEP PROFESSIONAL
APPROACH

GAIN TRUST

EMPHASIZE ON
COMMON INTERESTS

CONSULT CLIENT
BEFORE MAKING OFFERS

DEAL ISSUE
ONE – BY – ONE

DON'T'S

BE AGGRESSIVE

BE IMPATIENT

MAKE ISOLATED
CONCESSIONS

MAKE CONCESSIONS –
UNLESS CONDITIONAL

FOCUS ON “GHOST RISK “

GOOD PRACTICES

Meet client
before
negotiation
process

Understand
business
need

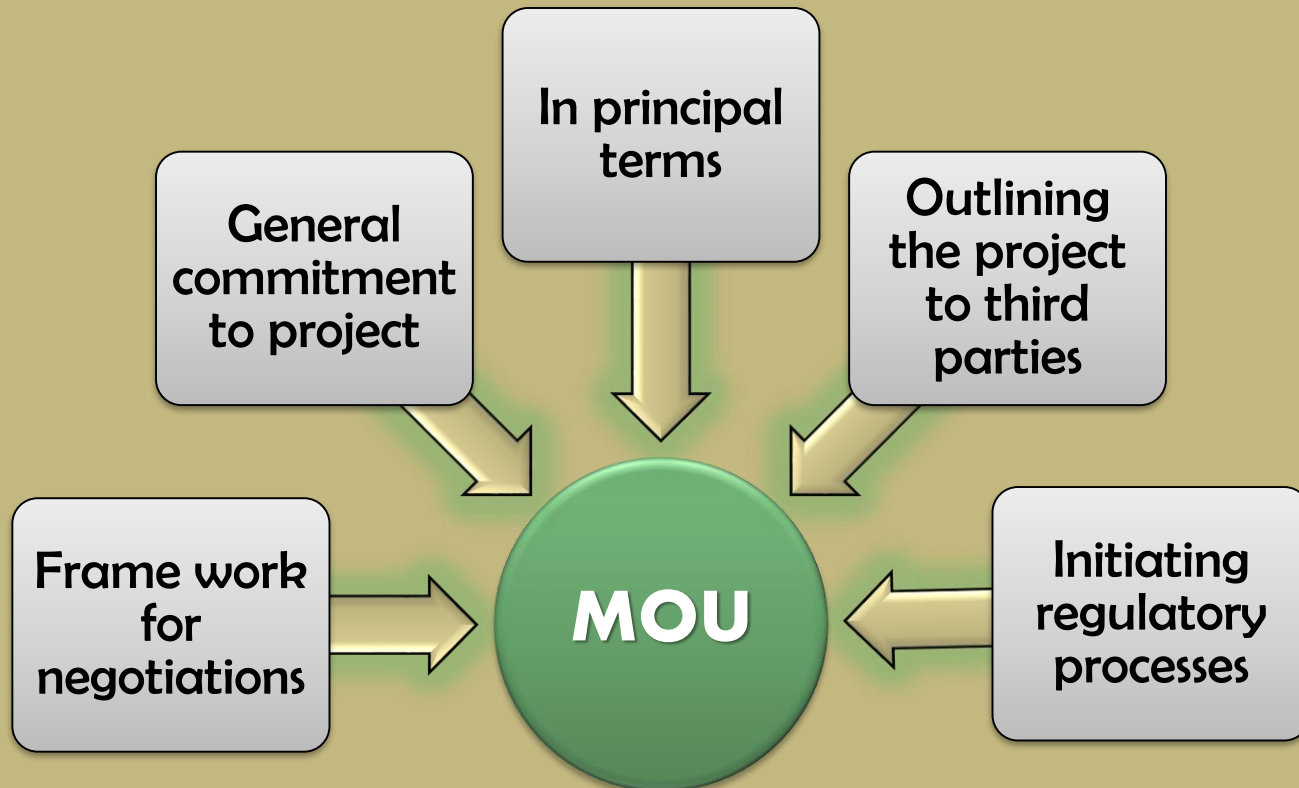
Onerous
obligations

Communicate
with counter
party

ENFORCEABILITY OF MOU

WHAT IS MOU...?

