

# **A Handbook of Contract Drafting: A Bangladeshi Perspective**

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## Part 1: Foundational Principles of Contract Drafting in Bangladesh

### Chapter 1: Introduction to the Craft of Contract Drafting

#### The Role and Goals of a Contract in the Bangladeshi Commercial Environment

In the dynamic and rapidly evolving commercial landscape of Bangladesh, a contract serves as the foundational instrument of business. It is far more than a mere record of an agreement; it is a forward-looking planning document, a mechanism for risk allocation, and a private legal framework that governs the relationship between parties.<sup>1</sup> At its core, a contract in Bangladesh is defined by Section 2(h) of the **Contract Act, 1872**, as "an agreement enforceable by law".<sup>2</sup> This statutory definition underscores the dual nature of any contract: it must first be a valid agreement, reflecting a meeting of the minds, and second, it must possess the characteristics that allow for its enforcement by the nation's courts.

The primary goals of a well-drafted contract in Bangladesh are multifaceted. First and foremost, it must **accurately and unambiguously memorialize the business deal**.<sup>1</sup> The drafter's task is to translate the commercial understanding—often expressed in broad business terms—into precise legal language that leaves no room for misinterpretation. This is particularly critical in a legal system where judicial interpretation often adheres closely to the written text of the agreement. Second, a contract must **clearly define the rights and obligations of each party**. It establishes a private set of rules, detailing each party's promises of future performance, the statements of fact upon which the deal is predicated, and the permissions granted to each party.<sup>1</sup> This clarity is essential for the smooth execution of the transaction and for preventing disputes before they arise. Third, a contract is a critical tool for **allocating risk**. Business transactions are inherently risky. A well-crafted contract anticipates potential future problems—market fluctuations, regulatory changes, non-performance—and assigns the responsibility for bearing the financial consequences of these risks to one party or the other.<sup>1</sup> Finally, a well-drafted contract aims to **prevent litigation**. While it provides the basis for legal action if a dispute occurs, its ultimate goal is to be so clear and comprehensive that it never needs to leave the file drawer. It should function as a practical guide for the parties, allowing them to manage their relationship and resolve issues without recourse to the courts.<sup>1</sup>

A fundamental challenge for the modern Bangladeshi drafter is navigating the legal landscape established by statutes enacted during the British colonial era, such as the Contract Act of 1872 and The Sale of Goods Act, 1930.<sup>2</sup> While these laws provide a robust common-law-based foundation, their language and conceptual frameworks do not always align seamlessly with the complex risk-allocation mechanisms

demanding by today's globalized commercial transactions. Therefore, a key skill, and a central theme of this handbook, is not merely applying the law, but skillfully adapting modern drafting techniques to ensure they are both commercially effective and legally enforceable within this established statutory framework.

### The Drafter's Mindset: Translating the Business Deal into Bangladeshi Legal Concepts

The professional expertise of a transactional lawyer lies in a distinct analytical skill: the ability to translate the business deal into contract concepts.<sup>1</sup> This process is fundamentally different from that of a litigator. A litigator starts with a set of past events (the "facts") and applies the existing law to those facts to build a persuasive argument. In contrast, a transactional lawyer starts with the client's future objectives and the commercial terms of the deal (the deal lawyer's "facts"). The lawyer's task is to deconstruct this business deal into its fundamental components and then map those components onto the specific legal concepts and structures provided by Bangladeshi law.

This "translation skill" requires the drafter to ask a series of foundational questions about each term of the deal:

- Is this a statement of a past or present fact that one party is relying on? If so, it needs to be framed as a representation, invoking the principles of misrepresentation and fraud under the **Contract Act, 1872**.
- Is this a promise for future action? This calls for a covenant, creating an enforceable obligation under Section 37 of the **Contract Act, 1872**.
- Does one party's obligation to perform depend on something else happening first? This requires a condition, which in Bangladesh is governed by the specific rules for "contingent contracts" in Chapter III of the **Contract Act, 1872**.
- Does a party have a choice or permission to act? This requires a grant of discretionary authority.
- Is this a mutually agreed-upon rule or definition for the contract? This is a declaration.

Mastering this translation process is the difference between being a "mere scrivener"—a person who simply records what they are told—and a true legal counselor who adds value by structuring the deal in a way that is legally sound, commercially practical, and protective of the client's interests.<sup>1</sup> The entire practice of modern contract drafting in Bangladesh is a continuous act of reconciliation between this sophisticated, functional approach to deal-making and the specific, often century-old, statutory framework that governs enforceability. This handbook is designed to equip the drafter to navigate this inherent

tension.

## Chapter 2: The Building Blocks: The Core Contract Concepts

Every contract, regardless of its complexity or subject matter, is constructed from a finite set of conceptual building blocks. Understanding these concepts is the essential first step in learning how to draft. This chapter introduces the seven core contract concepts that form the basis of Tina L. Stark's pedagogical framework and provides a crucial bridge, mapping these functional concepts to their specific statutory analogues within the legal system of Bangladesh.<sup>1</sup> This mapping is the foundational reference for this entire handbook, as it translates the "why" of modern drafting into the "how" of drafting for enforceability under Bangladeshi law.

The seven core concepts are:

1. **Representations:** Statements of past or present fact made to induce another party to enter the contract.
2. **Warranties:** Promises that a statement of fact is true, coupled with an implicit promise of indemnity if it is not.
3. **Covenants:** Promises to do or not do something in the future.
4. **Rights:** The entitlement to another party's performance of a covenant.
5. **Conditions:** States of fact that must exist before an obligation to perform is triggered.
6. **Discretionary Authority:** The permission or choice to act.
7. **Declarations:** Agreed-upon statements of fact or policy that govern the contract.

The following table provides an invaluable Rosetta Stone for the Bangladeshi drafter. It translates the modern, functional terminology of Stark's framework into the specific, and often distinct, statutory language of Bangladeshi law. This table prevents confusion and provides a constant reference point, enabling the reader to understand, for instance, that when this handbook discusses a "Condition," they should be thinking about the rules under "Contingent Contracts" in the **Contract Act, 1872**.

