

Centre for Advanced Research on
Corporate & Insolvency Laws

Contract Drafting Competition

in association with Corp Comm Legal

Problem Statement



Vidhikta 2.0



Problem Statement

Objective: Drafting an Investment Agreement.

Background

1. Your client Sahyog India Private Limited (“**Sahyog**” or “**Company**”), is an Indian company, incorporated and headquartered in Bengaluru, India. Its promoters are two young entrepreneurs, namely, Nikhil Jhaveri and Kamta Prasad (“**Promoters**”). Sahyog is engaged in the business of providing an online platform for small-sized investors to invest in early-stage Indian startups. The platform provided by Sahyog has revolutionized the way of startup investment and allows investment through ticket sizes as small as INR 1,000.

2. Sahyog also has a subsidiary company namely, Sanjog India Private Limited, (“**Sanjog**”) incorporated and headquartered in Bengaluru, India and engaged in offering an online matchmaking platform for matrimonial proposals.

3. To strengthen its market share and for further business growth, Sahyog is undertaking Series A round of fundraising with investment from Upright Capital, a Venture Capital Fund (“**Upright**”), based in the USA.

4. You are an associate in a Bengaluru-based law firm and Sahyog is your firm’s client. It has come to your firm for advice on the proposed transaction and has asked you to draft a suitable agreement for the same.

The Deal

5. Upright has agreed to invest INR 10,00,00,000 (Indian Rupees Ten Crores) through the issuance of 10,00,000 (Ten Lakhs) compulsorily convertible debentures (CCDs) of face value of 100 each by the Company to the Investor.

Client’s Instruction

6. While your client has agreed to the above-mentioned commercial point, it has concerns regarding a few issues. The major concerns have been listed below:

a. Incorporate detailed terms and conditions of the CCDs. Stipulate the nominal number of equity shares, if any, being issued to Upright to enable it to participate in Shareholders’ meetings of Sahyog as well.

b. Seek commitment from Upright to bring in additional investment, as and when required by Sahyog at a mutually acceptable valuation. In case, Upright is unable or unwilling to commit more such funding of Sahyog, the Promoters shall have the right to bring in other Investors, even if it results in dilution of Upright’s stake in Sahyog.



c. Your client is apprehensive of Upright in investing in competitors, which can cause potential damage to your client's business and poses a risk of leaking sensitive data and information. Upright is an institutional investor, and is not okay with restricting itself to invest in any potential business. It has asked to list down the names of a maximum of 10 (ten) real or perceived competitors of Sahyog, where the restriction would apply. Your client is amenable to propose a list of 10-12 competitors. However, as Sahyog is a data-driven company and the technology market is evolving at a fast pace, your client would like a comprehensive and detailed clause concerning competitors and investment in competitors. Your client would like to have discretion over the list and a right to revise the list from time to time, given the market dynamics. Your client wants you to draft the clause in such a manner that any violation of these conditions would lead to the fall-away of various rights of the investor. You are encouraged to mention in detail the fall-away rights while drafting the Agreement.

d. By receiving information about the company's operations, Upright would have access to a lot of sensitive information about Sahyog, including its technology, clients, business model, pipeline of projects, etc. Sahyog would lose its edge in the market if, by any chance, such information was to land up in competitors' hands. Sahyog is very concerned about this aspect. Your client wants watertight provisions to be incorporated in the agreement (even a standalone Non-Disclosure Agreement) (i) to limit the information that Upright can ask for as an investor, and (ii) to safeguard Sahyog's confidential information.

e. Poaching of good employees and clients by competitors has been a big headache for Sahyog in the last couple of years. Therefore, your client is also equally concerned about Upright's access to its key employees and clients. In no event should Upright approach them directly and entice them away to Sahyog's competitors or anyone else. It wants to bar Upright from approaching its employees and clients in any manner, other than that strictly required to give effect to the agreement.

