

# WELCOME

## **Drafting of Contract**

(Legal aspects of contract, Structuring a contract, Types of contract, Warranty, Indemnity, L/D, FM and Dispute resolution)

# What to expect today



# Public Procurement Process

Assessment of need  
Proc Planning  
Tender invitation

Tender evaluation  
Negotiation  
Cont-award decision

Contract drafting  
Contract Mgmt  
Dispute resolution

(1)

(2)

(3)

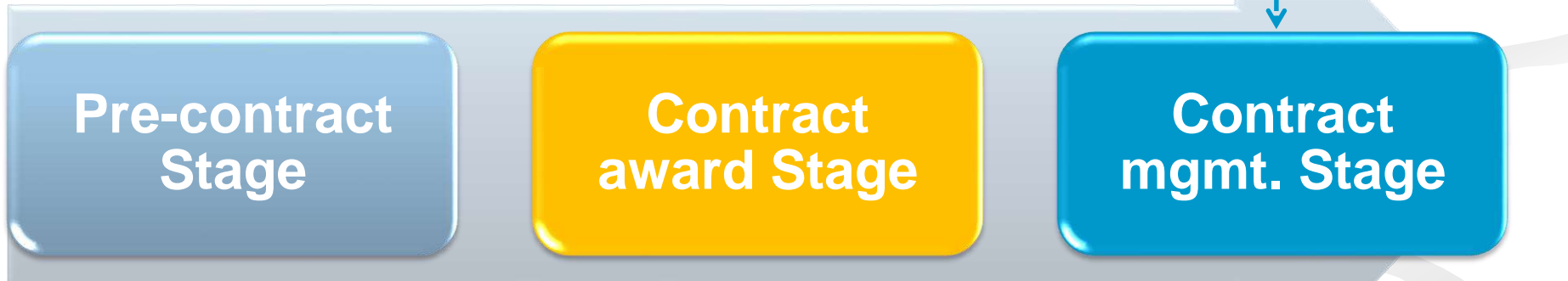
**Pre-contract  
Stage**

**Contract  
award Stage**

**Contract  
mgmt. Stage**

# Public Procurement Process

Cont drafting  
Cont Mgmt  
Dispute resolution



Pre-contract  
Stage

Contract  
award Stage

Contract  
mgmt. Stage

# Project management

## Field

- Project integration management
- Project scope management
- Project schedule management
- Project cost management
- Project quality management
- **Project human resource management (Team building)**
- **Project communication management**
- **Project risk management**
- **Project procurement & contracts management**

# Procurement & Contract Mgmt

It impacts all 3 critical aspects of a Project

**Time critical** -When deadline immovable;  
event-related projects.

**Quality critical**-When outcome must be of  
certain standard even if it  
involves more time & cost;  
engg, medical projects.

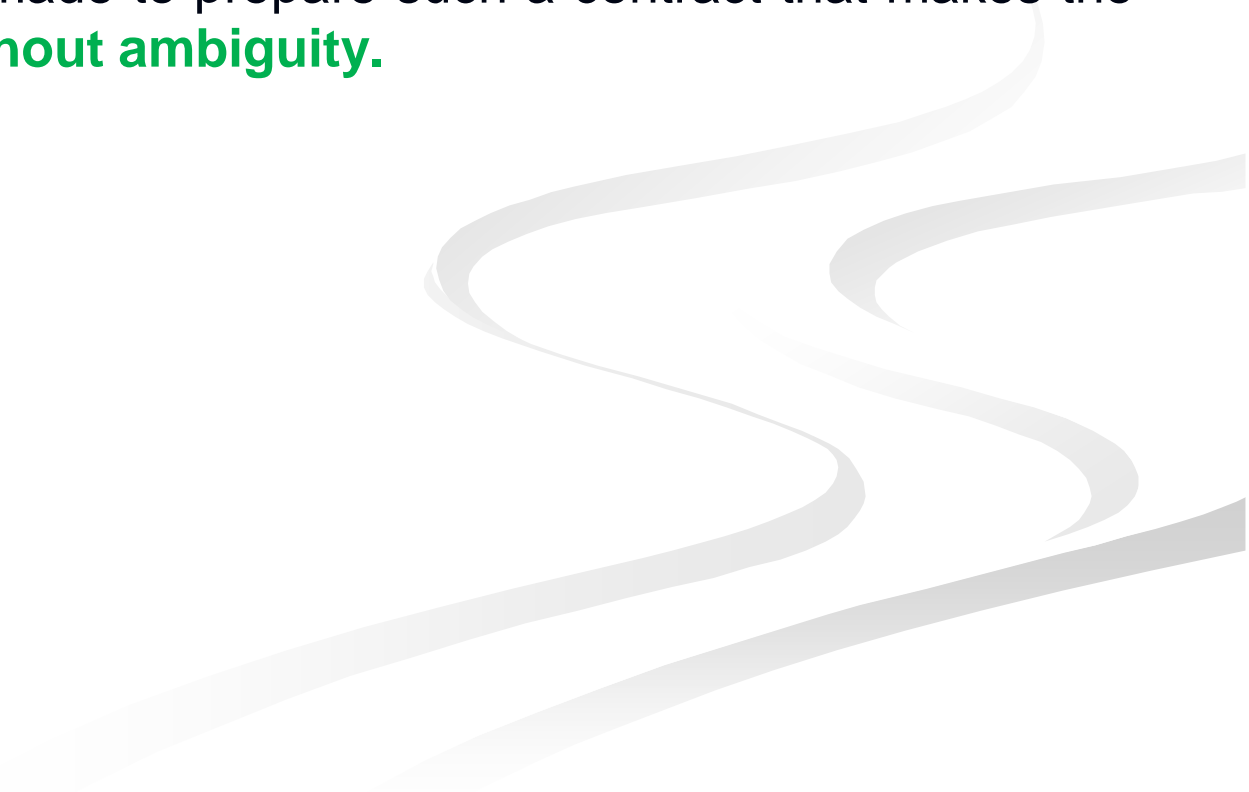
**Cost critical** -When profit is the purpose,  
keeping cost low becomes  
high priority; comm projects



