
THINK BEFORE YOU INK IMPORTANCE OF AGREEMENT REVIEW

Agreement(s) are a part of everyday life, be it buying a phone, opening a bank account, investing in mutual funds, etc.

All kind of transactions require you to enter into an Agreement. Many a times, it's an oral one which is/are very well valid or legal under the Indian Contract Act, 1872 and at times, it's a written one which needs signature of two or more parties involved into the transaction. In case of online agreements, for most of us, simply clicking on “**accept our terms and conditions**” is a routine.

HOW MANY OF US ACTUALLY “**READ TO UNDERSTAND ECONOMIC IMPACT**” OF TERMS AND CONDITIONS OF ANY AGREEMENT WE ARE AGREEING / SIGNING?

Very few actually..... AND at times, this carelessness can come back to haunt us.

WHAT IS THINK BEFORE YOU INK?

Simply, a procedure of reading to understand each and every clause of the agreement on word to word basis **OR** a tool that ensures agreement reflects understanding, intent and expectations of the parties entering into it.

WHY IT'S SO IMPORTANT...?

Surely, this question would have popped up into your mind, while reading, in one way or the other. You might be thinking, when one of the Parties to the Agreement (most of the time Opposite one!) already spent substantial cost on its drafting then why other Party(ies) should bear extra cost for REVIEWING?

So here's the answer....

TO MAKE SURE IT IS FAIR TO THE PARTY WHO OPT'S FOR ITS REVIEW. *Instead of simply relying on the opposite party's draft why not take another opinion?* Same as we do in case of medical emergencies, we do not simply rely on one Doctor's opinion rather we prefer taking second opinion to protect ourselves against misdiagnosis.

Scanning through agreements to assess its long-term impact on your business prospect is very important **as you might be focusing too much on the little details and not enough on the important ones.**

In Desiccant Rotors International Pvt. Ltd. (“Desiccant”) v. Bappaditya Sarkar & Anr

The Parties entered into arrangement involving a senior marketing manager as part of arrangement with Desiccant, the manager agreed to keep Desiccant's matters confidential, and soliciting Desiccant's customers, suppliers and employees, **for two years** after the termination of his employment. Expressly embodied in the employment agreement was an acknowledgment by the manager that he was dealing with confidential material of Desiccant. After few years the manager

resigned and **joined** a direct competitor of Desiccant and started **contacting** customers and suppliers of Desiccant.

In injunctive proceedings against the manager by Desiccant, the **Hon'ble Delhi High Court** ruled that in the clash between the attempt of employers to protect themselves from competition and the right of employees to seek employment wherever they choose, *the right of livelihood of employees must prevail*. However, the High Court did allow an injunction against the manager **prohibiting him** from soliciting Desiccant's customers and suppliers to stand in effect.

In the McDonald's India v. Vikram Bakshi

In the ongoing spat between McDonald's India and its equal Indian partner Vikram Bakshi over control of the business, the joint venture agreement drawn up by the two sides will come to play a pivotal role in the days ahead.

The agreement executed not only sketches the contours of their relationship, but also sketches in permanent ink several key points that underscore the escalating dispute between the \$27.5-billion US fast-food giant and its Indian partner. In particular, legal clauses in the agreement relating to three points will have a bearing on how the settlement to the dispute unravels.

1. Share Transfer, Valuation
2. McDonald's call option
3. Arbitration

In the cases of M/s Sicpa India Limited v. Shri Manas Pratim Deb and in Satyam Computer Services Limited v. Ladella Ravichander

The **Hon'ble Delhi High Court** and the **Hon'ble Andhra Pradesh High Court** respectively, held that the compensation imposed by the employer was too high when compared to the cost faced in the recruitment procedure, training the employee, hiring a replacement, etc. In both these cases the Courts **upheld the validity of employment bonds** but reduced the excessive compensation payable as per the contractual agreements to a '**reasonable**' amount.

Check-out Below Examples, how a Small Correction into the Draft Agreement, could safeguard your Economic Interest!!!

Reference	Standard Clause	Suggested Alteration (Highlighted in Red Colour)	Rationale for Suggested Alteration
Liability to bear Damages Typically found in Rent Agreement or Leave and License Agreement	The Licensor (' Owner of Property ') and the Licensee or Lessee hereby agrees that, the Licensee shall have the right to retain ownership of any and all improvements/interiors which the Licensee have installed so long as the Licensee repair at the earliest i.e. before handing over the vacant and peaceful	The Licensor (' Owner of Property ') and the Licensee or Lessee hereby agrees that, the Licensee shall have the right to retain ownership of any and all improvements/interiors which the Licensee have installed so long as the Licensee repair at the earliest i.e. before handing over the vacant and peaceful	A small addition into the Clause goes a long way in safeguarding the economic interest of Licensee or Lessee as damage to the Rented Property owing to normal wear and tear gets excluded .

