

# Anatomy of an American Contract

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# Speaker's profile

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- I counsel businesses in corporate, securities and commercial transactions. These include:
  - Organization, governance, mergers and acquisitions of corporations, limited liability companies and limited partnerships, including pooled investment vehicles;
  - Counseling private and public companies in private offering and registration of securities and periodic reporting before the Securities and Exchange Commission; and
  - Advising clients in negotiating, documenting and resolving disputes relating to a wide range of business contracts, including outsourcing and technology development and licensing contracts.
- I am a member of the bars of the States of New York and Delhi, India.

# Topics

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- ❑ Businessmen do business, lawyers do contracts
- ❑ Building blocks
- ❑ Analyzing the building blocks

# Minimum requirements

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- Businessmen know that having the right product, the right service - at the right time, right place, and right price – is the bare minimum required to enter the U.S. marketplace.
- Add to that, the right contract.

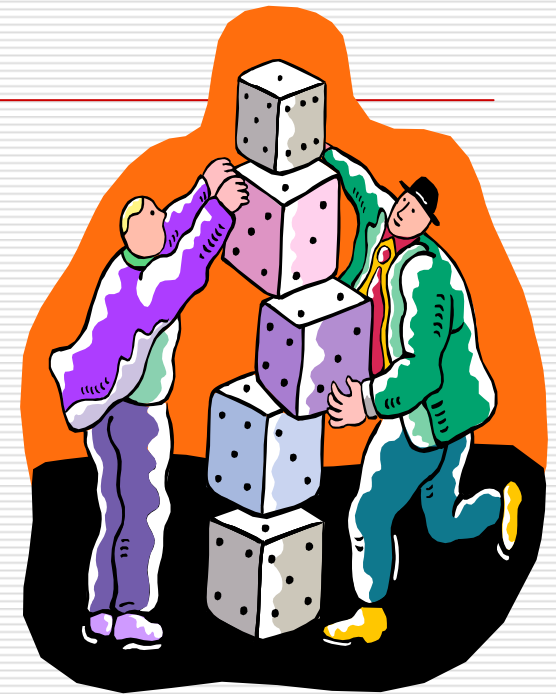
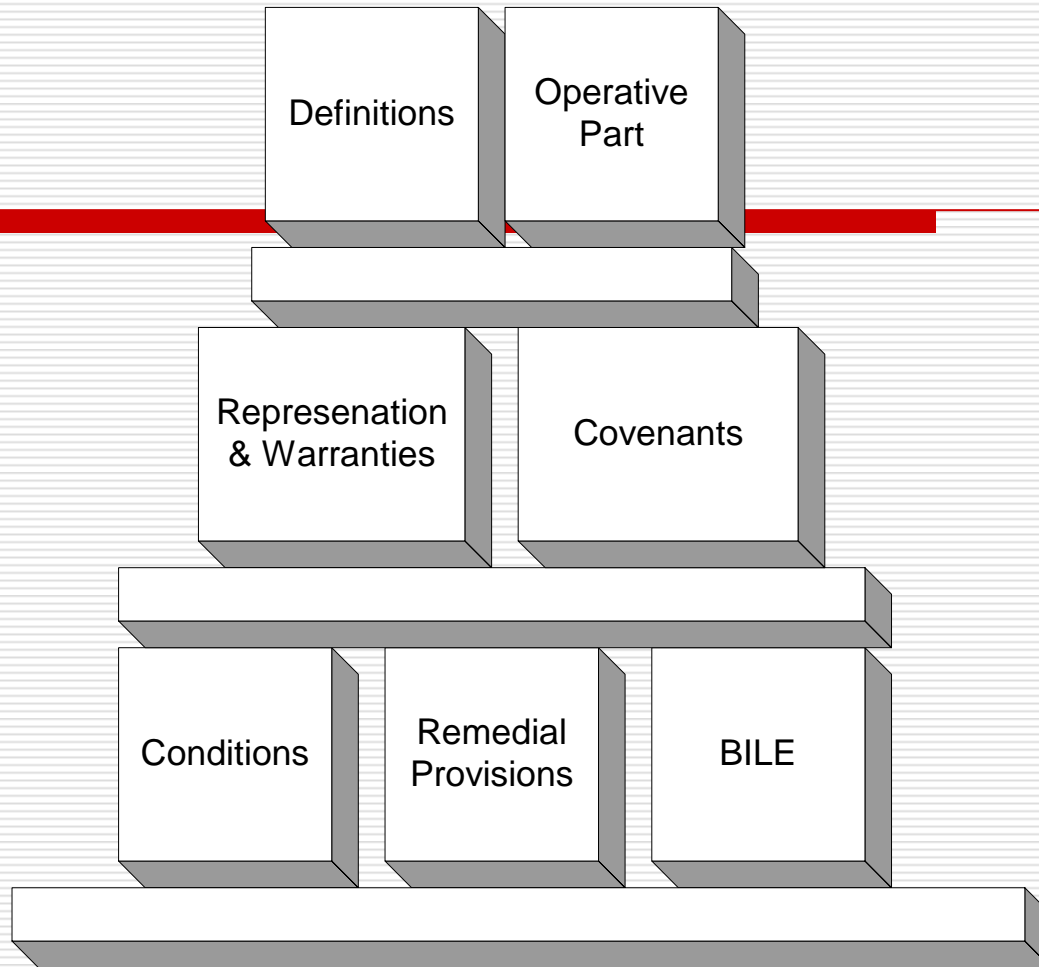
# Businessmen do business, lawyers do contracts

