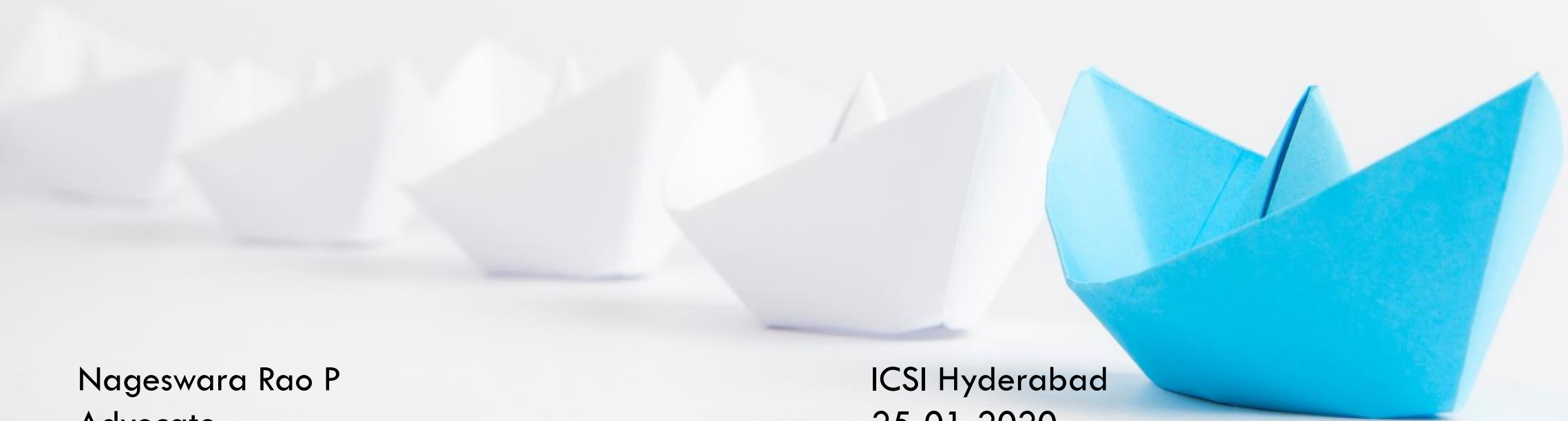


Drafting & Dealing with Commercial Agreement

Nageswara Rao P
Advocate

ICSI Hyderabad
25-01-2020



“Government has three primary functions. It should provide for military defense of the nation. **It should enforce contracts between individuals.** It should protect citizens from crimes against themselves or their property. When government-- in pursuit of good intentions tries to rearrange the economy, legislate morality, or help special interests, the cost come in inefficiency, lack of motivation, and loss of freedom. Government should be a referee, not an active player.”

— **Milton Friedman**

While there has been substantial progress, India still lags in areas such as enforcing contracts (163rd) and registering property (154th). It takes 58 days and costs on average 7.8% of a property's value to register it, longer and at greater cost than among OECD high-income economies. And it takes 1,445 days for a company to resolve a commercial dispute through a local first-instance court, almost three times the average time in OECD high-income economies.

<https://www.worldbank.org/en/news/press-release/2019/10/24/doing-business-india-top-10-improver-business-climate-ranking>