**All three need to be kept under control for project to be successful**

# Contracts

## How to make a good one?

- To make a good contract:
    - **Legal aspects contract** must be kept in mind and
    - Efforts must be made to prepare such a contract that makes the **things clear without ambiguity.**
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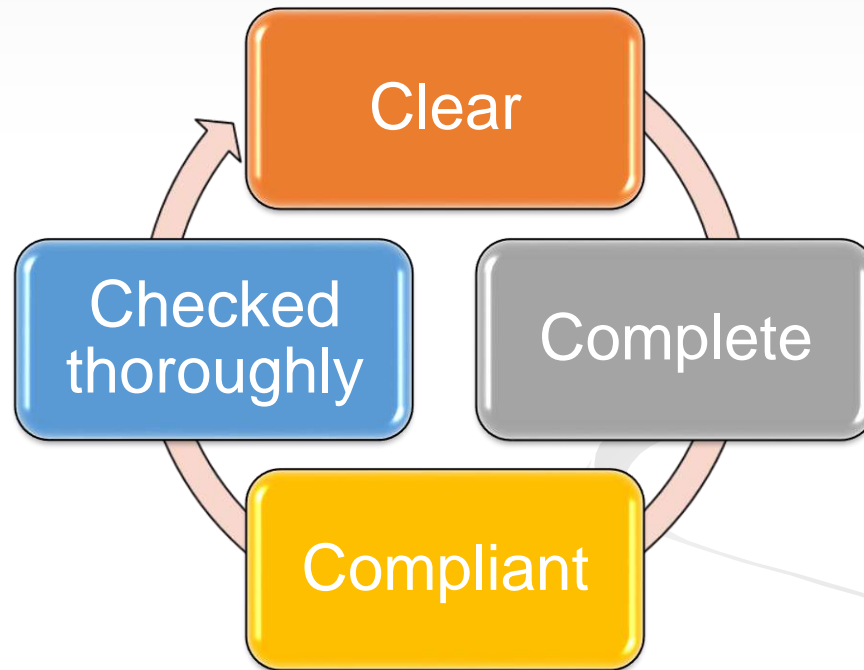
# What is a good contract?

- A good contract specifies clearly the technical, commercial, financial, legal and other parameters (to facilitate smooth execution) particularly in the following areas:
  - Specs and scope of Works/Goods
  - Delivery schedule, Milestones
  - Price
  - Quality assurance , tests, testing Labs, testing fees
  - Safety requirements
  - Quick resolution of disputes during execution of the contract itself.