## Chapter 3: Statements of Fact: Representations and Warranties

### The Dichotomy in Bangladeshi Law

In modern transactional practice, particularly in Anglo-American jurisdictions, the phrase "represents and warrants" is ubiquitous. The two terms are used together to secure the broadest possible protection for the recipient of a statement of fact.<sup>1</sup> A **representation** is a statement of past or present fact made to induce

reliance, and if false, gives rise to a tort claim for misrepresentation. A **warranty** is a contractual promise that a fact is true, and its breach gives rise to a contract claim for damages.<sup>1</sup>

While this conceptual distinction is useful, a drafter in Bangladesh must understand that the legal framework is codified and does not perfectly mirror this common law dichotomy. The remedies and legal consequences flow from specific statutory provisions rather than from distinct common law causes of action. The key statutes are the **Contract Act, 1872**, and **The Sale of Goods Act, 1930**.

#### Misrepresentation and Fraud under the Contract Act, 1872

The Contract Act addresses false statements not as a distinct concept of "representation" but as factors that affect the "free consent" of the parties, a prerequisite for a valid contract under Section 10.<sup>5</sup> Section 14 of the Act specifies that consent is not free when caused by, among other things, "misrepresentation" or "fraud".<sup>5</sup>

- **"Fraud"** is defined in **Section 17** and includes acts committed with an intent to deceive, such as suggesting a fact that is not true by one who does not believe it to be true, active concealment of a fact, or a promise made without any intention of performing it.<sup>17</sup>
- **"Misrepresentation"** is defined in **Section 18** and covers a broader category of untrue statements made without an intent to deceive. This includes the positive assertion of something that is not true, but which the person making it believes to be true, or causing another party to make a mistake about the substance of the agreement, even if done innocently.<sup>18</sup>

The primary remedy for a contract induced by fraud or misrepresentation is provided in **Section 19**. The contract is **voidable** at the option of the party whose consent was so caused. This means the aggrieved party has the right to rescind or terminate the contract.<sup>6</sup> Crucially, Section 19 also gives the aggrieved party the right to insist that the contract be performed and that they "be put in the position in which [they] would have been if the representations made had been true." This provides a remedy akin to expectation damages.<sup>6</sup>

#### Conditions and Warranties under The Sale of Goods Act, 1930

For contracts involving the sale of movable property ("goods"), **The Sale of Goods Act, 1930**, provides a more specific and distinct statutory framework for factual statements. **Section 12** of this Act defines "condition" and "warranty"<sup>4</sup>:

- A **Condition** is a "stipulation essential to the main purpose of the contract, the breach of which gives



rise to a right to treat the contract as repudiated."

- A **Warranty** is a "stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated."

This statutory distinction is critical. A breach of a condition is considered so fundamental that it allows the buyer to end the contract, whereas a breach of a warranty is less fundamental and only entitles the buyer to monetary compensation.<sup>19</sup>

### Drafting Implications and Remedies

Given this dual statutory framework, how should a drafter in Bangladesh approach statements of fact? The most prudent approach is to continue using the combined phrase "**represents and warrants.**" This is not mere stylistic convention; it is a strategic choice to maximize the client's potential remedies.

By having a party "represent" a fact, the drafter explicitly invokes the remedial scheme of the **Contract Act, 1872**. If the statement is false, the client can argue that their consent was vitiated by misrepresentation or fraud, giving them the powerful option under Section 19 to either rescind the contract or affirm it and seek to be put in the position they would have been in had the statement been true.<sup>6</sup>

By having the party also "warrant" the same fact, the drafter creates a clear contractual promise. While the **Sale of Goods Act, 1930**, specifically defines warranties for goods contracts, the principle is applied by analogy in other commercial contracts. A breach of this warranty gives the client a straightforward contractual claim for damages to compensate for any loss suffered due to the statement's falsity. The remedies for breach of warranty under the Sale of Goods Act are detailed in **Section 59**, which allows the buyer to either set up the breach to reduce the price or sue the seller for damages.<sup>4</sup>

In practice, the distinction between a "condition" under the Sale of Goods Act and a "representation" under the Contract Act can become functionally blurred, as a breach of either can lead to the repudiation of the contract. However, the legal foundations and the full scope of available remedies differ. A breach of a condition in a goods contract gives a clear right to reject the goods, while a misrepresentation makes the entire contract voidable. Precise drafting that explicitly uses both "represents" and "warrants" ensures that the client is not forced to choose between these remedial paths and can argue for whichever is most advantageous under the circumstances.

## Risk Allocation

Representations and warranties are the primary tools for allocating risk related to unknown or uncertain facts between the parties.<sup>1</sup> A party making a statement assumes the risk that the statement is false. The drafter can adjust this allocation of risk through careful wording.

- **Flat vs. Qualified Statements:** A "flat" representation is an absolute statement of fact (e.g., "The Company has no pending litigation."). This places the entire risk on the party making the statement. A "qualified" representation limits this risk, often through a **knowledge qualifier** (e.g., "To the best of the Seller's knowledge, there is no pending litigation."). This shifts a portion of the risk to the recipient, who would have to prove the seller's knowledge to establish a claim.<sup>1</sup>
- **Materiality Qualifiers:** Risk can also be managed by limiting the scope of a statement to only "material" facts (e.g., "The Company is not in default under any *material* contract."). This prevents a party from being in breach for a trivial or insignificant inaccuracy and focuses the risk allocation on issues that would genuinely affect a party's decision to enter the transaction.<sup>1</sup>

By skillfully negotiating and drafting these qualifiers, a lawyer can protect their client from assuming an unreasonable amount of risk regarding the factual basis of the deal.

## Chapter 4: Promises and Conditions: Covenants, Rights, and Contingent Contracts

### Covenants as Enforceable Obligations

While representations and warranties address the state of affairs at a specific moment in time, covenants govern the future conduct of the parties. A covenant is a promise to perform or refrain from performing a specified act.<sup>1</sup> In the context of Bangladeshi law, the legal force of a covenant is grounded in

**Section 37 of the Contract Act, 1872**, which states: "The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law".<sup>9</sup> This section establishes the fundamental duty of performance that lies at the heart of every contract.