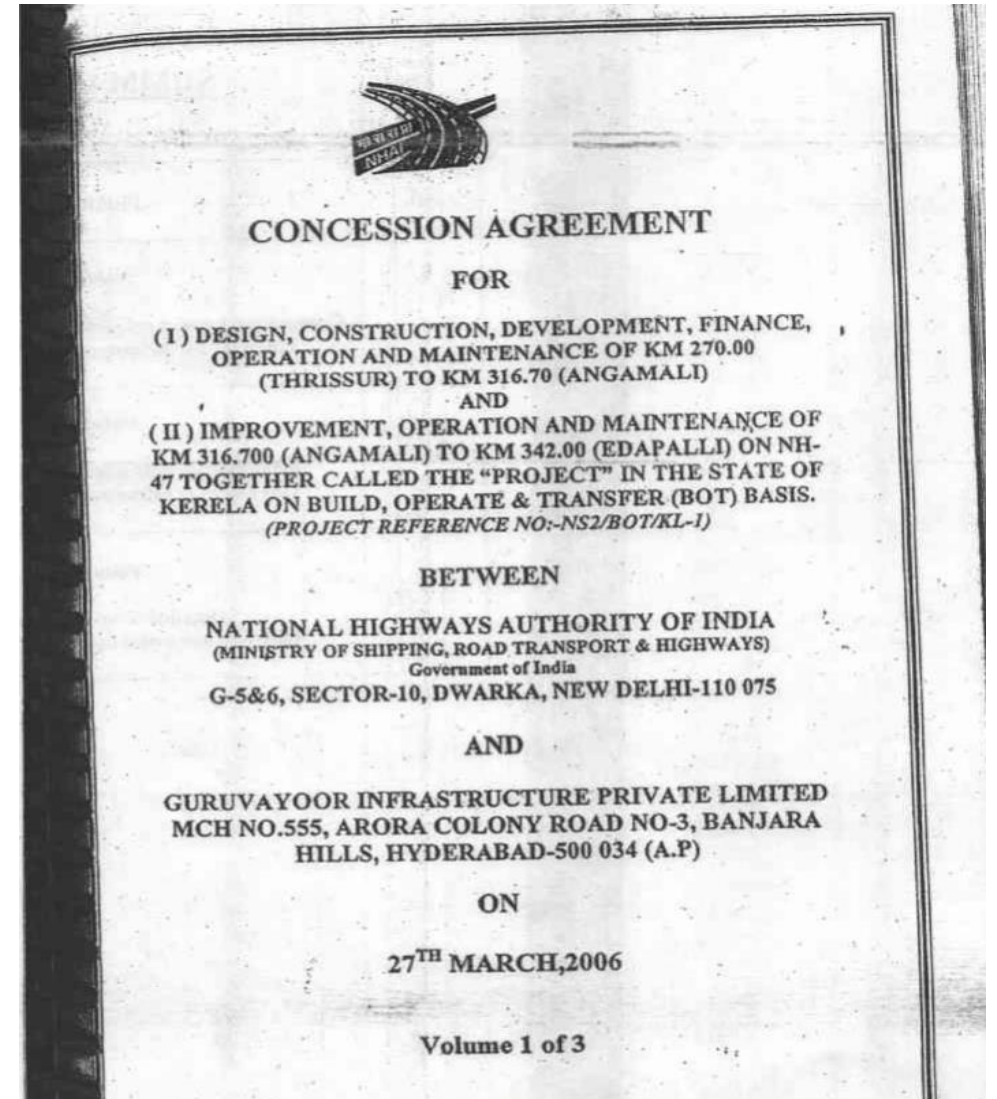
Three Volumes

502 Pages

24 Schedules

72 Kms road project

<https://www.pppinindia.gov.in/documents/20181/34422/6LANING+OFVADAKANCHERY+-+THRISSUR+SECTION+OF+NH+-+47+IN+STATE+OF+KERALA+%28NS2+BOT+KL+-+1%29.pdf/15628eac-c2d8-411c-86ec-0b78cdd34c08?version=1.0>



250 Pages
20 Schedules & Exhibits
INR 5,569 crores

<https://www.sec.gov/Archives/edgar/data/1370431/000095012309021596/u00259exv4w51.htm>

COMMON RUPEE LOAN AGREEMENT

AMONG

STERLITE ENERGY LIMITED
As the Borrower

AND

STATE BANK OF INDIA
As Facility Agent for the Lenders

AND

IDBI TRUSTEESHIP SERVICES LIMITED
As Security Trustee

AND

THE PERSONS
SET FORTH IN PART A of SCHEDULE II
As Rupee Lenders

AND

STATE BANK OF INDIA
As the Issuing Bank



FIRST STEP:

