

Business Agreements

Definition of a Deed

A deed is an instrument which is written on paper executed by a party under seal and delivered as his act, or deed expressing that the person named makes, confirms, concurs in, or consents to some assurance, (other than by way of testamentary disposition), of some interest in the property or some legal or equitable rights, or claim or undertakes or enters into some obligation, duty, or agreement enforceable at law or in equity or does or concurs in some other act affecting the legal relation or position of a party to the instrument or some other persons or corporation.

- Halsbury's Laws of England

Need for documenting Business Agreements

- Memory is short
- People in organisations change
- Law may require a written agreement
- Serves as an evidence and formal record
- A properly drafted document reduces chances of disputes

Essentials for drafting a Business Agreement

- Knowledge of the governing laws
- Understanding of the transaction
- Terms agreed between the parties
- Command over the language

For any Deed, the foundation is the law, the facts are the bricks, cement and the language is the architecture.

Naming of an Agreement

- Not mandatory, there is no hard and fast rule.

Use of precedents

- Precedents should not be used blindly.
- If using a precedent or a form, do not mix different styles.
- Modify them appropriately to fit into the style used.
- Do not tamper with the precedents unnecessarily.

Some basic rules of drafting a Business Agreement

- Conceive the whole design of the draft
- Nothing should be omitted or added at random
- Avoid statements of negation
- The order of the draft should be logical
- Where certain technical terms have specific, clear and accepted meaning, use those terms

Some basic rules of drafting a Business Agreement (contd)

- Use precise and accurate language, each phrase should have a clear meaning
- Read as a whole, the draft should not lead to ambiguity
- Avoid repetition of the same provisions
- Avoid tautology of words or superfluous phrases
- Use familiar word rather than a far-fetched word
- Avoid long sentences, wherever possible use short sentences
- Use Saxon words rather than Roman or Latin words

Contents of a Business Agreement

- Name of the Agreement
- Date and place
- Parties
- Recitals
- Testatum
- Consideration
- Operative part
- Terms and conditions
- Covenants
- Miscellaneous Clauses
- Schedules
- Signature clause or Execution

Various types of Business Agreements

- Agreements relating to tangible movable property
- Agreements relating to intangible movable property like patents, trademarks, copyright
- Franchisee agreements
- Assignment of actionable claims
- Loan agreements
- Brand Ambassador agreements
- Agreements for manufacture of goods on contract basis

Various types of Business Agreements (contd)

- Advertising contracts
- Dealership or Distributorship agreements
- Lease, Leave and Licence agreements
- Sale of running business
- Business Conducting agreements
- Joint Venture agreements
- Foreign Collaboration agreements

Common Issues in Business Agreements

- Confidentiality/Non –Disclosure
- Dispute Resolution – Conciliation, Arbitration
Court jurisdiction
- How notices should be served
- Rights of premature termination
- Effects of Termination
- Provisions that will survive
- Force majeure clause
- Taxation

Business Conducting Agreements

- What is Business?
- A successful business normally generates goodwill.
- What is a Business Conducting Agreement ?
- Business conducting agreements are common in Hospitality Industry – Hotels and Restaurants

Issues in Business Conducting Agreements

- Consideration
- Control over cash flows
- Rights, if any, of the owner in the management
- Investment of funds
- Appointment and dismissal of employees
- Statutory obligations and liabilities
- Goodwill

Issues in Business Conducting Agreements (contd)

- Use of name of the conductor and discontinuance thereof on termination of the agreement
- Premises and tenancy
- Withholding tax
- Head of taxation under the Income tax Act
- Should not result in an AOP
- Service tax issues

Joint Venture Agreements

- Nature of Joint Ventures
 - As an entry route for a foreign entity in India
 - A genuine partnership with equal footing or unequal holding
 - Joint Venture for carrying out a project like construction of dams, highway etc. (Consortium)
 - Joint Venture with a foreign party / Indian party
 - As a part of technical collaboration

- Joint Venture may be in Corporate form or an AOP

Corporate Joint Venture

- There can be more than one agreement

A Joint Venture agreement

A Shareholders' agreement

- If JV is part of technical and /or other form of collaboration, there could be an 'Umbrella agreement' and a separate shareholders' agreement, collaboration agreement etc.