f. Your client wants to make it clear that Sahyog or the Promoters shall not be liable to provide damages of any nature, more than the investment amount. There should be minimal representations and warranties on the part of the Promoters along with the minimum obligation to indemnify the investors for the losses. Your client also wants to ensure that Upright doesn't have the advantage of double dipping for the claim of damages. Thus, appropriate provisions for limitation of liability should be incorporated in the agreement.

g. Your client intends to apply for the license of a Non-Banking Financial Company ("NBFC") in the future and wants to ensure that there is no roadblock for Sahyog to obtain the license. Your client wants a detailed and comprehensive clause for representation and warranties to be taken from investors for the same purpose. Investors must undertake to comply with any terms and conditions laid down by the Reserve Bank of India in respect of foreign investments, disclosures, capitalisation norms, etc. and cooperate with Promoters and other stakeholders in securing and maintaining an NBFC licence.



h. Your client wants you to draft the clause for Board composition in such a manner that the Promoters and your client will have control over the board at all times, Upright shall only have one nominee on the Board.

i. Your client wants to retain the sole right to nominate the Chairman, Managing Director, Chief Executive Officer, Chief Operating Officer and other CXOs – it may inform and consult Upright on such appointments. Upright may be given the right to seek further information about the candidates but shall not have a veto right to negate any such nominations and appointments at the Board or shareholders' level.

j. Your client is apprehensive about the unvested shares of Promoters in the event of a good leaver or a bad leaver situation and wants you to draft clauses protecting the interest of the Promoters. Your client wants pre-emptive rights to buy the securities held by Upright in Sahyog at any point in time if Upright wants to exit the company. Incorporate suitable clauses with valuation methodologies to be adopted in different circumstances.

k. Upright has been given Inspection and Information Rights, the cost of which has to be borne by your client. Your client has asked you to draft this clause in such a manner that it would not create any unnecessary burden on your client if Upright is conducting regular inspections. You may incorporate a clause relating to reasonable frequency and a list of subject matters for such inspection. An MIS plan indicating appropriate heads of information would be in order.

l. Upright would carry out detailed due diligence over Sahyog, Sanjog and the Promoters (at Sahyog's cost) before infusing the investment amount. Therefore, your client wants you to limit the representations and warranties to be provided by them under the agreement and minimize any potential outgo if Upright were to claim any damages.

m. Your client has agreed to give Affirmative Voting Rights (AVM) to Upright concerning Sahyog. However, Promoters want such rights limited only to important policy decisions and do not want interference with the day-to-day operations and management of Sahyog by Upright. Upright is also demanding AVM concerning its subsidiary, Sanjog. Your client is concerned about the operational challenges it may face by giving AVM. After negotiation, Upright has asked your client to draft the AVM clause for Sahyog and its subsidiary. Your client wants you to draft the clause in such a manner that it would not lead to any operational challenges for your client or would give excessive control to Upright. Sahyog also wants a carve out for management and operations of Sanjog as much as possible as it may be hived off as a separate business at some point in time.

n. Your client wants to ensure dispute resolution is subject to arbitration and the seat of the arbitration should be Bengaluru, India.



o. Governing law for the agreement should be that of India and competent courts at Bengaluru should have the jurisdiction to entertain any dispute arising out of the agreement.

p. Your client wants you to draft a Deed of Adherence for transferring of securities to any third party from Upright.

q. Your client is not sure about the other rights to be provided to Upright as an Investor and wants you to draft clauses concerning the right to be given to Upright in a detailed manner, balancing the interest of the Company, Promoters and other stakeholders.

7. Your firm has asked you to incorporate suitable terminology for the clauses to raise finance through CCD and draft the Agreement in a detailed and comprehensive manner ensuring the rights of your client.

Note: *The Problem Statement is drafted by Mr. Bhumesh Verma (Managing Partner, Corp Comm Legal) and by CNLU Alumna Ms. Jyotshna Yashaswi (Corporate M&A and PE & VC Lawyer). Any communication with the drafters in reference to the problem statement or the competition shall be considered a valid ground for disqualification.*

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