ARRIVE AT THE DRAFT AGREEMENT

Commercial
Inputs



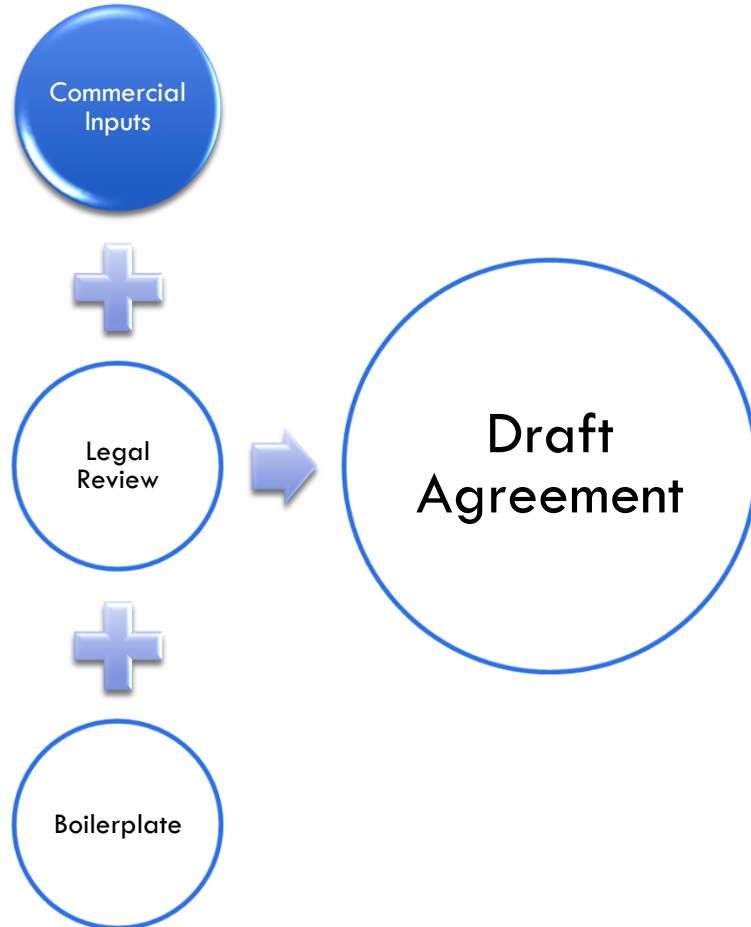
Legal
Review



Draft
Agreement



Boilerplate



Commercial Inputs

1. Covenants of parties
2. Deliverables
3. Service Levels
4. Consideration
5. Payment terms
6. Acceptance
7. Warranties

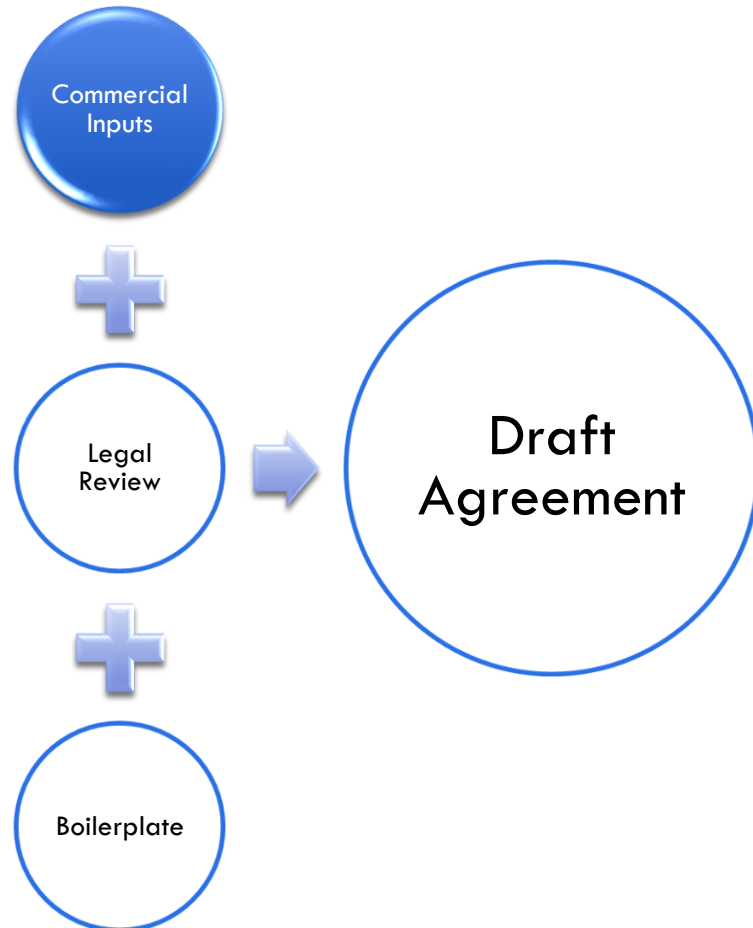


Information Memo

1. Who is the Opposite Party?
2. Nature of the engagement- supply of goods, services, etc.
3. The role and deliverables of the Opposite Party
4. Project schedule details- one time activity, ongoing, etc.
5. Is our data being shared with the opposite party or is opposite party providing data to us?
6. Is there any Intellectual Property (IP) that is sought to be licensed to Opposite Party or to be licensed from Opposite Party?

Commercial Inputs

1. Train Business teams on the agreement process
2. Awareness of business specific Critical Items and general items
3. Information memorandum to be supplied by Business teams