Covenants are the workhorses of a contract, detailing the actions each party must take to execute the business deal. They can be:

- **Positive Covenants:** Promises to take a specific action (e.g., "The Buyer *shall pay* the Purchase Price at the Closing.").
- **Negative Covenants:** Promises to refrain from taking a specific action (e.g., "The Seller *shall not*

sell the assets to any third party before the Closing Date.").

The concept of **reciprocal promises**, defined in Section 2(f) and elaborated upon in Sections 51-58 of the Contract Act, provides the statutory basis for the interlocking obligations that form the core of most commercial agreements.<sup>6</sup> Section 51, for instance, clarifies that a promisor is not bound to perform unless the reciprocal promisee is ready and willing to perform their part of the bargain.<sup>9</sup> This principle is crucial for drafting action sections where performance is concurrent, such as the exchange of goods for payment.

The flip side of a covenant (a duty) is a **right**. If Party A has a covenant to pay Party B, then Party B has a right to be paid by Party A.<sup>1</sup> While contracts can be drafted from the perspective of rights (e.g., "The Seller is entitled to receive the Purchase Price"), the clearer and more direct approach is to draft from the perspective of the obligation, using the active voice and the word "shall" to create a clear duty for the performing party.

### Conditions as Contingent Contracts

In modern drafting, a "condition" is an event or state of facts that must occur before a party's duty to perform a covenant is triggered. If the condition is not met, the obligation to perform never arises, and the non-performing party is not in breach.<sup>1</sup>

This functional concept finds its direct and explicit legal basis in Bangladesh in **Chapter III of the Contract Act, 1872, titled "Of Contingent Contracts"**.<sup>6</sup> This is a critical point of adaptation for the Bangladeshi drafter. Rather than relying on a general common law understanding of conditions, one must adhere to the specific statutory framework laid out in Sections 31-36.

- **Section 31** defines a "contingent contract" as "a contract to do or not to do something, if some event, collateral to such contract, does or does not happen".<sup>12</sup> This definition perfectly captures the essence of a contractual condition.
- **Section 32** governs the enforcement of contracts contingent on an event *happening*. It states that such contracts "cannot be enforced by law unless and until that event has happened." If the event becomes impossible, the contract becomes void.<sup>11</sup> This provides the legal foundation for a "walk-away right" or a condition precedent. For example, a clause stating, "The Buyer's obligation to purchase the property is conditional upon the Buyer obtaining financing," is a contingent contract under Section 32. If financing is not obtained, the obligation to purchase is not enforceable.
- **Section 33** governs contracts contingent on an event *not happening*. These can be enforced when the happening of that event becomes impossible.<sup>11</sup>

- **Sections 34, 35, and 36** provide further specific rules regarding contingencies based on the future conduct of a person, events that must happen within a fixed time, and events that are impossible from the outset.<sup>11</sup>

The existence of this specific statutory chapter means that drafting conditions in Bangladesh is less about reflecting a general commercial understanding and more about ensuring strict compliance with the rules of Chapter III of the Contract Act. A drafter who is unaware of these provisions might create a condition that is commercially logical but is rendered void or unenforceable by the statute. For example, a condition contingent on an event that is impossible from the start is void under Section 36, regardless of whether the parties knew of the impossibility.<sup>11</sup> Similarly, the rules for conditional transfers of immovable property are further governed by **The Transfer of Property Act, 1882**, adding another layer of statutory complexity.<sup>21</sup>

## Chapter 5: Permissions and Policies: Discretionary Authority and Declarations

### Drafting Discretionary Authority

Not all contractual provisions create absolute duties. Many are designed to provide flexibility by granting a party **discretionary authority**—the choice, permission, or authorization to act without being obligated to do so.<sup>1</sup> The standard word used to signal discretionary authority is "may." For example, "Upon a default, the Lender *may* accelerate the loan." This gives the Lender the choice to accelerate but does not require it to do so.

When drafting clauses that grant discretion, particularly those giving one party "sole and absolute discretion," the drafter must be aware of the judicial oversight that applies in Bangladesh, as in other common law jurisdictions. While parties are free to contract, courts will generally imply a duty of good faith and fair dealing, preventing a party from exercising its discretion arbitrarily, capriciously, or for a purpose outside the reasonable contemplation of the parties.<sup>24</sup> The judicial power to grant or withhold remedies like specific performance under **Section 22 of the Specific Relief Act, 1877**, which explicitly states that the jurisdiction to decree specific performance is "discretionary," is a testament to the role of judicial discretion in enforcing contractual rights.<sup>13</sup> Therefore, even a clause granting "sole discretion" is not a license to act unreasonably, and its exercise can be challenged in court.<sup>24</sup>

### Declarations and their Legal Effect

A **declaration** is a provision that states an agreed-upon fact, policy, or rule that will govern the parties' relationship under the contract.<sup>1</sup> Unlike representations, declarations are not made to induce reliance, and

unlike covenants, they do not contain a promise of future performance. As such, a declaration cannot be "breached" in the traditional sense.

The most common types of declarations are:

- **Definitions:** Clauses that define key terms used in the agreement (e.g., "'Business Day' means any day other than a Saturday, Sunday, or public holiday in Dhaka."). These are crucial for ensuring clarity and avoiding uncertainty, which could otherwise render an agreement void under Section 29 of the Contract Act.<sup>27</sup>
- **Policy Statements:** Clauses that establish a rule for the administration of the contract, such as a governing law clause (e.g., "This Agreement shall be governed by and construed in accordance with the laws of Bangladesh.").

While declarations do not create obligations that can be breached, they are not without legal force. The legal effect of a declaration is powerfully reinforced by **Section 42 of the Specific Relief Act, 1877**. This section allows a person entitled to any legal character or right to property to institute a suit against any person denying, or interested to deny, his title to such character or right. The court may, in its discretion, make a declaration that he is so entitled.<sup>13</sup> This means that if a dispute arises over the meaning or application of a declarative clause (such as the scope of a definition or the proper governing law), a party can seek a binding "declaratory decree" from a court to resolve the issue. This statutory remedy elevates declarations from simple statements of agreement to legally enforceable components of the contract's framework.