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- ❑ Businessmen make, negotiate and trouble-shoot deals; lawyers make, negotiate and trouble-shoot contracts.
- ❑ Contracts made in the U.S. have a characteristic structure.
- ❑ The business deal is only a part of the contract.

# BUILDING BLOCKS OF CONTRACTS





# Representations & Warranties

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- A representation is a statement of fact at a particular point in time upon which the other party is expected to rely.
- A warranty is a statement that a fact is true. It creates an indemnification obligation if that fact is false.

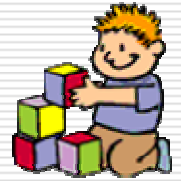


# Covenants

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- On-going promises by a party to take or not to take certain actions.
- Affirmative
- Negative
- Events of Default

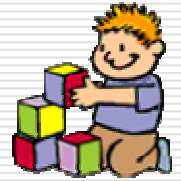




# Conditions

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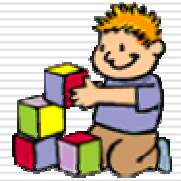
- ❑ "I promise to pay you \$1 m."
- ❑ "I promise to pay you \$1 m *if* your house burns down."
- ❑ A condition is an event which must occur before performance becomes due.
- ❑ Conditions are "outs."



# Remedial Provisions

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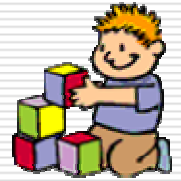
- Do not omit; often are in a non-lawyer document
- 3 elements:
  - Triggering events that give rise to a remedy
  - Catalog of available remedies
  - Costs



# Typical Remedies

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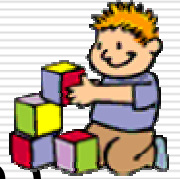
- Termination:
  - More useful if exercised before performance is due - *case*
- Acceleration:
  - Making debt due and payable immediately rather than stated maturity; loan contracts.
- **Indemnification:**
  - Liability is often limited: baskets, caps, time limits; M&A contracts.
- Liquidated damages
- Equitable remedies



# Definitions

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- Isolate a term or concept so it is given same meaning each time used.
  - Landlord's representation: "On the Closing Date, there will be no liens, *mortgages*, encumbrances, *easements* or *encroachments* on the Leased Premises."
  - Landlord's covenant: "Landlord shall not create, incur or permit to exist any *security interest*, lien or encumbrance on the Leased Premises."



# Boilerplate – BILE (Jaipat's dozen)

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## □ Interpretation

- We scan: Waivers; entire agreement; severability; counterparts; amendments; notices

## □ Last minute and miscellaneous bargains

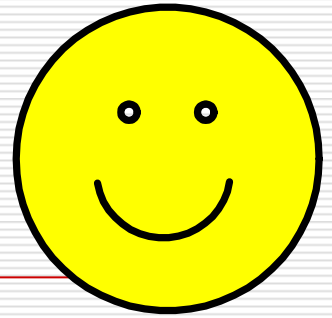
- IAF: indemnification (if not included); assignment; further assurances

## □ Enforcement

- J lo? - Applicable law; forum; jury trial

# What say you?

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- An employee was entitled to certain payments “on termination of her employment by the Company.”

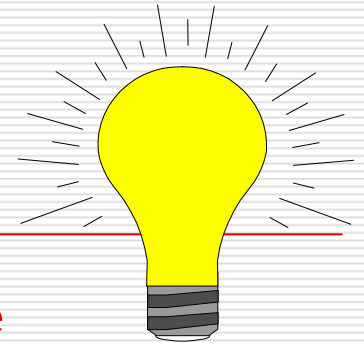
The employee quit her employment and moved, claiming the payments. She read “by the Company” as modifying employment – “employment by the Company.”

The Company, however, argued that the prepositional phrase modified “termination,” and since the employee left voluntarily, she was not entitled to the payments.

Source: not known

# What say you?

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- Found in a contract: "...the fee will not be payable with respect to renewals or extensions of contracts which are concluded after the year 2000."

Means:

- fee will not be payable for renewals or extensions with respect to contracts that are concluded after the year 2000, *or*
- fee will not be payable with respect to renewals or extensions if the renewals or extensions are concluded after the year 2000?

Source: not known

# Contact information:

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