Legal Review

1. Domain Knowledge
2. Understand the legal framework
3. Updation on the legal changes- statutory & legislative
4. Creation of the matrix of critical items and tolerance limits
5. Communication with Business teams on position of company on critical items

Challenges

1. Importance on “Substance over form” by Courts
2. Frequent legislative changes- Arbitration Act, Companies Act, IBC, GST, Income Tax, etc
3. Numerous judgements- at times conflict between different High Courts
4. Identification of applicable regulation covering the transaction
5. New area- no legislation or judgements to guide

Legal Review

1. General Laws
2. Stamp Act
3. Registration Act
4. Land Ceiling
5. SARFAESI Act
6. RBI
7. SEBI

UK:

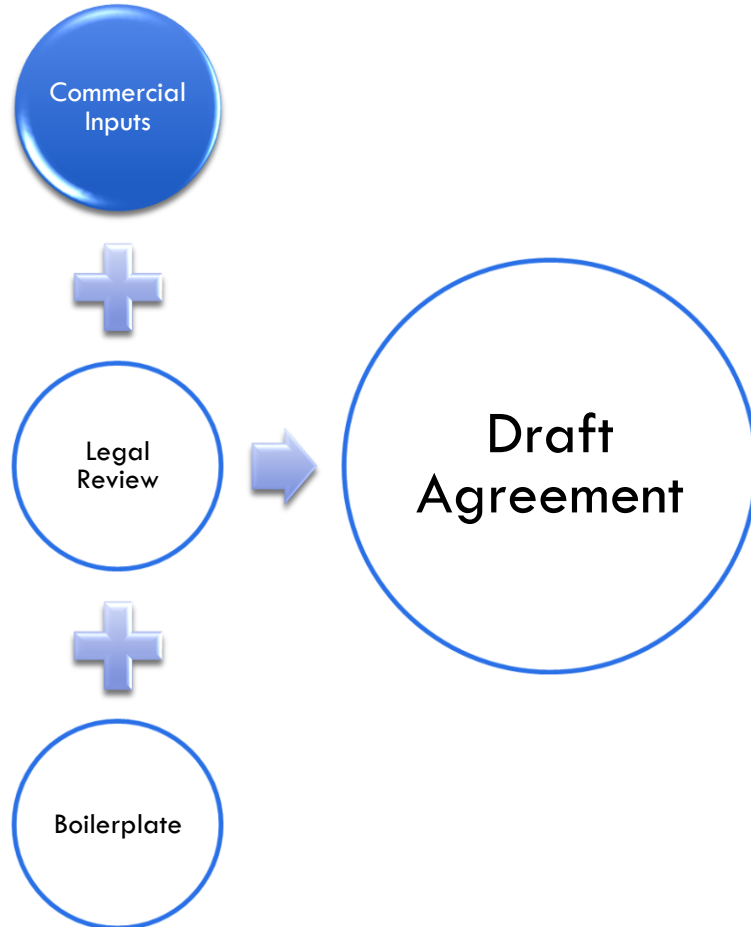
NEITHER PARTY SHALL BE LIABLE TO THE OTHER OR ANY OTHER PERSON OR ENTITY FOR ANY claim to the extent that the same is or can be characterised as a claim for (or arising from):