Shareholders' Agreement

- Parties to Shareholders' Agreement
- Enforceability of Shareholders' Agreement
- Incorporate provisions in Articles of Association
- Provisions of the Companies Bill, 2012

Main Provisions in Shareholders' Agreement

- Recital
- Definitions
- Structure of share capital
 - Existing Capital
 - Further Issue of Shares
 - Calls on shares
- Constitution of Board of Directors
- Powers of Board of Directors

Main Provisions in Shareholders' Agreement (contd)

- Meetings of Board of Directors
 - Frequency of meetings
 - Venue of meetings
 - Notice for meetings
 - Coram for the meetings
 - Chairman of Board of Directors
 - How resolutions may be passed
 - Casting vote in case of tie

Main Provisions in Shareholders' Agreement (contd)

- General Meetings
 - Similar provisions need to be considered keeping provisions of the Companies Act in view
- Management of JV Co
 - Appointment of Managing Director, CFO, Auditors
 - Reporting by Managing Director and CFO
 - Accounts and Audit
 - Business Plan – Long Term and Short Term
 - Dividend Declaration Policy
 - Assurance regarding not following unethical practices

Main Provisions in Shareholders' Agreement (contd)

- Matters requiring concurrence of various sets of Shareholders
 - Changes in the MoA, AoA
 - Change of Registered Office of JVCo
 - Share Capital Structure
 - Change in Business, Business Model
 - Investment exceeding certain limit
 - Disposal of JVCo's assets and undertakings
 - Appointment of senior executives

Main Provisions in Shareholders' Agreement (contd)

- Matters requiring concurrence (contd)
 - Loans and advances by JVCo
 - Creation of charge over JVCo's properties
 - Dealings with Related Parties
 - Market restrictions
- Non-compete clause
- Exercise of voting rights by shareholders

Main Provisions in Shareholders' Agreement

(contd)

- Transfer of Shares
 - Lock in Period
 - Transfer between Affiliates
 - Pre-emption Right
 - Right of First Refusal
 - Exit Options
 - Call option to Majority Shareholders
 - Put Option to Minority Shareholders
 - Tag along Rights
 - Drag along Rights
 - Pricing of shares – Valuation, Minimum Return

Main Provisions in Shareholders' Agreement (contd)

- Dispute Resolution

 - Dead Lock situations

 - Mediation

 - Arbitration

 - Appointment of Arbitral Tribunal

 - Rules to be followed

 - Place of Arbitration

- Court Jurisdiction

- Governing Law

Collaboration Agreements

- Types of collaborations
 - Technical
 - Marketing
 - Financial

- Often collaboration is multifaceted

Main Provisions of Collaboration Agreements

- Definitions
 - Know how
 - Technical Information
 - Territory
 - Products
 - Manufacture

Main Provisions of Collaboration Agreements (contd)

- Grant of Right / License
 - Transferable / Non-transferable
 - Exclusive / Non-exclusive
 - Whether of limited period or indefinite period
 - Limitations, if any
- Procedure of transfer
 - Documentation for transferring
 - Technical personnel's visits
 - Training to staff

Main Provisions of Collaboration Agreements (contd)

- Access to Research, Developments, Improvements, Innovations
- Right to make developments, modifications
 - Obligations to disclose to Collaborator
- Consideration
 - Lump sum
 - Based on production / sale
 - Subject to withholding tax or otherwise
 - Time of payment
 - Certification by auditor / CA

Main Provisions of Collaboration Agreements (contd)

- Incidental Rights
 - Patents and other similar rights
 - Trademark, if products to be sold using Collaborator's mark
 - Labelling of products
- Rights of Collaborator
 - Inspection of manufacturing facility
 - Books of account and record

Main Provisions of Collaboration Agreements (contd)

- Covenants by Collaborator
 - Has legal right
 - No infringement of third party rights
- Non-disclosure / confidentiality
- Termination
 - Reasons for termination
 - Effects of termination

Other types of Collaborations

- Generally these go hand in hand
- There could be pure financial collaboration
- Equity participation
 - Provisions for safeguarding investments
 - Right to appoint directors
 - Takeover of management in certain cases
 - Prior approval for certain actions
 - Periodic reports
 - Access to records
 - Business Plans, targets
 - Handholding