## Part 2: The Anatomy of a Bangladeshi Contract

### Chapter 6: Introductory Provisions: Preamble, Recitals, and Words of Agreement

The introductory provisions of a contract set the stage for the substantive terms that follow. They consist of three parts: the preamble, the recitals, and the words of agreement. While often viewed as preliminary formalities, these sections require careful drafting as they establish the context, identify the parties, and can influence judicial interpretation.<sup>1</sup>

#### Preamble

The preamble is the first paragraph of the contract and serves to identify the agreement and its parties. A well-drafted preamble in the Bangladeshi context should include:

1. **Name of the Agreement:** The title should be clear and descriptive (e.g., "Share Purchase Agreement," "Deed of Lease"). Using a generic title like "Agreement" is discouraged as it can create confusion when multiple documents are part of a single transaction.<sup>1</sup>
2. **Date of the Agreement:** The date is typically stated as "dated" a specific day or "dated as of" a specific day. The "as of" formulation is used when the parties want the contract to be effective from a date earlier than the actual date of signing.<sup>1</sup> This can have significant legal and financial implications and should be used with caution.
3. **Identification of the Parties:** Each party must be identified with complete legal accuracy.
  - For a **company**, this includes its full legal name, its status as a company registered under **The Companies Act, 1994**, and its registered address.<sup>29</sup> For example: "Meghna Petroleum Limited, a public company limited by shares incorporated under the laws of Bangladesh, having its registered office at [Address] (hereinafter referred to as the 'Company')."
  - For an **individual**, this includes their full name, father's name, and full address.
  - For a **partnership or other entity**, the full legal name and address are required.
4. **Defined Terms for Parties:** It is standard practice to assign a shorthand defined term to each party in the preamble (e.g., "Seller," "Buyer," "Lessor") for ease of reference throughout the agreement.<sup>1</sup>

#### Recitals

The recitals, often introduced by the heading "Background" or the traditional term "WHEREAS," follow the preamble. Their purpose is to provide context for the transaction. They narrate the background of the agreement, the relationship between the parties, and the reasons they are entering into the contract.<sup>1</sup>

While recitals are not typically considered operative, binding parts of the contract, they can be used by a

court in Bangladesh to aid in the interpretation of ambiguous operative clauses.<sup>31</sup> They help the court understand the parties' intent and the commercial purpose of the transaction. Therefore, it is crucial that the recitals are accurate and consistent with the substantive provisions. Covenants, representations, or conditions should not be placed in the recitals, as their enforceability in that location is highly doubtful.<sup>1</sup>

## Words of Agreement

This is the transitional phrase that signals the end of the introductory sections and the beginning of the binding, operative part of the contract. Traditional formulations are often archaic (e.g., "NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth, the parties hereto agree as follows:"). A modern, contemporary style, which is perfectly acceptable and legally sound in Bangladesh, is much simpler: "Accordingly, the parties agree as follows:". <sup>1</sup> This phrase confirms the parties' mutual assent to the terms that follow, a cornerstone of a valid agreement under the **Contract Act, 1872**.

## Chapter 7: Definitions: The Contract's Private Lexicon

The definitions section of a contract is a critical tool for achieving clarity and precision. It functions as a private dictionary for the agreement, ensuring that key terms are understood by the parties—and by a court, if necessary—in the exact same way every time they appear.<sup>1</sup> In the context of Bangladeshi law, a well-drafted definitions section is a primary defense against an agreement being challenged as void for uncertainty under **Section 29 of the Contract Act, 1872**.<sup>6</sup>

## Purpose and Strategic Use of Definitions

Drafters use definitions for several strategic purposes:

- **To Clarify Meaning:** To give a precise meaning to a word that might otherwise be vague (e.g., defining "Business Day" to exclude specific public holidays).
- **To Narrow or Expand Meaning:** To limit or broaden the ordinary dictionary meaning of a word to suit the specific commercial deal (e.g., defining "Territory" in a distribution agreement to mean only the administrative boundaries of Dhaka Division).
- **To Create Shorthand:** To create a convenient shorthand for a complex concept that will be repeated throughout the agreement (e.g., defining "Intellectual Property Rights" to include a long list of patents, trademarks, copyrights, and trade secrets).

## Placement and Drafting Guidelines

While definitions can be placed in context where they first appear, for longer and more complex agreements, it is standard practice in Bangladesh, as elsewhere, to group them in a dedicated "Definitions" article, usually at the beginning of the contract.<sup>1</sup> This makes them easy to find and emphasizes their importance.

Key drafting guidelines include:

- **Alphabetical Order:** List defined terms alphabetically for ease of reference.
- **Signal Defined Terms:** Capitalize the first letter of each word in the defined term (e.g., "Purchase Price") and use bold font where it is defined and throughout the document to signal to the reader that it is a defined term.
- **Use the Present Tense:** Definitions are declarations of meaning that apply throughout the contract's term, so they should be drafted in the present tense (e.g., "'Person' *means* any individual, corporation...").
- **Avoid Substantive Obligations:** Do not embed covenants, representations, or conditions within a definition. This can create ambiguity and hide important obligations from the reader. For example, a definition of "Intellectual Property" should not include the phrase "...all of which shall be transferred free of encumbrances." That is a covenant that belongs in the operative part of the agreement.<sup>1</sup>

## Chapter 8: Action Sections: Memorializing the Core Transaction

The action sections contain the core commercial terms of the agreement. They are the provisions that set the transaction in motion, detailing the primary performance obligations and the financial consideration.<sup>1</sup> These sections are where the business deal is translated into binding legal commitments.

### Subject Matter Performance Provision

This is the central provision where the parties make their fundamental promises to each other. It directly reflects the main purpose of the contract. In Bangladeshi law, these are the "reciprocal promises" that form the consideration for each other, as contemplated by the **Contract Act, 1872**.<sup>10</sup>

- **For a Sale of Goods:** "The Seller shall sell and deliver the Goods to the Buyer, and the Buyer shall purchase and accept the Goods from the Seller, in accordance with the terms of this Agreement."
- **For a Lease:** "The Lessor hereby leases the Premises to the Lessee, and the Lessee hereby takes the Premises on lease from the Lessor, for the Term and at the Rent specified herein."
- **For Services:** "The Service Provider shall perform the Services for the Client, and the Client shall



pay the Service Provider the Fees, as set forth in this Agreement."