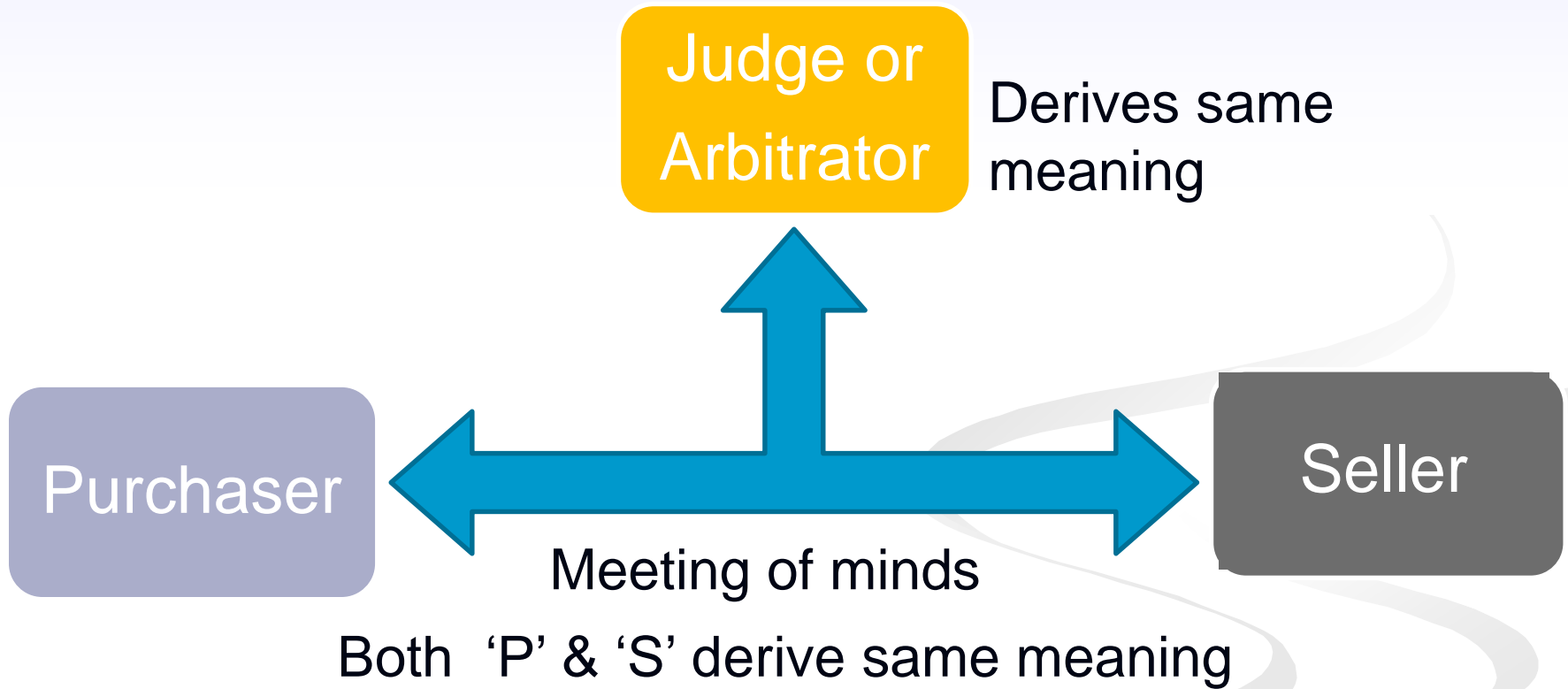
# Contract drafting

## Top 4 criteria



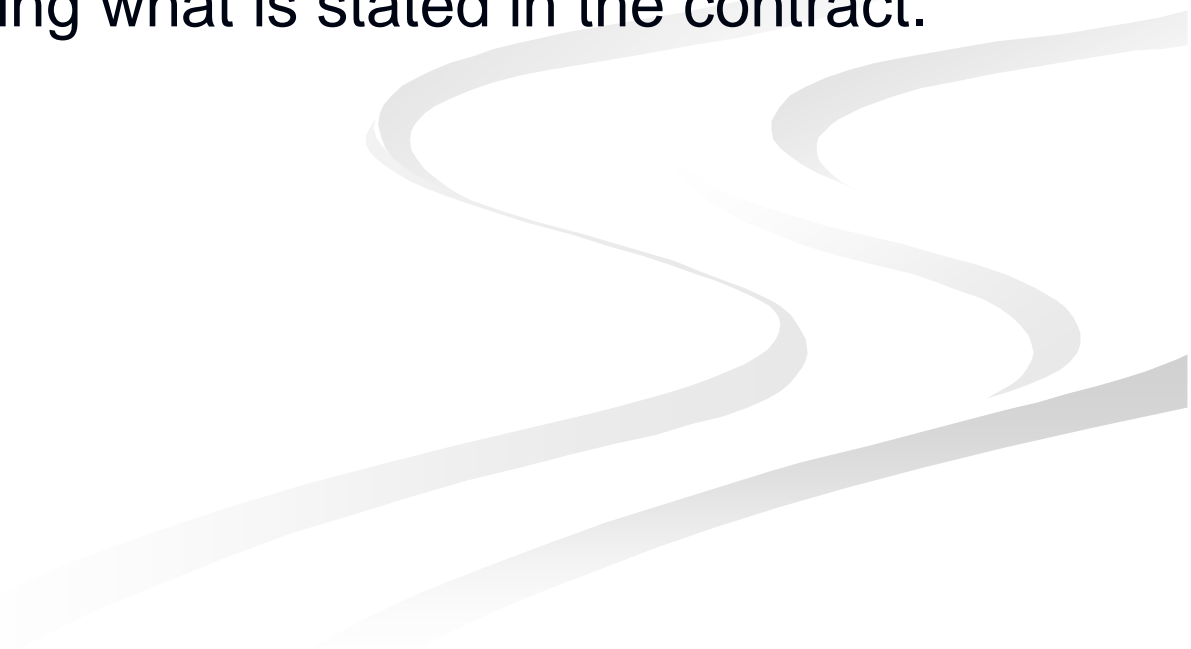
# Contract drafting

How to make a good one?



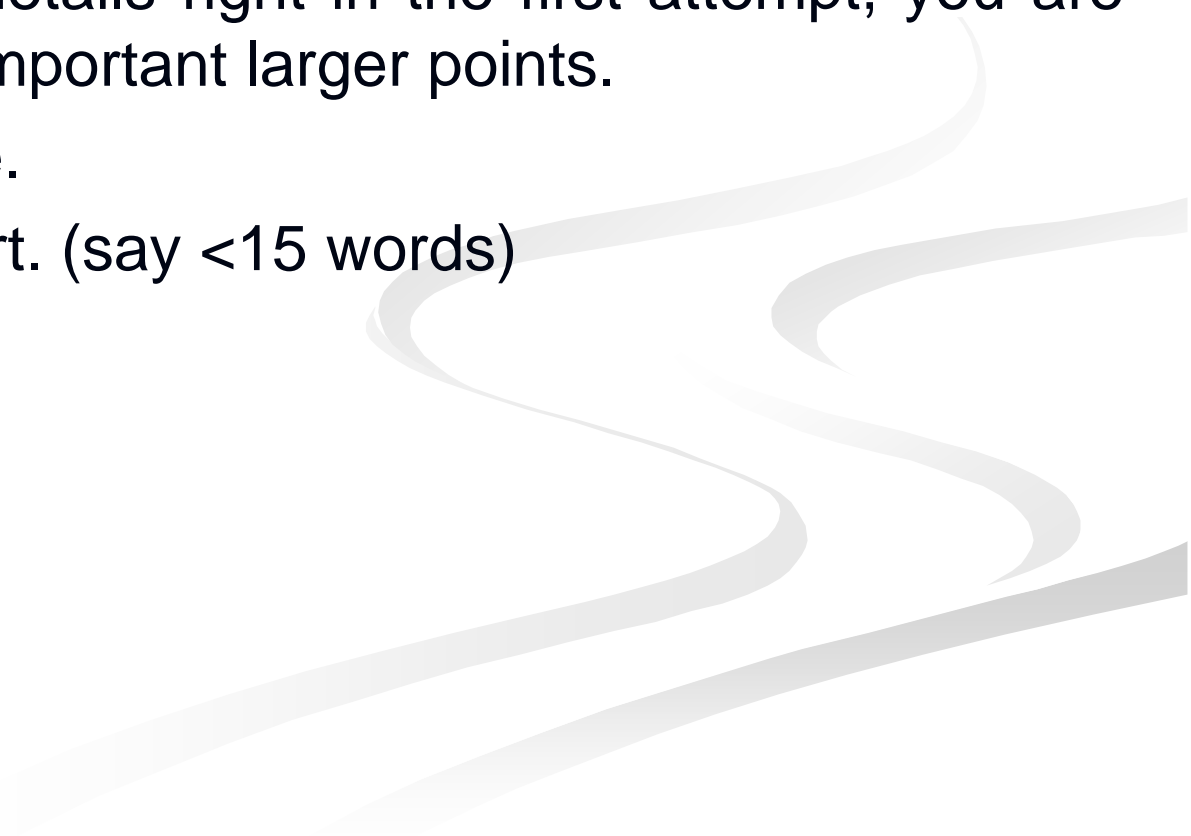
# Contracts

## What language should I use to draft a contract?

- There is no specific/ magic language. The key is to make the thing clear to avoid misunderstandings and disputes.
  - If there is a dispute, it is not what you think the contract says, it is what the Court thinks the contract says, usually by interpreting what is stated in the contract.
- 

# Contract drafting

## Principles

- Reconcile yourself to preparing a draft, revising, fine tuning and reading it meticulously.
  - If you try to get all details right in the first attempt, you are likely to miss some important larger points.
  - Use simple language.
  - Keep sentences short. (say <15 words)
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# Contract drafting

## Principles

- **Repeat key terms:** in case of a novel, it can be boring for the reader to see the same word repeated many times. In case of a legal document, use of the same word with the same meaning is vital- to avoid misunderstanding
- When revising, check for ambiguities. Remember two rules. First, do not revise while you write; this slows down both the writing and revising processes. When you are writing, concentrate solely on your ideas no matter how unpolished your writing may seem. Revise later.