Preliminary agreement to record basic terms of a transaction in advance



ENFORCEABILITY OF MOU

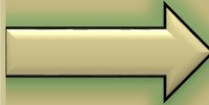
Three questions

Was anything left for further agreement, which was so essential to give effect to the agreement?



If Answer to the first question is in negative and to the second in affirmative. MOU is Binding. Otherwise not.

Did the Parties intend to be bound by the terms agreed upon?



If anything left for future, was merely a matter of formality.

MOU IS BINDING.

WHETHER *CONSENSUS AD IDEM*

IF YES
BINDING

IF NO
NOT
BINDING

DRAFTING OF CONTRACT



CONTRACT

General definition :

A **contract** is a voluntary arrangement between two or more parties that is enforceable at law as a binding legal agreement.



CONTRACT

A **legal contract** is not a mere piece of paper for signing between two parties but it protects one business entity with its rights and remedies

A **contract** also create responsibilities , conditions, manners , time limit , monetary issues, etc. so that every corner of the agreement is properly sealed failing which it may result in unforeseen losses

STAGES OF DRAFTING CONTRACT

Engagement phase

Analytical phase

Drafting phase

Execution phase

Contract administration phase

CONTENTS OF CONTRACT

- ❖ Name of document
- ❖ Date of document and place of execution
- ❖ Parties
- ❖ Recitals
- ❖ Testatum
- ❖ Consideration
- ❖ All estate clause
- ❖ Exceptions and reservations
- ❖ Habendum
- ❖ Terms and conditions
- ❖ Covenants
- ❖ Description of property
- ❖ Testimonium
- ❖ Receipts