These provisions should be drafted as clear, active-voice covenants using "shall" to denote the obligation.

### Payment Provisions

This section details the financial consideration for the contract. It must be drafted with meticulous attention to detail, answering the questions of who pays, what is paid, to whom, when, where, and how.<sup>1</sup>

- **What:** The amount should be stated clearly in figures and words, specifying the currency (e.g., "BDT 1,000,000 (One Million Bangladeshi Taka)").
- **When:** The timing of payment must be precise (e.g., "within 30 days of receipt of a valid invoice," "on the Closing Date").
- **How:** The method of payment should be specified (e.g., "by bank transfer to the Seller's nominated bank account," "by account payee cheque").

### Term of the Agreement

For contracts that govern a relationship over a period of time (e.g., leases, employment agreements, supply agreements), the action sections must define the contract's term. This includes specifying the commencement date and the termination date.<sup>1</sup> The provision should also address what happens at the end of the term, such as whether it terminates automatically or renews (an "evergreen" provision).

### Closing-Related Provisions (for Acquisitions and Financings)

In transactional agreements like acquisitions or financings, the action sections will include provisions related to the "Closing"—the event where the transaction is formally consummated. These provisions specify the **Closing Date**, the **location of the Closing**, and the **closing deliveries**—the documents and funds that each party covenants to exchange at the Closing.<sup>1</sup> For example, in a sale of land, the seller's deliveries would include the executed deed of sale (*Bainama*), while the buyer's delivery would be the purchase price.<sup>33</sup>

## Chapter 9: Drafting Representations and Warranties

This chapter provides a practical guide to drafting the statements of fact that form the basis of the business deal, applying the legal principles discussed in Chapter 3. The primary goal is to create a clear, accurate, and enforceable allocation of risk regarding the state of affairs at the time of the contract.

The introductory phrase for this section should be unambiguous: "The Seller hereby represents and

warrants to the Buyer as follows:". This ensures that both the remedies for misrepresentation under the **Contract Act, 1872**, and the remedies for breach of warranty are available to the recipient.<sup>6</sup>

Key drafting considerations include:

- **Tense:** Representations are statements of past or present fact. Therefore, they should be drafted in the present tense ("The Company *is* a corporation duly organized...") or the present perfect tense ("The Seller *has paid* all taxes due...").<sup>1</sup> Avoid using "will" or "shall," as representations do not concern future events.
- **Active vs. Passive Voice:** The active voice is strongly preferred for clarity and directness ("The Seller owns the Assets."). The passive voice ("The Assets are owned by the Seller.") can sometimes obscure who is responsible for the statement.<sup>1</sup>
- **Qualifiers:** As discussed in Chapter 3, knowledge and materiality qualifiers are essential tools for tailoring risk. A drafter for the party giving the representations will seek to insert these qualifiers (e.g., "To the Seller's knowledge...", "...except for such defaults as would not have a Material Adverse Effect."). The drafter for the recipient will seek to resist or narrow them.
- **Schedules:** For lengthy lists of information required by a representation (e.g., a list of all material contracts), it is common practice to place the information in a schedule attached to the agreement and incorporate it by reference (e.g., "Schedule 3.5 lists all Material Contracts to which the Company is a party.").<sup>1</sup> This keeps the body of the agreement clean and readable.

## Chapter 10: Drafting Covenants and Rights

This chapter focuses on the practical drafting of promises for future performance, which form the operational core of the contract. As established in Chapter 4, the legal basis for these obligations in Bangladesh is **Section 37 of the Contract Act, 1872**.<sup>9</sup>

The cardinal rule for drafting a covenant is to use the word "**shall**" to create a binding duty. Words like "will" (which denotes the future but not necessarily an obligation), "agrees to" (which is redundant), or "is responsible for" (which is vague) should be avoided.<sup>1</sup>

A well-drafted covenant must be precise and comprehensive, addressing the "five Ws and one H":

- **Who** is obligated to perform? (e.g., "The *Lessee* shall...")
- **What** is the substance of the obligation? (e.g., "...pay the Monthly Rent...")
- **When** must the performance occur? (e.g., "...on or before the fifth day of each calendar month...")
- **Where** must the performance take place? (e.g., "...to the Lessor's designated bank account.")

- **To Whom** is the performance owed? (e.g., "...to the *Lessor*.")
- **How** must the performance be rendered? (e.g., "...by wire transfer of immediately available funds.")

**Degrees of Obligation:** Covenants are a key tool for risk allocation through the precision of the performance standard. A drafter can significantly alter a client's risk by negotiating the degree of obligation. Common standards, from highest to lowest obligation, include:

1. **Absolute Obligation:** "The Seller *shall obtain* all necessary consents." (High risk for the Seller, as performance is not within its complete control).
2. **Best Efforts:** "The Seller shall use its *best efforts* to obtain all necessary consents." (A high standard, requiring the Seller to take all reasonable steps).
3. **Reasonable Efforts:** "The Seller shall use *reasonable efforts*..." (A lower, more common standard).
4. **Commercially Reasonable Efforts:** A standard judged by the context of the specific business.

Choosing the appropriate standard is a critical part of the negotiation and drafting process.<sup>1</sup>

## Chapter 11: Drafting Conditions (Contingent Contracts)

This chapter provides guidance on drafting the triggers for contractual obligations, rooted in the framework of **Chapter III of the Contract Act, 1872**.<sup>11</sup> As discussed in Chapter 4, a condition in a Bangladeshi contract is best understood as a "contingent contract."

The most effective way to draft a condition is using an "if/then" formulation, which mirrors the structure of a contingent contract.

- **"If" Clause:** This clause describes the contingent event. It should be drafted in the present tense (e.g., "If the Buyer *obtains* financing...").
- **"Then" Clause:** This clause states the obligation that is triggered upon the satisfaction of the condition. It should be drafted as a covenant using "shall" (e.g., "...then the Buyer *shall purchase* the Property.").