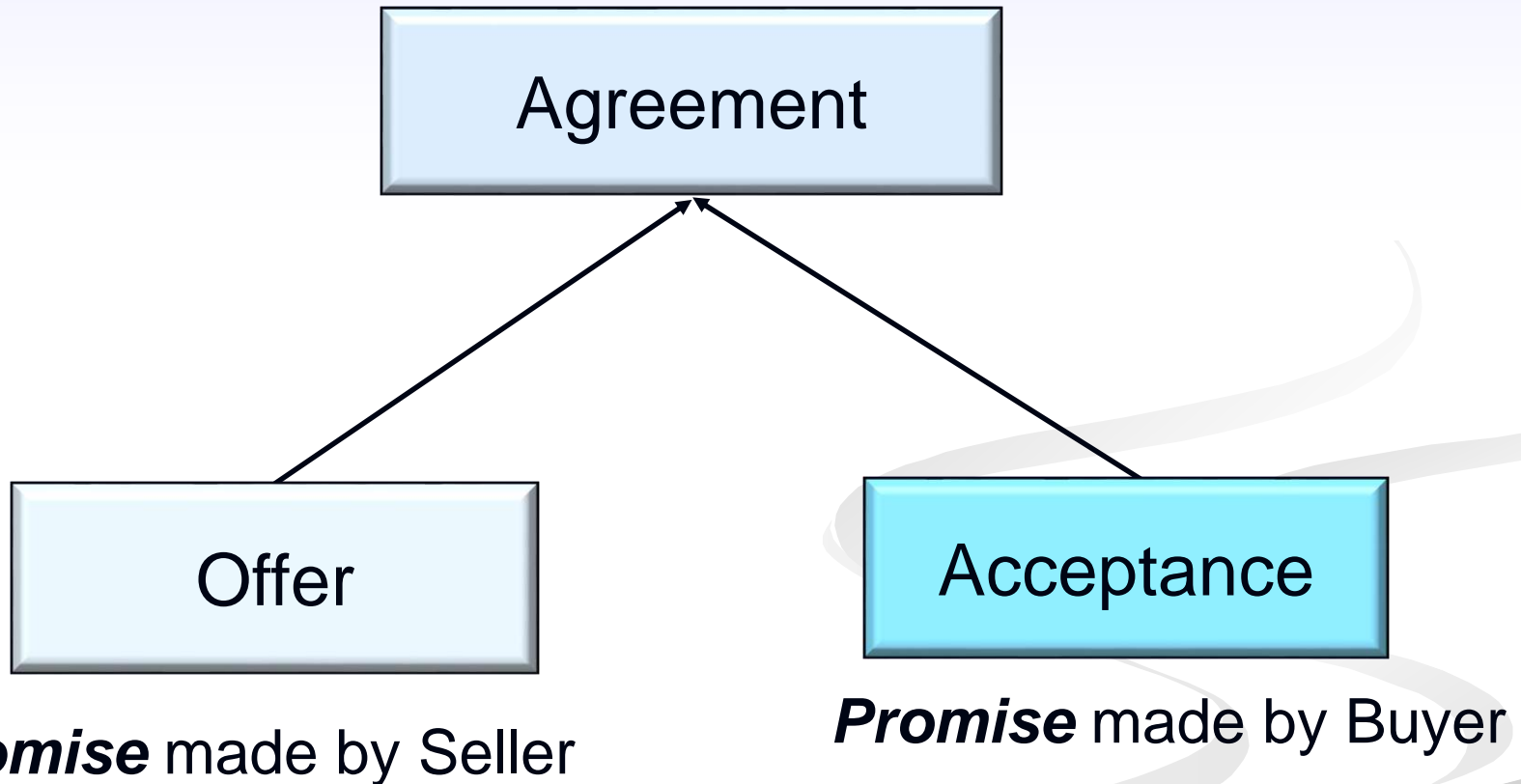
# Contract drafting

## Principles

- After polishing each clause, re-read the document as a whole looking for contradictions between parts of the contract, rather than wording problems within one clause. In your concern for details, you may have overlooked some larger ambiguities
- Consult others. No one person can imagine all the ways some reader can misconstrue a point. Therefore, it is better to verify the text by your peer.

# What is an agreement?

An agreement is a Set of Promises- S 2 (e) of ICA,1872



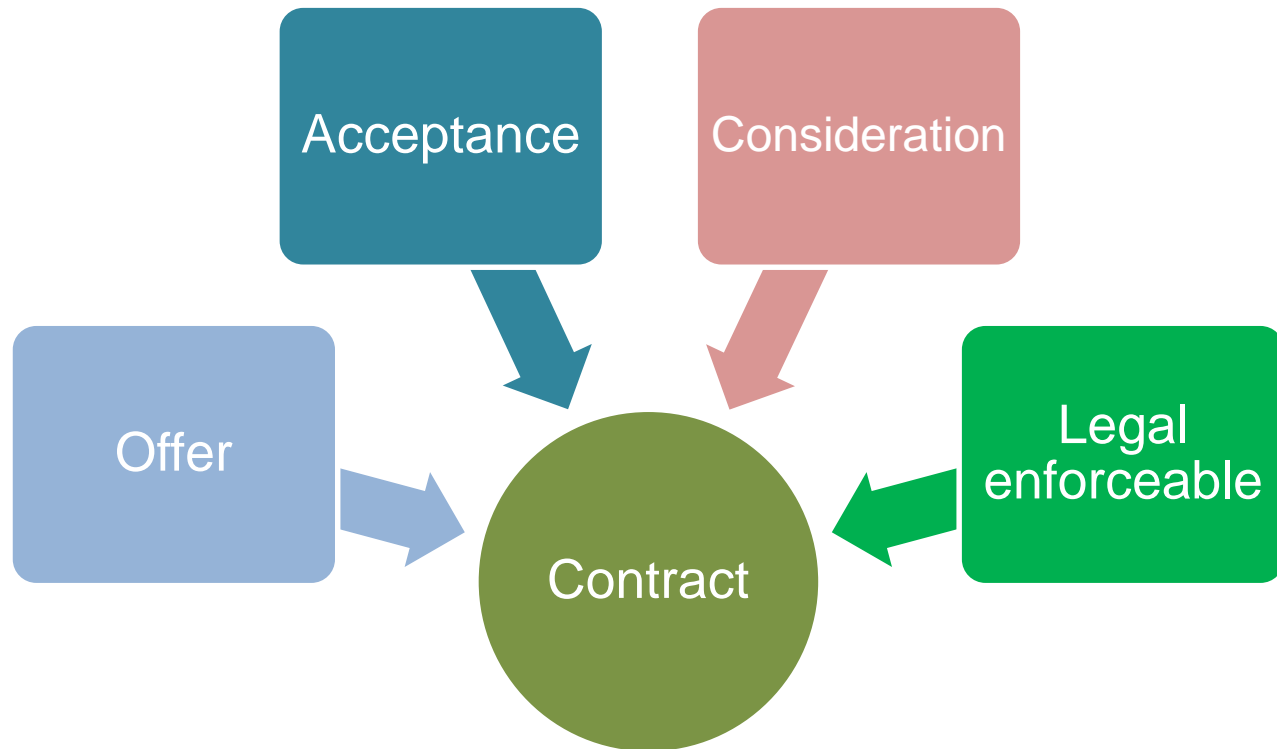
Offer when accepted becomes a **Promise**- s 2 (b) of ICA