- loss of revenue or profits;
- loss of anticipated savings;
- loss of goodwill or injury to reputation;
- loss of business opportunity;
- punitive damages;
- loss of data;
- losses suffered by third parties; or
- indirect, consequential or special loss or damage,

regardless of the form of action, whether in contract, strict liability or tort (including negligence), and regardless of whether the first named Party knew of, had reason to know of, or could have reasonably foreseen the possibility of the loss, injury, or damage in question.

US/India

NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY OR ANY OTHER PERSON OR ENTITY FOR ANY INDIRECT, INCIDENTAL, PUNITIVE, EXEMPLARY, SPECIAL OR CONSEQUENTIAL DAMAGES OF ANY KIND OR NATURE WHATSOEVER, EVEN IF SUCH PARTY HAS BEEN INFORMED IN ADVANCE OF THE POSSIBILITY OF SUCH DAMAGES OR SUCH DAMAGES COULD HAVE BEEN REASONABLY FORESEEN BY SUCH PARTY



Boilerplate

1. Objective
2. Term
3. Liabilities
4. Governing Law
5. Payment terms
6. Confidentiality
7. Reps & Warranties
8. IPR
9. General



Challenges

1. Modifying prior templates- Cut & Paste
2. Balancing interests of both the parties (or all the parties)- Zero sum game
3. US Vs UK agreements- broad vs specific
4. Reiteration- again and again
5. Capturing aspects which are already outlined in the Statutes
6. Push from Business to close the deal- waiver of key items or rights
7. Lack of understanding on implications- 100% advance, clear termination provisions, etc.


OBJECTIVE:

1. Scope of the agreement
2. Covenants of parties
3. Deliverables & SLA
4. Consideration
5. Acceptance

TERM:

1. Duration,
2. renewal,
3. termination for cause,
4. termination without cause
5. Automatic termination
6. Effect of termination
7. Survival clause

LIABILITIES OF PARTIES

1. Indemnity
2. Limitation of liability
3. Indirect damages
4. Exclusions
5. Insurance

GOVERNING LAW

1. Governing Law
2. Jurisdictional Courts
3. Arbitration
4. Preliminary Injunctions
5. Legal expenses



PAYMENT TERMS:

1. Invoice submission process
2. Disputing invoices
3. Payment terms
4. GST & tax liability

CONFIDENTIALITY:

1. Duration
2. Inclusions & Exclusions
3. Disclosures
4. Damages for disclosure
5. Injunctions
6. Privacy
7. Data Protection

REPRESENTATIONS & WARRANTIES:

1. Basic Hygiene- E.g., entity legally subsisting
2. Continuing compliance during term
3. Compliance with applicable laws- E.g., employment
4. Any special reps or warranties, agreed by parties

IPR:

1. IPR covered
2. Transfer/License of IPR
3. Exclusions from transfer
4. Indemnity



GENERAL

1. Non Exclusive
2. Non Solicitation
3. Non Hire
4. Publicity
5. Notices
6. Anti Corruption
7. Principal to Principal Engagement
8. Waiver
9. Severance
10. Amendment
11. Copies of Agreement
12. Interim provisions
13. Special Conditions