It is incorrect to draft the "then" clause in the negative (e.g., "...then the Buyer is not obligated to purchase..."). This merely states the legal consequence of the condition's failure, rather than creating the conditional obligation itself.<sup>1</sup>

When drafting conditions within a dedicated "Conditions to Closing" article in an acquisition or financing agreement, the standard phrasing is: "The obligation of the Buyer to consummate the Closing is subject to

the satisfaction of the following conditions:". <sup>1</sup> Each condition that follows is then drafted to describe the required state of facts (e.g., "The representations and warranties of the Seller *must be* true and correct as of the Closing Date."). The drafter must ensure that the contingent event is a "collateral" event as required by Section 31 and not an act that is within the sole control of the party whose obligation is conditional, as this could render the promise illusory.

## Chapter 12: Drafting Discretionary Authority and Declarations

### Signaling Discretionary Authority

The word "**may**" is the universally accepted term for granting discretionary authority. <sup>1</sup> It signals choice or permission. For example, "Either party *may* terminate this Agreement upon 30 days' written notice."

It is crucial to distinguish "may" from "shall." A common drafting error is to use "may" when an obligation is intended, which can create significant ambiguity. For example, "The Tenant may pay rent on the first of the month" grants permission but does not create a duty to pay. The correct phrasing is "The Tenant *shall* pay rent..." When granting discretion, the drafter should consider its scope. Is the discretion absolute ("The Landlord may withhold consent in its sole discretion") or is it qualified ("The Landlord may not unreasonably withhold consent")? As noted previously, even "sole discretion" is subject to an implied duty of good faith in Bangladesh. <sup>26</sup>

### Drafting Declarations

Declarations are statements of policy or agreed fact and should be drafted in the **present tense** because they are intended to be true for the entire duration of the contract. <sup>1</sup>

- **Definition:** "'Affiliate' *means* any Person that directly or indirectly controls, is controlled by, or is under common control with, another Person."
- **Governing Law:** "The laws of Bangladesh *govern* this Agreement."
- **Notices:** "Any notice given under this Agreement *is* effective upon receipt."

By using the present tense, the drafter ensures the provision speaks to the parties at whatever future point in time they are reading it.

## Chapter 13: Endgame Provisions: Termination and Remedies

Endgame provisions govern how the contractual relationship ends, whether amicably or in dispute. They are among the most heavily negotiated clauses because they directly address financial consequences and

remedies.<sup>1</sup> The drafting of these provisions in Bangladesh must be closely aligned with the remedies provided under the **Contract Act, 1872**, and **The Specific Relief Act, 1877**.

### Grounds for Termination

A contract should clearly specify the events that give a party the right to terminate the agreement. These typically include:

- **Termination for Breach (Unfriendly Termination):** This occurs when one party fails to perform a material obligation. The clause should specify what constitutes a material breach and often provides a "cure period"—a set amount of time for the breaching party to fix the breach after receiving notice.<sup>1</sup>
- **Termination for Convenience (Friendly/Neutral Termination):** This allows one or both parties to terminate the agreement without any fault, usually upon providing a specified period of written notice (e.g., 30 or 60 days).<sup>1</sup>
- **Termination upon Specific Events:** This can include events like insolvency, bankruptcy, or a change of control of one of the parties.

### Remedies

Upon termination or breach, the contract should specify the available remedies. While the law provides default remedies, parties can and should tailor them to their specific transaction.

- **Damages:** The primary remedy for breach of contract under the Contract Act is monetary compensation for the loss or damage caused by the breach.
- **Specific Performance:** For certain types of contracts, particularly involving unique goods or real estate, monetary damages may be inadequate. **The Specific Relief Act, 1877**, allows a court, in its discretion, to order the breaching party to actually perform its contractual promise (Sections 12-21).<sup>13</sup> Drafters can include a clause acknowledging that specific performance would be an appropriate remedy, which, while not binding on a court, can be persuasive.
- **Injunctions:** The Specific Relief Act also provides for injunctions to prevent a party from breaching a negative covenant (Sections 52-57).<sup>13</sup>
- **Liquidated Damages:** Parties may agree in advance on a reasonable amount of damages to be paid in the event of a specific breach. This is enforceable under the Contract Act, provided it is a genuine pre-estimate of loss and not a "penalty" designed to punish the breaching party.

## Chapter 14: General Provisions ("Boilerplate")

The final substantive section of a contract contains the "general provisions" or "boilerplate." These clauses deal with the mechanics of the contract and the legal framework governing it. Despite being standardized, they are not "one-size-fits-all" and require careful consideration and tailoring.<sup>1</sup>

### Force Majeure

This clause excuses a party from performance if its failure is caused by an event beyond its reasonable control (e.g., natural disasters, war, strikes). As Bangladeshi law does not have a statutory definition of "force majeure," the doctrine of **frustration** under **Section 56 of the Contract Act, 1872**, applies as the default.<sup>38</sup> Frustration requires that performance become impossible, which is a very high legal standard. A well-drafted force majeure clause is therefore essential, as it allows the parties to contractually define a broader set of excusing events and the specific procedures (e.g., notice requirements) and consequences (e.g., suspension or termination) that will apply.<sup>40</sup>

### Indemnity

An indemnity clause is a promise by one party (the indemnitor) to compensate the other party (the indemnitee) for specific types of losses or damages. The legal basis for this is found in **Sections 124 and 125 of the Contract Act, 1872**.<sup>15</sup> Section 124 defines a "contract of indemnity," and Section 125 outlines the rights of the indemnity-holder to recover damages, legal costs, and settlement sums. Drafting should be precise about the scope of the indemnity: what losses are covered, whether it includes third-party claims, and the procedures for making a claim.

### Governing Law and Jurisdiction

These two clauses work together to provide certainty in the event of a dispute.

- **Governing Law:** This clause specifies which country's laws will be used to interpret the contract (e.g., "This Agreement shall be governed by the laws of the People's Republic of Bangladesh.").
- **Jurisdiction:** This clause specifies which country's courts will have the authority to hear any disputes (e.g., "The parties submit to the exclusive jurisdiction of the courts of Dhaka, Bangladesh.").