# What is a contract?

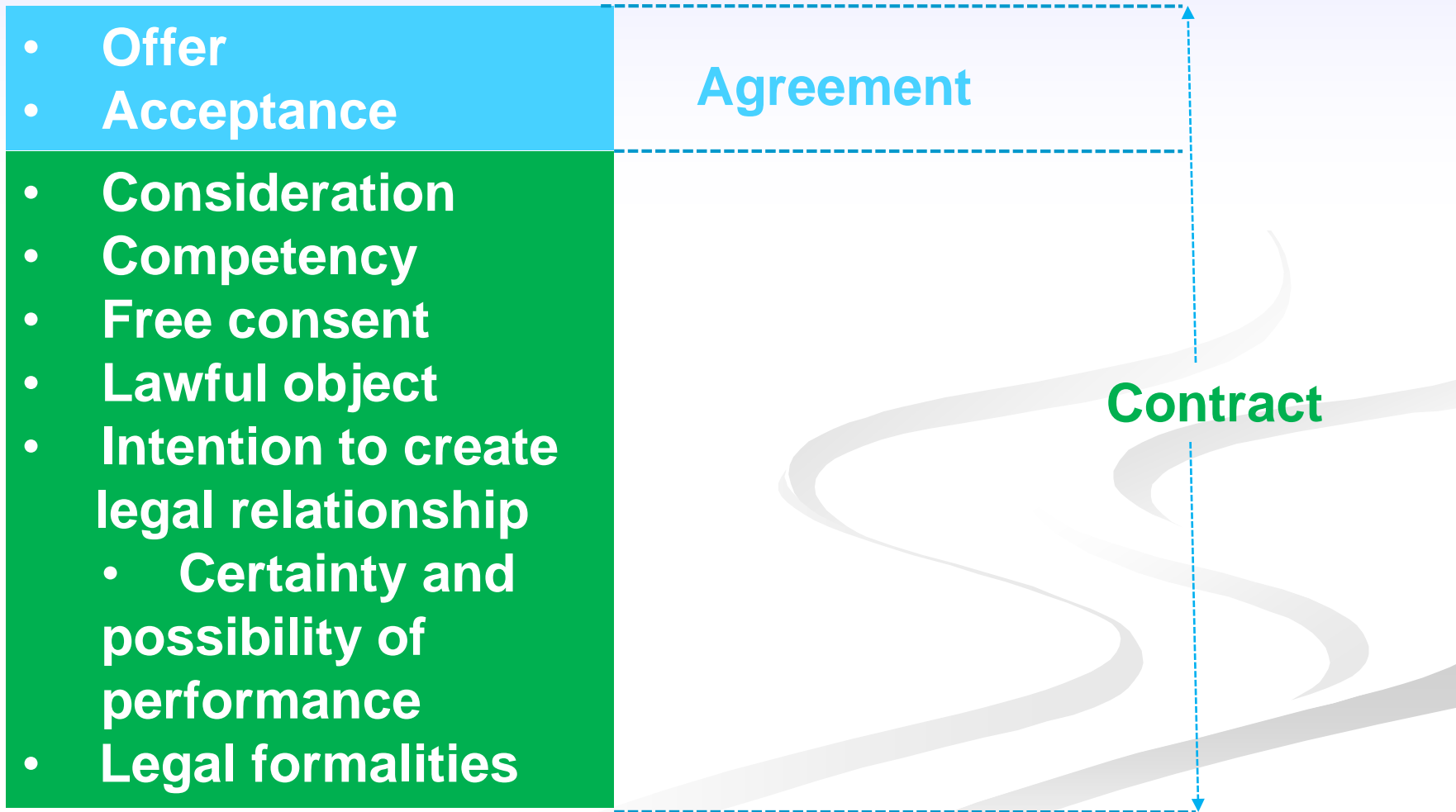
- An agreement is a set of promises
- A contract is a promise or set of promises between the parties enforceable by law.
- Offer + Acceptance = Agreement
- Agreement + Legal Comp = Contract
- **All contracts are agreements, but all agreements are not contracts**



# How a contract is formed



# Agreement and contract



# Intention to create legal relationship

- There must be an intention to create legal commitment. This acts like a glue. In commercial arrangements, this is evident.
- This differs from social environment where the presumption is that there was no intention to create legal relations. The intention is tested by whether a reasonable man would consider that the parties intended to create legal relations.

# Competency of parties

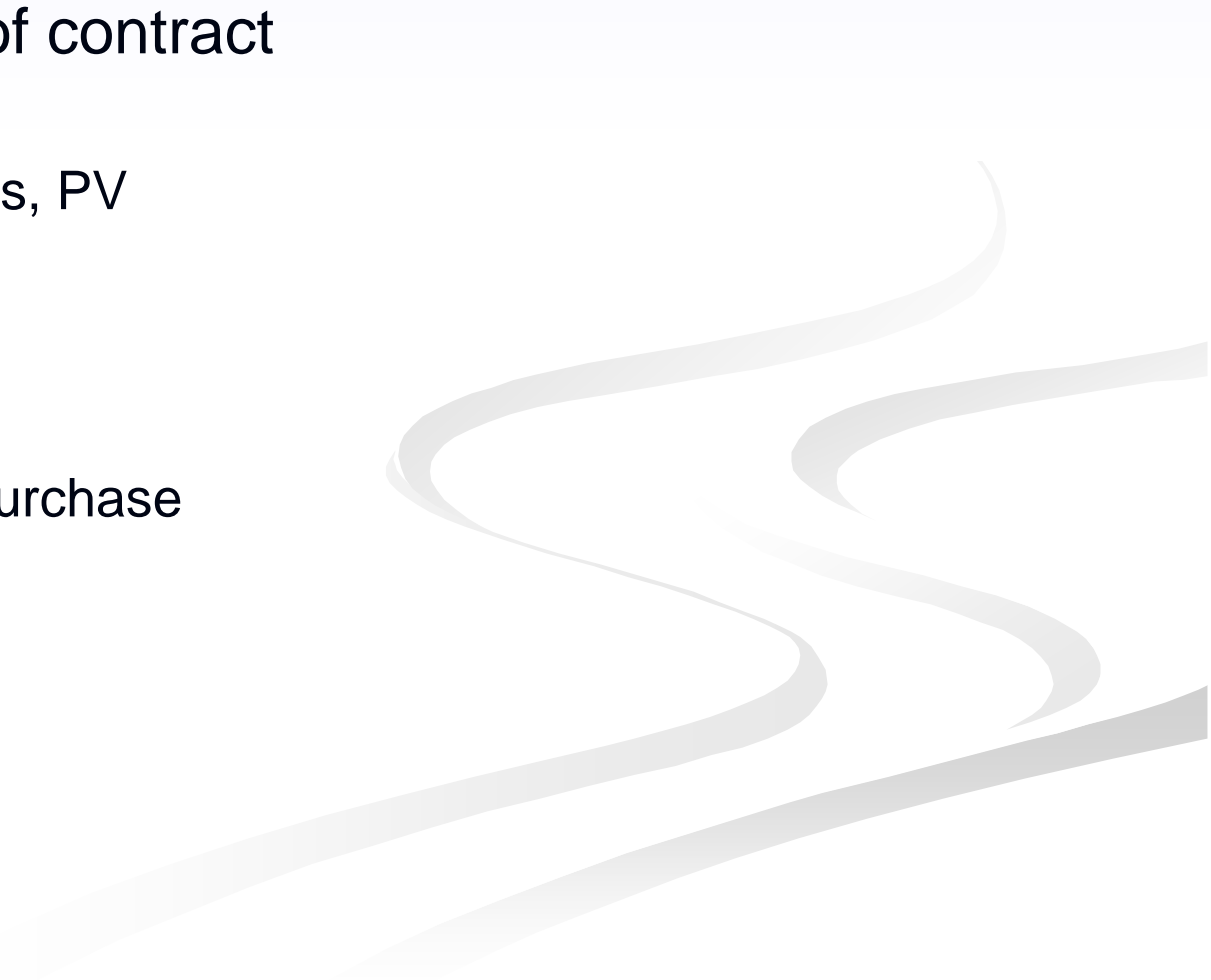
- The parties must have the capacity to contract. A statutory corporation only has the power to contract for the services for which it was incorporated. As regards a person, this refers to age, i.e. attainment of age of majority, sound mind and not suffering any disqualification from contracting by any law. S-11