Reference	Standard Clause	Suggested Alteration (Highlighted in Red Colour)	Rationale for Suggested Alteration
<i>or Lease Agreement</i>	possession of the Licensed Premises (Rented Property), any damage resulting from the removal thereof at their sole cost.	possession of the Licensed Premises (Rented Property), any damage resulting from the removal thereof at their sole cost subject to normal wear and tear.	
Typically found in Joint Venture or Shareholders Agreements	In the event the XYZ (Majority Shareholder) proposes to Transfer its entire shareholding in the ABC Pvt. Ltd., then it shall have the right call upon the DEF and their respective Affiliates, as the case may be (Minority Shareholder), to sell their entire shareholding in the ABC Pvt. Ltd to such third party at the same price at which the XYZ is selling their respective shareholding in the ABC Pvt. Ltd to such third party then the DEF shall be obligated to sell its Shares in such manner and within such time period as may be required by the XYZ	In the event the XYZ (Majority Shareholder) proposes to Transfer its entire shareholding in the ABC Pvt. Ltd., then it shall have the right call upon the DEF and their respective Affiliates, as the case may be (Minority Shareholder), to sell their entire shareholding in the ABC Pvt. Ltd to such third party at the same price and other terms and conditions at which the XYZ is selling their respective shareholding in the ABC Pvt. Ltd to such third party then the DEF shall be obligated to sell its Shares in such manner and within such time period as may be required by the XYZ...	For instance, XYZ (Majority Shareholder) is selling its entire shareholding in ABC Pvt. Ltd. to MNP (third party) at Rs. 100/- per share for 100% upfront payment. XYZ is calling upon DEF (Minority Shareholder) to sell its shareholding as well at a same price of Rs. 100/- per share BUT at a deferred payment of Consideration i.e. No upfront payment to DEF. Under these circumstances, DEF is contractually obligated to say YES otherwise legal consequences shall follow.
Additional Funding Clause Typically found in Joint Venture or	Mr. XYZ (Majority Shareholder) and Mr. DEF (Minority Shareholder) acknowledges that Joint Venture may require capital from time to time and shareholders shall infuse the same. If any shareholder	Mr. XYZ (Majority Shareholder) and Mr. DEF (Minority Shareholder) acknowledges that Joint Venture may require capital from time to time and shareholders shall infuse the same. If any shareholder	Here infusion of Debt or Loan by a Shareholder in ABC Pvt. Ltd. is considered at par with the Equity. As such, mandating dilution in the Equity stake of Non-contributing Shareholder.

Reference	Standard Clause	Suggested Alteration (Highlighted in Red Colour)	Rationale for Suggested Alteration
<p>Shareholders Agreements</p> <p><i>[ABC Pvt. Ltd. is a Joint Venture]</i></p>	<p>refuses or fails to comply with any capital requirement as provided in the preceding clause or elects not to make any additional capital contribution (“Non-contributing Shareholder”), the other shareholder may procure necessary funding to ABC Pvt. Ltd. either in the form of debt and/or equity. In such case, the Non-contributing Shareholder shall accept proportionate dilution of its shareholding in ABC Pvt. Ltd. by the capital injection of the other shareholder(s).</p>	<p>refuses or fails to comply with any capital requirement as provided in the preceding clause or elects not to make any additional capital contribution (“Non-contributing Shareholder”), the other shareholder may procure necessary funding to ABC Pvt. Ltd. either in the form of debt—and/or equity. In such case, the Non-contributing Shareholder shall accept proportionate dilution of its shareholding in ABC Pvt. Ltd. by the capital injection of the other shareholder(s).</p>	<p>This clause is likely to be exploited by a Majority Shareholder in the future to silently kick-off Minority Shareholder from ABC Pvt. Ltd.</p> <p>Needless to mention that debt attracts payment of interest so equity dilution of Minority Shareholder would be very much unfair.</p>
<p>Termination Clause</p> <p>Typically found in Joint Venture or Shareholders Agreements</p>	<p>The Parties to the agreement mutually agrees to terminate the agreement in case of commencement of any proceedings against Minority Shareholder under the Insolvency and Bankruptcy Code, 2016 or similar provisions there is an appointment of an Interim Resolution Professional under the Insolvency and Bankruptcy Code, 2016.</p>	<p>The Parties to the agreement mutually agrees to terminate the agreement in case of admission of any proceedings against Minority Shareholder under the Insolvency and Bankruptcy Code, 2016 and similar provisions there is an appointment of an Interim Resolution Professional under the Insolvency and Bankruptcy Code, 2016.</p>	<p>Careful reading would indicate that the word ‘commencement’ + ‘or’ is / are likely to create a confusion that when this clause will actually trigger?</p> <p>A. When any Third Party simply files a case / petition / application before appropriate court of law? or</p> <p>B. When any case / petition / application filed by such Third Party is actually accepted or admitted by appropriate court of law?</p>

Reference	Standard Clause	Suggested Alteration (Highlighted in Red Colour)	Rationale for Suggested Alteration
			In case of 'A' Minority Shareholder becomes vulnerable for no valid reason.
Choice of Law	A governing law clause fixes the system of law which is going to be used to decide the rights under the agreement in case of any dispute or differences between the parties to the Agreement.		
Any Agreement	<p>For instance, you're a service provider based in India. You would usually agree to Indian law to govern your agreement and Indian Courts to decide disputes or differences. That makes sense. No argument there. Now, you have a potential customer in another country and they want the laws of California or USA or Canada to govern the terms of the agreement and you agree to it and if a serious dispute arises then you would have to:</p> <ol style="list-style-type: none"> 1. Engage a lawyer in such foreign destinations, and 2. Sue there. 		

An agreement review requires diligence and an eye for detail. Managing expectations, focusing on outcomes and getting the key information are few aspects which need to be worked upon for better outcomes. Consulting a professional before signing any agreement ensures your interests are protected. There should be someone who can examine the contract, explain the contract to you, and even suggest changes that are in your best interest.

**We are Happy to Assist You.
Please feel free to reach out to us!!!**

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Thanks and Regards
Team ~ K. Bagla & Associates
Your Compliance Partner