CONTENTS OF CONTRACT

Preamble

Nature, Date, Place , Purpose

Indemnification

Parties

Security interest

Definitions

Delivery

Offer and acceptance

Risk of loss

Obligation of both parties

Consideration

Condition

Precedent and subsequent

Force majeure

CONTENTS OF CONTRACT

Default

Confidentiality and non
compete

Termination and
expiration

Penalties and
liquidation damages

Assignment

Waiver

MAC

Notice

Intellectual property
rights

Dispute resolution

Jurisdiction

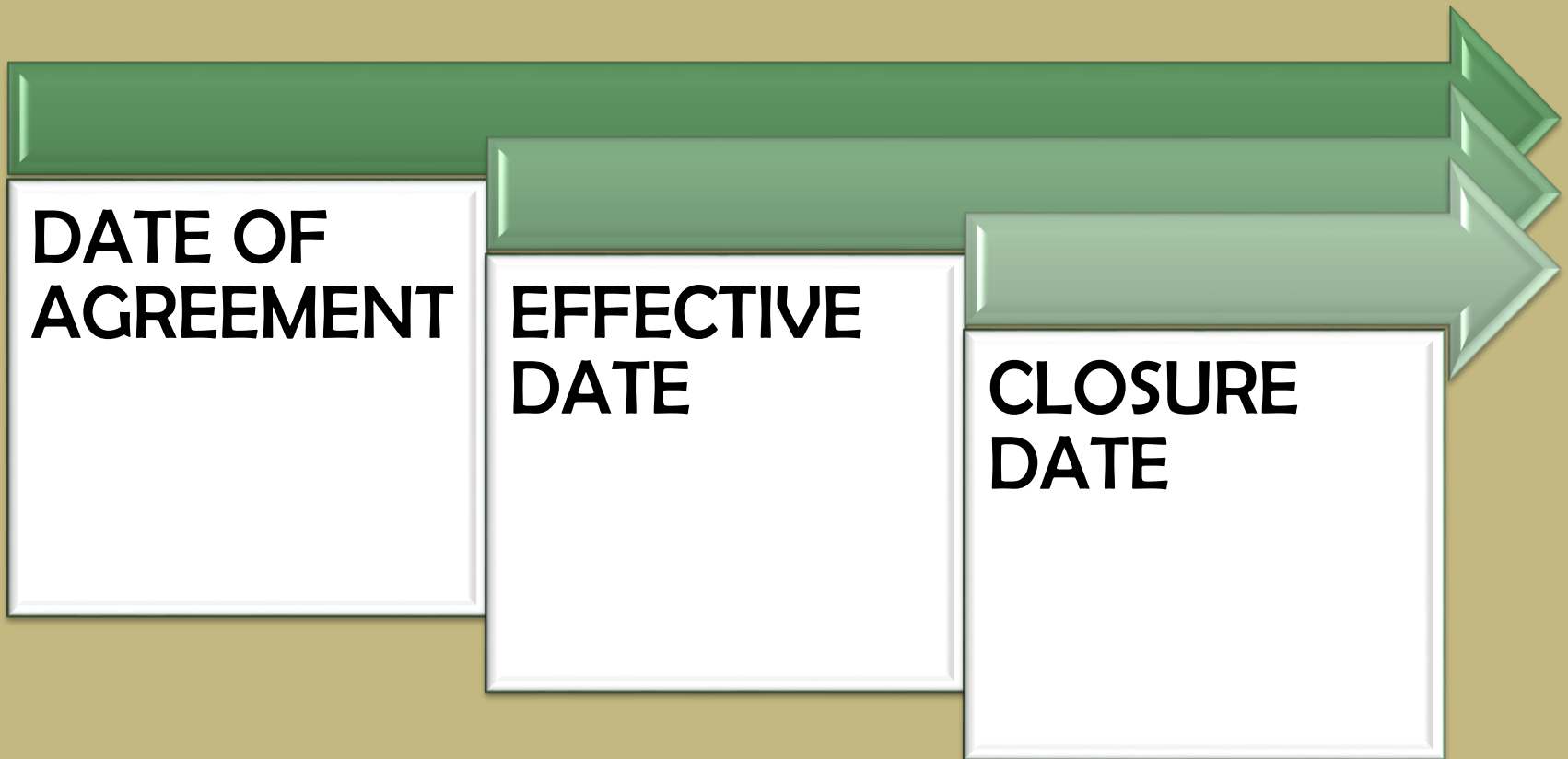
POINTS TO BE KEPT IN MIND WHILE DRAFTING CONTRACT

DATE CLAUSE

- The date is of great importance
- If any legal action is required to be taken in respect of a document, in some cases limitation begins to run from the date of the document
- Can be put in testimonium, but best way is to put it at the beginning of document
- Should be written in words not figures

DATE CLAUSE

Differentiate Between



DATE CLAUSE

- Should Clearly mention Date of Agreement, if it is signed by parties on different date and different place
- If deed is executed by more than one person, the date on which each signs the deed must be shown preferably against his signature
- If several parties to a deed sign it on different dates, the question is which date should be entered as the date of deed
- The practice is to regard the last of such dates as the date of deed, however not seem to be universally correct

TITLE OF DOCUMENT

The word “DEED” and “AGREEMENT” should be properly used

“Agreement” in simple terms means an offer from one party and acceptance from another party.

Agreement precedes the contract

“Deed” refers to the document pertaining to alienation of immovable property in accordance with the legal requirements

TITLE OF DOCUMENT

- ❖ In England, deeds are drafted either as “Deeds poll” or “Indentures”
- ❖ All deeds should be described by the name of the transaction which they evidence
Eg: this deed of gift, this deed of mortgage
- ❖ When deed is of complex character and evidences different transactions it should be simply described as “THIS DEED”

PARTIES TO A CONTRACT

PERSON

Natural person



Artificial person



TERMS SHOULD BE USED CAREFULLY

Heirs, successor, assignee, permitted assignee,
administrator, executor, nominee

PARTIES TO A CONTRACT

FULL DESCRIPTION OF PARTIES

Name

Age

PAN

Parentage

Occupation

Residence

PARTIES TO A CONTRACT

In case of artificial person

Resolution details

Authorized person with designation

CIN

PAN

Registered office address

Statutory recognition

PARTIES TO A CONTRACT

- ❖ Parties should be given a reference name.
- ❖ Parties should be referred to throughout by the same name
- ❖ Avoid: “party to first part”
- ❖ Use : “vendor”, “purchaser”