# Free consent

- **Free consent:** This is said to be caused when it would not have been given but for the existence of coercion, under influence, fraud, misrepresentation or mistake. S-13
- **Lawfulness of object:** The object of the agreement must be lawful, if it is to be a valid contract.  
- S. 24

# Contract drafting

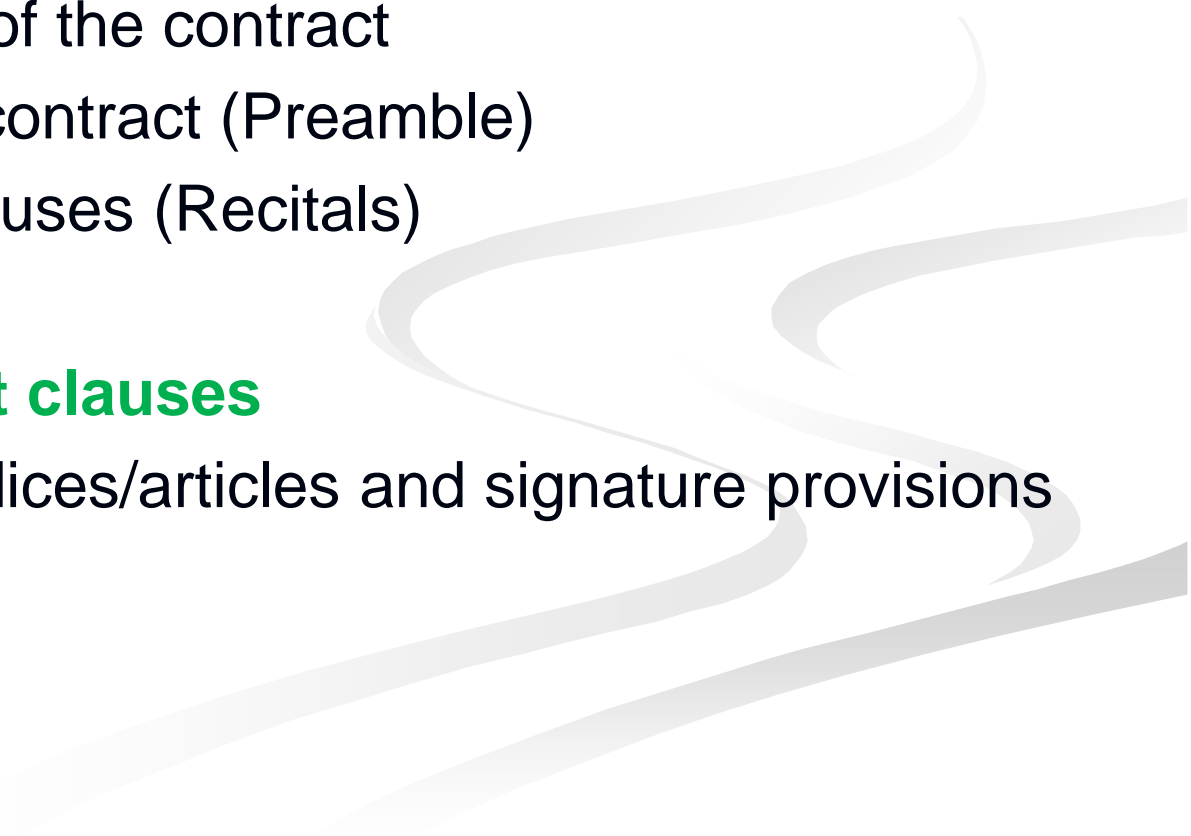
## Important clauses

- Preparation of LOI / LOA
  - Drafting of clauses of contract
    - Scope
    - Price, Statutory levies, PV
    - Time schedule
    - Force Majeure
    - Liquidated Damages
    - Termination & risk Purchase
- 
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# Main sections of a contract

- Preamble - Latin: 'Prae' - before; 'Ambulare'- to go, to walk; it means - to precede; Preamble- preface of a book.
- Recitals – Latin: Recitare – to read out,
- Subject matter of contract/ Scope
- Definitions
- Key commercial & legal clauses.
- Signatures {preamble(starting)- signature(ending) is sometimes called the Frame of contract}