Under **Section 28 of the Contract Act**, agreements that absolutely restrain a party from enforcing their rights through ordinary legal proceedings are void.<sup>42</sup> However, Bangladeshi courts have generally upheld exclusive jurisdiction clauses that nominate a specific court, as this does not constitute an absolute

restraint but rather a choice of forum by the parties.<sup>43</sup>

## Dispute Resolution

Parties may wish to resolve disputes outside of the court system. An arbitration clause provides for this. To be enforceable in Bangladesh, such a clause must be in writing and comply with the provisions of **The Arbitration Act, 2001**.<sup>44</sup> The clause should specify the rules of the arbitration (e.g., BIAC rules), the seat (location) of the arbitration, the number of arbitrators, and the language of the proceedings.<sup>46</sup>

## Chapter 15: Signatures and Formalities

The final part of the contract is the execution block. For a contract to be legally binding, it must be properly executed by persons with the authority to bind the parties.

### Execution and Attestation

The signature blocks should clearly state the name of the party, followed by the signature and name of the authorized signatory and their title. For companies, this is typically a director or managing director, acting pursuant to a board resolution.

## The Critical Role of The Registration Act, 1908

A key feature of Bangladeshi law is the mandatory registration of certain types of documents. **The Registration Act, 1908**, requires that any instrument creating, declaring, assigning, limiting, or extinguishing any right, title, or interest in immovable property be registered with the relevant Sub-Registrar's office.<sup>47</sup> This includes deeds of sale (*Bainama*), lease deeds, and mortgage deeds.<sup>33</sup>

The consequence of non-registration is severe: **Section 49** of the Act provides that an unregistered document that is required to be registered shall not affect any immovable property comprised therein or be received as evidence of any transaction affecting such property.<sup>48</sup> This makes registration an absolute necessity for the enforceability of real estate and other specified contracts, a critical point of practice that drafters must always consider.

## Part 3: The Craft of Drafting: Ensuring Clarity and Precision

### Chapter 16: Avoiding Legalese and Enhancing Readability

The language of law has historically been criticized for being obscure, archaic, and inaccessible to non-lawyers.<sup>1</sup> While some technical terms are necessary, much of traditional legal writing—often called "legalese"—can and should be replaced with plain, modern language. This is not merely a matter of style; it is a matter of clarity and risk reduction. An unclear contract is a contract ripe for dispute.

Practices to avoid include:

- **Archaic Words:** Words like "hereinafter," "witnesseth," "aforesaid," and "hereto" should be eliminated. Instead of "the parties hereto," simply write "the parties."
- **Couplets and Triplets:** Redundant phrases like "null and void," "all and every," or "covenant and agree" should be reduced to a single, precise word. "Null and void" simply means "void."
- **Verbose Expressions:** Replace lengthy phrases with simpler alternatives. For example, instead of "in the event that," use "if." Instead of "for the duration of," use "during."

Adopting a "contemporary commercial drafting" style, as advocated by Tina L. Stark, makes contracts more understandable for clients and reduces the likelihood of ambiguity that a court might have to resolve.<sup>1</sup>

### Chapter 17: Clarity Through Format and Sentence Structure

The visual presentation of a contract significantly impacts its readability and clarity. A dense wall of text is difficult to navigate and understand. Drafters should use formatting techniques to break up the text and guide the reader through the document.<sup>1</sup>

- **Sections and Subsections:** Break the contract into logically numbered articles, sections, and subsections. This creates a clear hierarchy of information.
- **Headings:** Use descriptive headings for each section and subsection. This acts as a roadmap, allowing the reader to quickly locate relevant provisions.
- **Tabulation:** For long sentences with multiple conditions, obligations, or permissions, use tabulation (i.e., bullet points or numbered lists) to break the sentence into digestible parts. This is one of the most powerful tools for improving clarity.
- **Sentence Structure:** Keep sentences short and direct. Place the subject and verb at the beginning of the sentence and keep them close together. Avoid long, introductory clauses that force the reader to



wait for the main point of the sentence.<sup>1</sup>

## Chapter 18: Ambiguity and Canons of Interpretation in Bangladeshi Courts

Ambiguity is the greatest enemy of the contract drafter. A provision is ambiguous if it is reasonably susceptible to more than one meaning.<sup>1</sup> When an ambiguity leads to a dispute, a court in Bangladesh will be called upon to interpret the contract to ascertain the parties' intent.

Bangladeshi courts, following common law tradition, apply several canons of construction to resolve ambiguity<sup>31</sup>:

- **The Plain Meaning Rule:** The court will first look to the ordinary, grammatical meaning of the words used in the contract.
- **Interpretation of the Contract as a Whole:** The court will read the disputed clause in the context of the entire agreement, seeking to give effect to all provisions and arrive at a harmonious interpretation.<sup>31</sup>
- ***Contra Proferentem*:** If an ambiguity remains, it will generally be construed against the party who drafted the contract. This rule incentivizes drafters to be as clear as possible.
- **Commercial Purpose:** The court will seek to interpret the contract in a way that makes commercial sense and gives effect to the underlying business purpose of the transaction.<sup>32</sup>

The drafter's goal is to write with such precision that these canons of interpretation are never needed. This involves avoiding common sources of ambiguity, such as imprecise use of "and" and "or," dangling modifiers, and inconsistent terminology. The cardinal rule is to **say the same thing the same way** every time it appears in the contract.<sup>1</sup>

## Part 4: The Drafter as Counselor: A Client-Centric Approach

### Chapter 19: Adding Value Beyond the Written Word

A great transactional lawyer is more than a skilled writer; they are a trusted business advisor. The ability to add value to a deal comes from looking beyond the legal technicalities and analyzing the transaction from the client's commercial perspective.<sup>1</sup> Tina L. Stark proposes a five-prong framework for this analysis, which is directly applicable to the Bangladeshi context:

#### **Money, Risk, Control, Standards, and Endgame.**

- **Money:** The drafter must follow the cash flow of the transaction meticulously. Who pays whom? When? How much? Are there any adjustments, holdbacks, or contingent payments? What are the tax implications?
- **Risk:** What can go wrong in this deal? The drafter must identify all potential risks—commercial, legal, regulatory, political—and use the contract's building blocks (representations, covenants, conditions, indemnities) to mitigate and allocate those risks in the client's favor.
- **Control:** Who has the power to make decisions during the life of the contract? The drafter must ensure that the client retains control over critical aspects of the transaction and is not subject to the unfettered discretion of the other party. This involves negotiating approval rights, consent requirements, and information rights.
- **Standards:** The contract must set clear, objective, and measurable standards for performance. Vague standards like "good quality" or "promptly" are invitations for dispute. Standards should be specific (e.g., "in accordance with ISO 9001 standards," "within three Business Days").
- **Endgame:** As discussed in Chapter 13, the drafter must think through all possible ways the contract could end and ensure that the client is protected in each scenario.