RECITALS

*Provides An Explanation Of The Reasons For
The Transaction*



NARRATIVE

Set forth the facts
on which instrument
is based



INTRODUCTORY

Explains the motive
for operative part

RECITALS

Some Rules Which must Be Kept In Mind

- If both recitals and covenant of a deed are clear and unambiguous, but they are inconsistent with each other, the covenant is to be preferred
- If the recitals are ambiguous and the operative part is clear, covenant must prevail
- If the recitals are clear and the covenant is ambiguous the recitals govern the construction
- A misrecital may operate by way of estoppel

RECITALS

- A misrecital will not affect the deed, if it be sufficiently clear what is intended
- A misrecital may influence the construction
- A recital in a deed may operate as a covenant where it appears to have been the intention of the parties that it should so operate

PURPOSE AND OBJECT OF CONTRACT

- Should Be Lawful
- It Is Essence Of Contract

COMMERCIAL TERMS

- Should Be complete
- Should Be Clearly Defined

Condition precedent (CP)

- ❖ Is an event which must occur for enforceability
- ❖ Initiates a duty
- ❖ Agreement becomes voidable
- ❖ Damages can be claimed

Condition subsequent (closing)

- ❖ Event or state of affairs that brings an end to something
- ❖ Brings a duty to an end
- ❖ Agreement cannot be terminated
- ❖ Specific performances can be sought

TESTATUM

The operative part of deed commences with a witnessing clause termed as “testatum”

Usually begins with the words “now this deed witnesses”

If the *testatum* portion in the deed is substantial part in the deed, the entire commercial contract becomes substantial

TESTATUM

EXAMPLE

Now, therefore, in *consideration* of the mutual covenants and in reliance on the *representations and warranties* contained herein, and for good and *valuable consideration*, the *receipt* and sufficiency of which are hereby acknowledged, the parties hereto, intending to be *legally bound*, hereby agree as follows:

COVENANTS

Also known as "Operative Clause"

A **covenant** is a promise by a party by which it pledges that something is either done, will be done or shall not be done



COVENANTS

Broadly divided into

**COVENANT FOR SUBJECT
MATTER**

IT RUNS WITH TITLE OF LAND
ENFORCEABLE AGAINST SELLER
AND HIS LEGAL
REPRESENTATIVES

**COVENANT AGAINST
ENCUMBRANCE**

**COVENANT FOR PEACEFUL
POSSESSION**

PERSONAL COVENANTS
ENFORCEABLE AGAINST
SELLER ONLY

**COVENANT FOR FUTHER
ASSURANCES**

REPRESENTATION

Black's Law Dictionary defines a representation as “A presentation of fact — either by words or by conduct — made to induce someone to act, especially to enter into a contract.”

The statement, made before or at the time of making the contract, regarding a past fact or existing circumstance related to the contract which influences such party to enter the contract

MISREPRESENTATION [SEC. 18] of ICA

False statement of fact made by one party to another party, which has the effect of inducing that party into the contract

WARRANTIES

An assurance, promise, or guaranty by one party that a particular statement of fact is true and may be relied upon by the other party

A warranty is an undertaking or stipulation that a certain fact in relation to the subject of the contract is or shall be as it is stated or promised; and refers to an agreement to protect the recipient against loss if the fact is or becomes untrue

IN CASE OF FALSE
REPRESENTATION,
CONTRACT BECOMES
VOIDABLE

IN CASE WARRANTY IS
BREACHED, DAMAGES AND
SPECIFIC PERFORMANCE
CAN BE SOUGHT

INDEMNITY

According to the Law Lexicon indemnity is defined as “the obligation or duty resting on one person to make good any loss or damage another has incurred while acting at his request or for his benefit”.

DAMAGES

The Law Lexicon defines Damages as “a compensation for legal injury. As a general rule the theory upon which the law allows damages for the violation of a civil right is based upon the doctrine that where a civil injury has been sustained the law provides a remedy that should be commensurate to the injury sustained”.