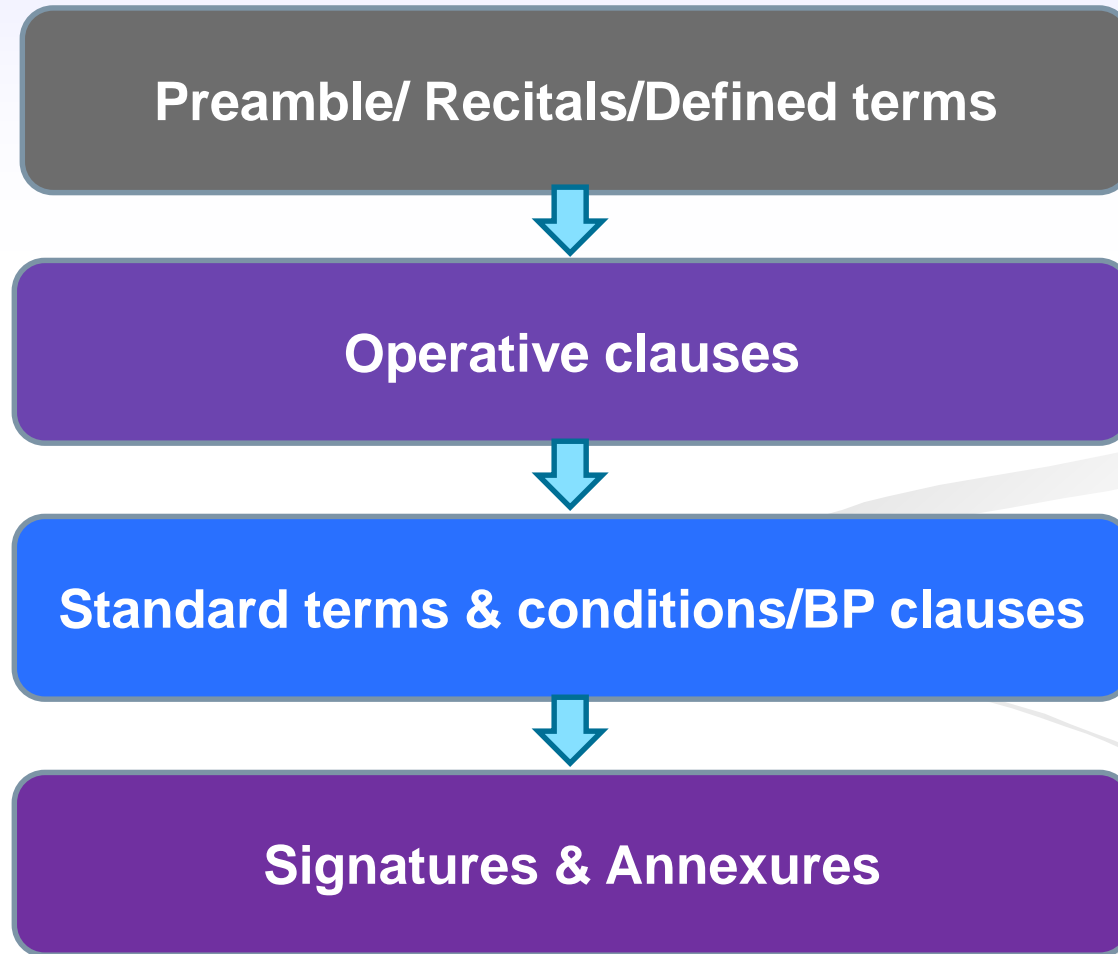
# Is there a typical contract structure?

- Contracts can come in all shapes and sizes
  - They need framework like a container holding the contents
  - The effective date of the contract
  - The parties to the contract (Preamble)
  - Any preliminary clauses (Recitals)
  - Defined terms
  - **The main contract clauses**
  - Schedules/ appendices/articles and signature provisions
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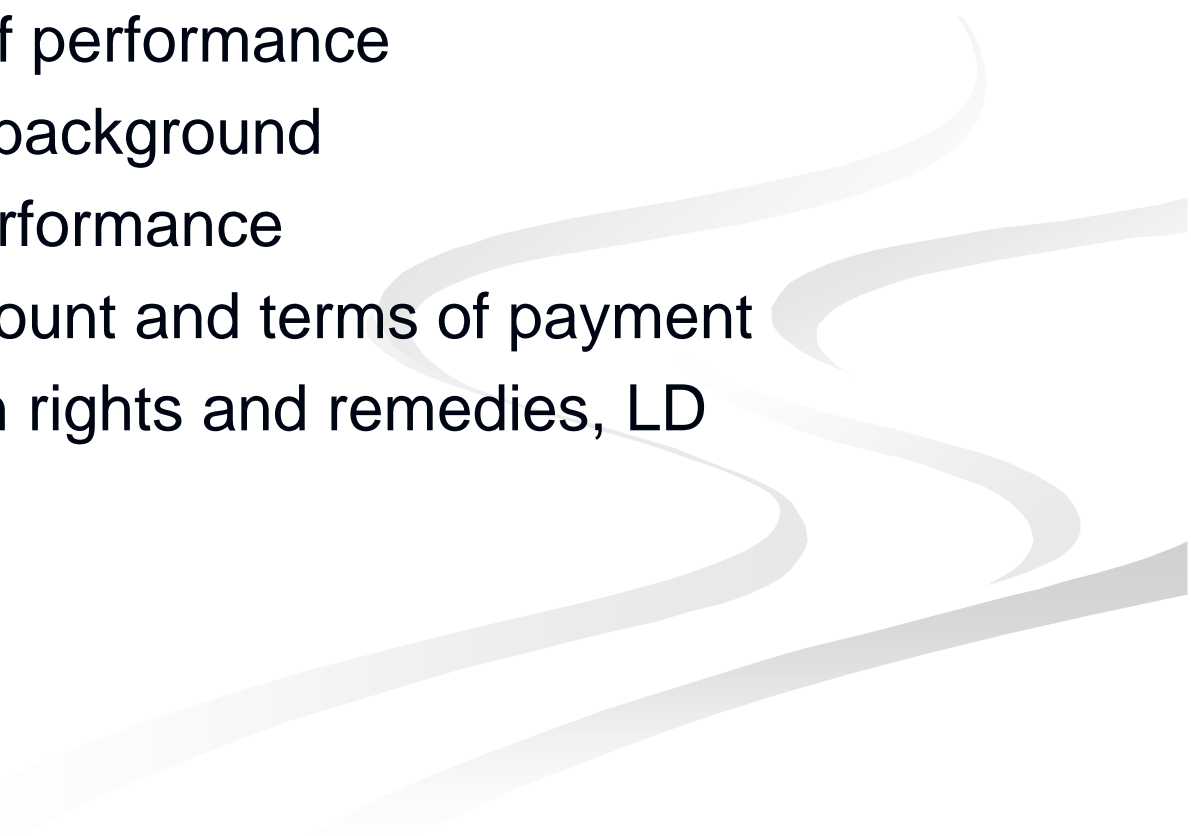


# Is there a typical contract structure?

## Segments of a contract



# What should be in a contract?

- Who: the parties
  - What: the rights and duties of the parties
  - When: the terms of delivery etc
  - Where: the place of performance
  - Why: any relevant background
  - How: method of performance
  - How much: the amount and terms of payment
  - What if: termination rights and remedies, LD
- 