By systematically analyzing every provision through this five-prong lens, the drafter moves from being a passive scribe to an active participant in shaping a better, safer, and more profitable deal for the client.

## Part 5: The Drafting Lifecycle

### Chapter 20: The Drafting Process: From Precedent to Final Document

Drafting a contract is an iterative process, not a linear one. It typically begins long before the first word is written and continues through multiple rounds of revision and negotiation.<sup>1</sup>

1. **Understanding the Deal:** The process starts with a thorough understanding of the client's business and the specific commercial terms of the transaction. This involves interviewing the client, reviewing term sheets or letters of intent, and asking probing questions to uncover unstated assumptions and potential issues.
2. **Choosing and Using a Precedent:** Most drafting does not start from a blank page. Lawyers typically work from a precedent—a previous contract from a similar transaction. However, using a precedent requires great care. The drafter must not simply "fill in the blanks" but must critically analyze every clause to ensure it is appropriate for the current deal, conforms to current law, and reflects the client's specific negotiating position.<sup>1</sup> Adapting foreign precedents for use in Bangladesh is particularly risky and requires a thorough review to ensure compliance with local statutes like the **Contract Act, 1872**, and **The Registration Act, 1908**.
3. **Drafting the First Draft:** The party with the greater negotiating leverage (e.g., the lender in a financing, the buyer in an acquisition) typically prepares the first draft. This provides a significant strategic advantage, as it allows that party to frame the issues and set the starting point for negotiations.
4. **Revision and Refinement:** The initial draft will go through several internal revisions before it is sent to the other side. This involves refining the language, checking for consistency, and ensuring all business points have been captured correctly.

### Chapter 21: Reviewing and Commenting on a Counterparty's Draft

Reviewing a contract drafted by the other side is a critical skill. It requires a different mindset than initial drafting. The reviewer must read every word with a healthy dose of professional skepticism, constantly asking: "How could this provision be used against my client?"<sup>1</sup>

The review process involves:

- **Substantive Review:** Checking the draft against the agreed-upon business terms to ensure it accurately reflects the deal.
- **Risk Analysis:** Identifying provisions that allocate an unreasonable amount of risk to your client and

proposing revisions (e.g., adding materiality or knowledge qualifiers to representations, weakening the standard of a covenant).

- **Identifying Omissions:** Looking for what is *not* in the contract. Does it lack key protections for your client? Is a crucial covenant or representation missing?
- **Providing Comments:** Comments are typically provided in a "markup" or "redline" of the document, showing proposed deletions and additions. A cover letter or memorandum explaining the key changes is also common practice.<sup>1</sup>

## Chapter 22: Amendments, Consents, and Waivers

Once a contract is signed, it is not set in stone. Circumstances may change, requiring the parties to modify their agreement. There are three primary ways to do this:

- **Amendment:** A formal change to the terms of the contract. An amendment must be in writing and signed by both parties, as is typically required by the "Amendments" clause in the boilerplate section.<sup>1</sup>
- **Consent:** If a contract prohibits a certain action without the other party's permission (e.g., "The Lessee shall not sublet the Premises without the Lessor's prior written consent"), that permission is granted through a formal consent document.
- **Waiver:** A waiver occurs when one party voluntarily relinquishes a right it has under the contract, typically the right to a remedy following a breach by the other party (e.g., waiving the right to charge default interest for a late payment).<sup>1</sup> A waiver does not change the underlying terms of the contract for future performance.

## Part 6: Ethical Obligations for the Bangladeshi Drafter

### Chapter 23: Professional Responsibility in Drafting

A lawyer's duty extends beyond technical skill; it includes a profound ethical responsibility to the client, the legal system, and the public. In Bangladesh, these duties are codified in the **Bangladesh Bar Council Canons of Professional Conduct and Etiquette**.<sup>50</sup> While the Canons were framed with a strong focus on litigation, their underlying principles apply with equal force to the practice of transactional law.

A critical analysis of the Canons reveals a heavy emphasis on courtroom conduct, duties to other advocates, and the adversarial process.<sup>50</sup> This presents a challenge for the transactional lawyer, whose role is often more collaborative and whose ethical dilemmas are more subtle. For example, the Canons do not explicitly address common transactional issues such as:

- Negotiating against an unrepresented or less sophisticated party.
- The duty to disclose or correct a "scrivener's error" in a draft that benefits one's own client.
- The line between zealous negotiation and bad faith tactics.

Therefore, the transactional lawyer in Bangladesh must interpret and apply the spirit of the Canons to their practice. Key principles include:

- **Duty of Competence:** An advocate must provide competent representation. In the drafting context, this means possessing not only knowledge of the law but also an understanding of the client's business and the commercial context of the deal.<sup>53</sup> Taking on a drafting assignment in an unfamiliar area without adequate preparation would be a breach of this duty.
- **Duty to the Client:** An advocate owes a duty of loyalty and must act in the client's best interests. This includes providing candid advice, even if it is not what the client wants to hear, and ensuring the client understands the risks and obligations they are undertaking in the contract.
- **Conduct with Regard to Other Advocates:** The Canons require advocates to treat each other with fairness and courtesy.<sup>50</sup> In a negotiation, this means avoiding personal attacks, misrepresentations, and deceptive tactics. While a drafter must be a zealous advocate for their client, they must also maintain professional integrity.
- **Upholding the Rule of Law:** An advocate must never assist a client in conduct that is illegal or fraudulent.<sup>52</sup> This is a paramount duty. A drafter cannot knowingly include false statements in a representation or draft a contract to facilitate an unlawful purpose.

By applying these core principles, the Bangladeshi drafter can navigate the unique ethical challenges of

transactional practice and uphold the high standards of the legal profession.

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