INDEMNITY **vs.** DAMAGES

Third party losses are covered

Unforeseeable

Need not be incurred

Breach not necessary

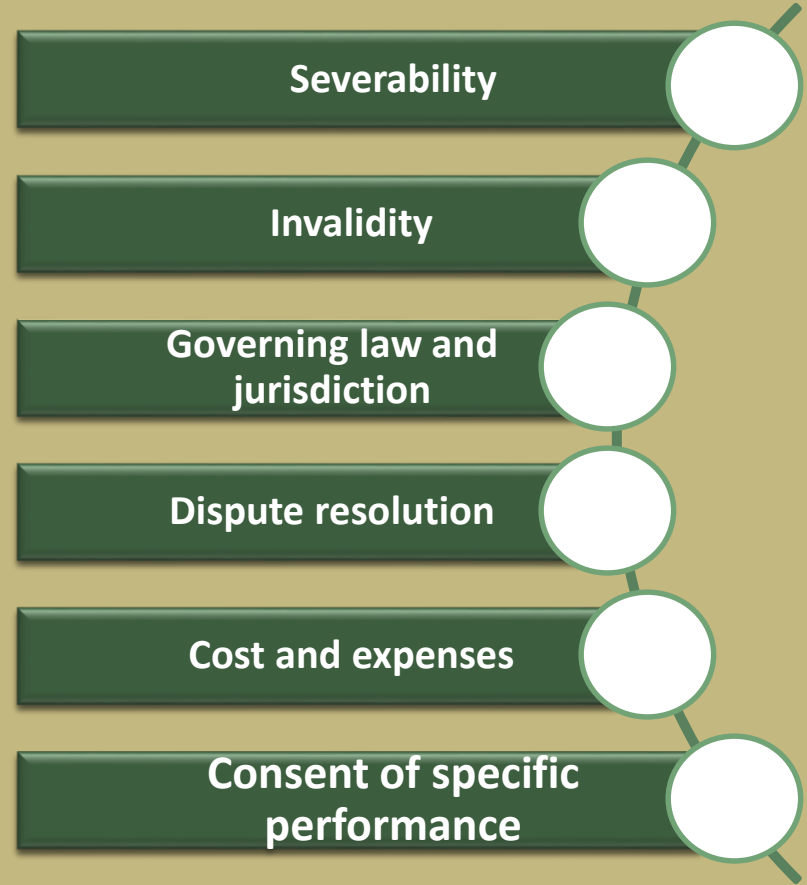
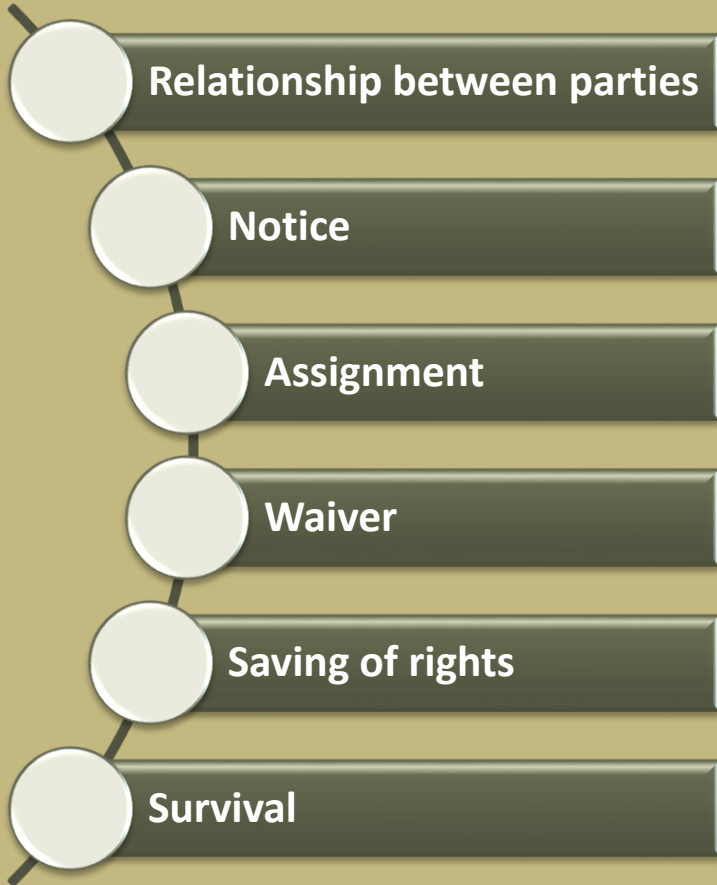
Third party losses are not covered