NDA

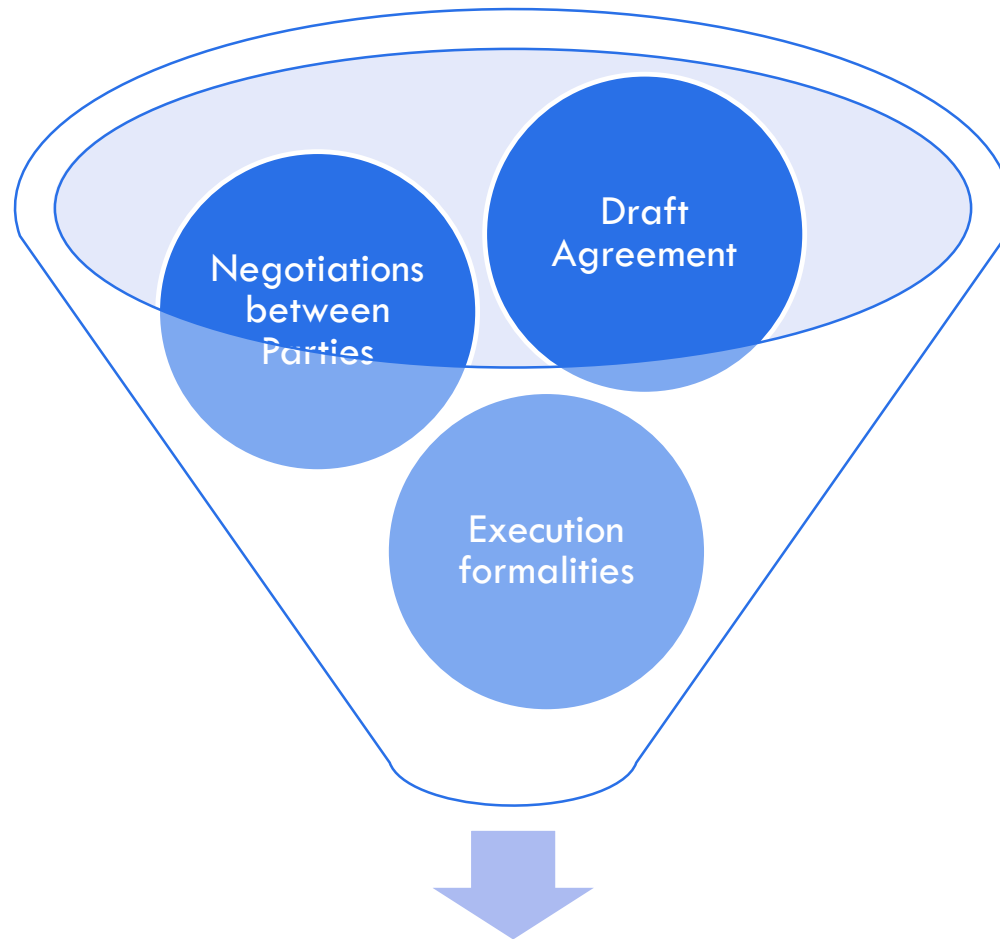
- Generally 2 to 4 pages
- Definition of Confidential Information
- Exclusions
- Disclosure conditions
- Protection of Confidential Information
- Return/Destruction of CI
- Indemnification
- Term & Termination
- No IPR license
- Not a definitive agreement

IP LICENSE AGREEMENT (USD 100 Mn)

- Can run into 50 pages, with dozens of annexures and attachments
- Definitions
- License grant
- Equipment
- License fees
- Confidential information
- Term and termination
- Liability & indemnities
- Patent indemnity
- Representations & warranties
- Mutual covenants
- Export control regulations
- Publicity
- Governing law & dispute resolution
- Additional agreements
- Hierarchy of agreements
- Force majeure
- Other provisions



IF DRAFT AGREEMENT IS PROVIDED BY OPPOSITE PARTY:
TO BE REVIEWED ON THE ABOVE YARDSTICKS



Contract

Indian Contract Act, 1872: Sec 2(h): “An agreement enforceable by law is a contract”



Negotiation
between
Parties

- Preparation of draft note on the structure and purpose of the agreement
- Company position on points of difference between parties
- Role clarity- who in the organisation signs off on an exception
- Track changes, version control
- Arriving at consensus

*“LAWYERS HAVE TWO COMMON FAILINGS.
ONE IS THAT THEY DO NOT WRITE WELL AND THE OTHER IS
THAT THEY THINK THEY DO”.*

THANK YOU