Foreseeable

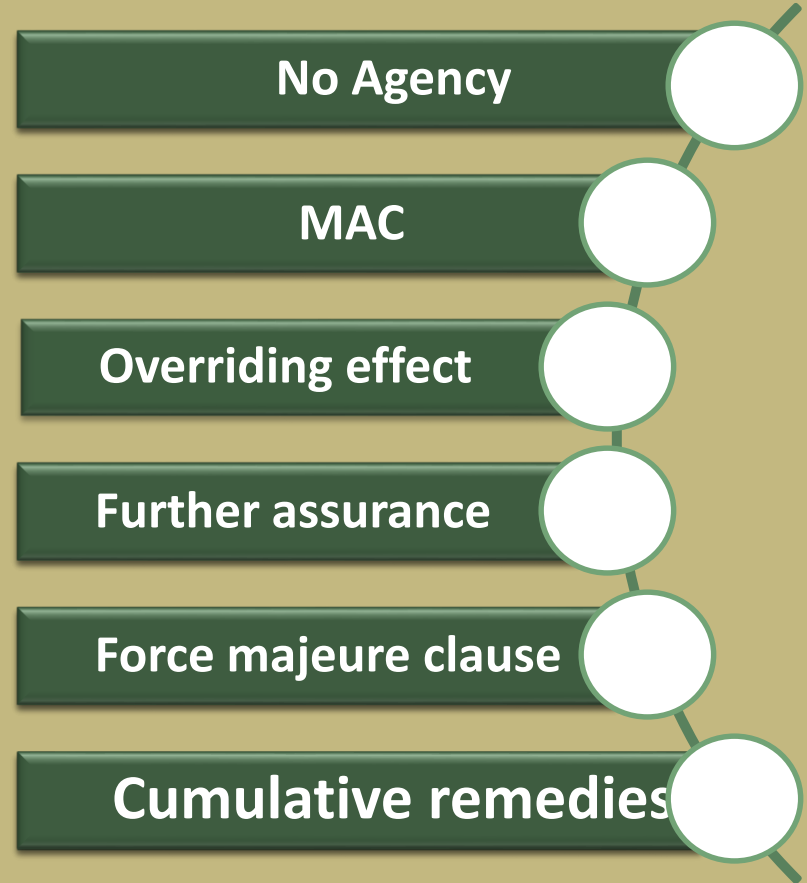
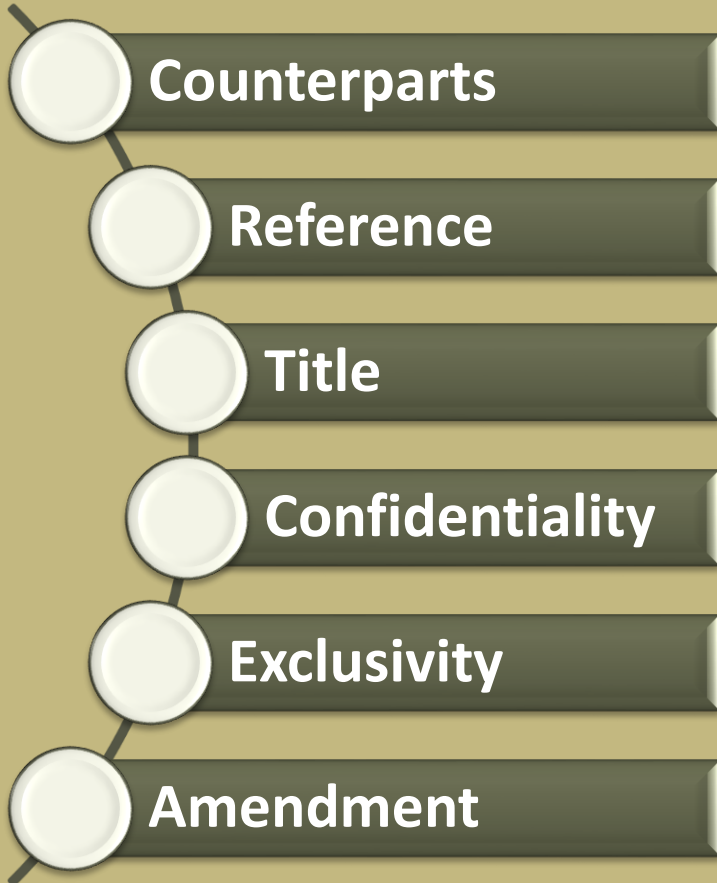
Actually suffered

Breach is necessary

BOILER PLATE CLAUSES



BOILER PLATE CLAUSES



DESCRIPTION OF PROPERTY

It Should Contain :

Area of land in sq.mtrs

Survey numbers

Buildings and structures with their municipal numbers

Boundaries

Generally, tendency is to copy paste schedule from previous documents but it is necessary to verify the correctness

DESCRIPTION OF PROPERTY

MAP

This is optional but sometimes necessary, to avoid mistake about its identity

Plan or map should be appended to the deed

The words “for greater clarity” or “by way of further identification” are added to indicate that the description controls the plan

TESTIMONIUM

- This clause is common to all documents
- The clause runs like this *“In witness whereof the vendor has put his hand/signature and seal on the day and year first hereinabove written”*

SIGNATURE CLAUSE :

- Every document of transfer or otherwise is required to be executed by the parties executing the same

SIGNED AND DELIVERED

**SIGNED SEALED AND
DELIVERED**

**Should be
carefully used**

TESTIMONIUM – NORMAL PERSON

ATTESTATION CLAUSE :

It should appear clearly that a witness intended to sign as an attesting witness

Between signature of executants and witness the words “in the presence of” are added

Attestator is not allowed to so delegate his authority to any other person

TESTIMONIUM - ILLITERATE PERSON

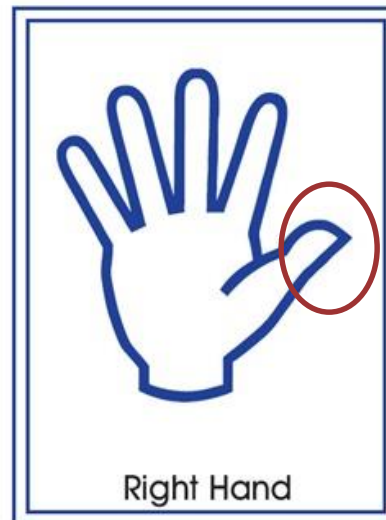
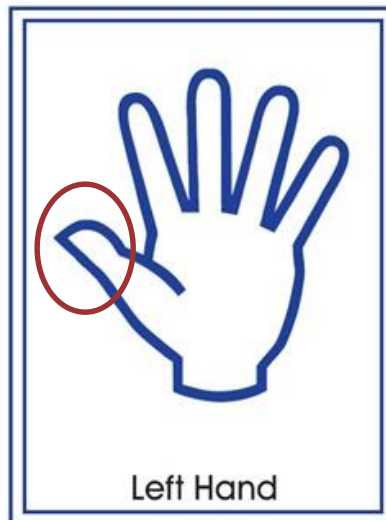
MALES



FEMALES



MALES /FEMALES



DEFECTIVE THUMB

Another person should make endorsement to show whose mark and of which hand's thumb it is

ENDORSEMENT

The endorsement may begin by saying

“this deed made on this ____ day of ____ between the within named ____ and the within named ____”A

OR

“the parties to the within written deed hereby agree as follows”

FOLLOWED BY



OPERATIVE PART

ENDORESEMENT

Original deed is referred as

'within written deed'

Parties referred as

'within named parties'

Covenants

'within mentioned
covenants'

SUPPLEMENTAL DEED

The form shall be the usual form of deed or agreement

In which after the name of parties the words “supplemental” or “intended to be read as annexed” to a deed of ___ dated ___ and made between the parties hereto, hereinafter called the “principal deed” should be inserted

FOLLOWED BY

RECITALS

(only which are considered absolutely necessary)

To refer matter or person in the principal deed we should say “ _____ mentioned (or recited) in the principal deed”

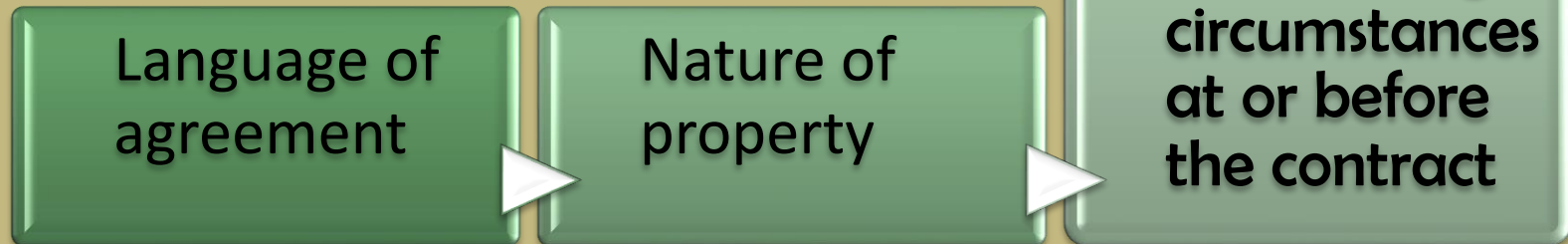
TIME ESSENCE OF CONTRACT

- Means a breach of the condition as to the time of the performance will entitle the innocent party to repudiate the contract
- If parties intent to make time essence of the contract, they must express it in explicit and unmistakable language in the agreement

In **Gomathinayagam pillia v. palaniswami nadar AIR 1967 SC 868** it is stated that mere mention of specific date for completion of contract or fixing the penalty for default does not establish intention of the parties.

TIME ESSENCE OF CONTRACT

Such intentions may be gathered by :



Further in [Union of India v. Plantation corporation of kerala ltd.](#) states when contract itself provided the clause for extension of time as also in view of the nature of the contract, time can never be said to be essence of the contract

TIME ESSENCE OF CONTRACT

- ❖ Under Sec. 55 of ICA, the contract becomes voidable after the lapse of the specific time if the intention of the parties was that time should be the essence of contract.
- ❖ The intention should not only be ascertained by written words but the nature of the property, nature of contract and surrounding circumstances.

Kalidas ghosh v. mungeeran bangur and co.
AIR 1955 CAL 298

TIME - WHEN ESSENCE OF CONTRACT

Time will be considered as the essence of contract when

- Where the parties have expressly agreed to treat it as essence of contract
- Where delay operates as an injury; and
- Where the nature and necessity of the contract require it to be so construed

The date of completion of work should be specifically mentioned in the condition precedent and not a mere warranty, even if the stipulated time was extended further by mutual consent

CONCLUSION

Sir James Fitzjames Stephen, says

“In drafting it is not enough to gain a degree of precision which a person reading in bad faith cannot misunderstand”

To achieve these objectives following precautions should be observed:

- ❖ Deed should contain all the material facts and terms and conditions
- ❖ Intention of the parties should be made clear by plain and simple reading

CONCLUSION

- ❖ Use active voice not passive voice
- ❖ Understand whole design before you begin drafting
- ❖ “Will/shall/must” are command and “May” is permission. Use wisely
- ❖ Be clear, direct, and precise and not reflective, provocative

CONCLUSION

- ❖ The words and expression should be used in their primary natural and grammatical meaning
- ❖ Recitals should be kept at minimum
- ❖ The law on the subject is to be carefully looked
- ❖ Verification of signature should be done
- ❖ As far as possible, corrections, deletions, omissions should be avoided

CONCLUSION

- ❖ If making corrections over a deed or agreement, full signatures endorsing the corrections should be done by the parties
- ❖ Wherever area is given, care should be taken that it is correct. To be on the safe side, it is advisable that after the area the word “approximately” or the words “more or less” may be added so that there may not be trouble if the area is found to be correct

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