# Preamble and Recitals

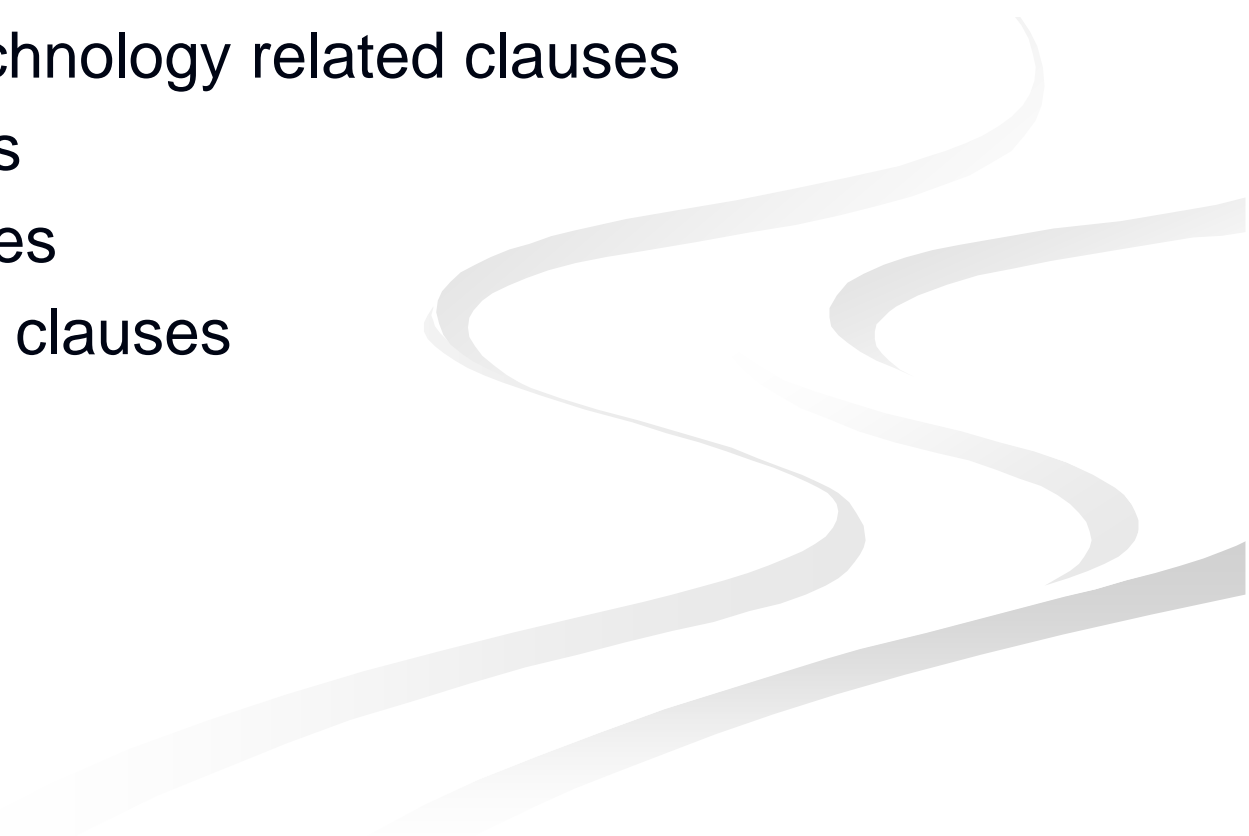
The 'PREAMBLE' of a contract is the introductory paragraph that identifies the parties to the agreement.

It is typically followed by paragraphs known as 'RECITALS', which are sometimes labelled as 'Whereas clauses'

Taken together they tell the 'who', 'what', 'when' and 'why' of the transaction.

They tell who the parties are, the date of the agreement and what the parties hope to accomplish

# Main contract clauses

- Operative clauses
  - Financial terms
  - Risk management clauses
  - Innovation and technology related clauses
  - Boilerplate clauses
  - Termination clauses
  - Dispute resolution clauses
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# Key clauses

## More important

Scope of contract  
Price, Taxes, duties, PV  
DP, Terms of delivery

Liquidated Damages  
Force Majeure  
Termination

## Important

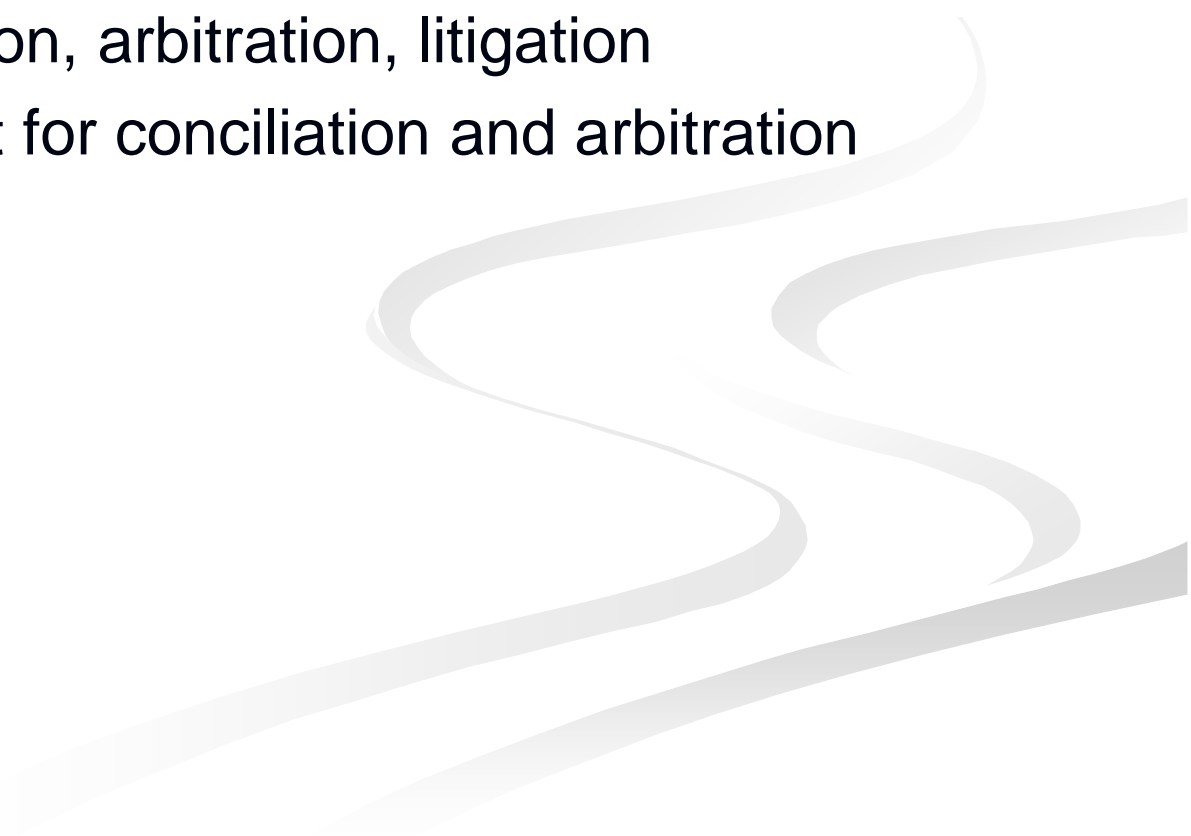
Inspection  
Documentation  
Payment

Indemnity  
Warranty  
Dispute resolution


Governing laws  
and  
Jurisdiction

# The 'laws' of Contract

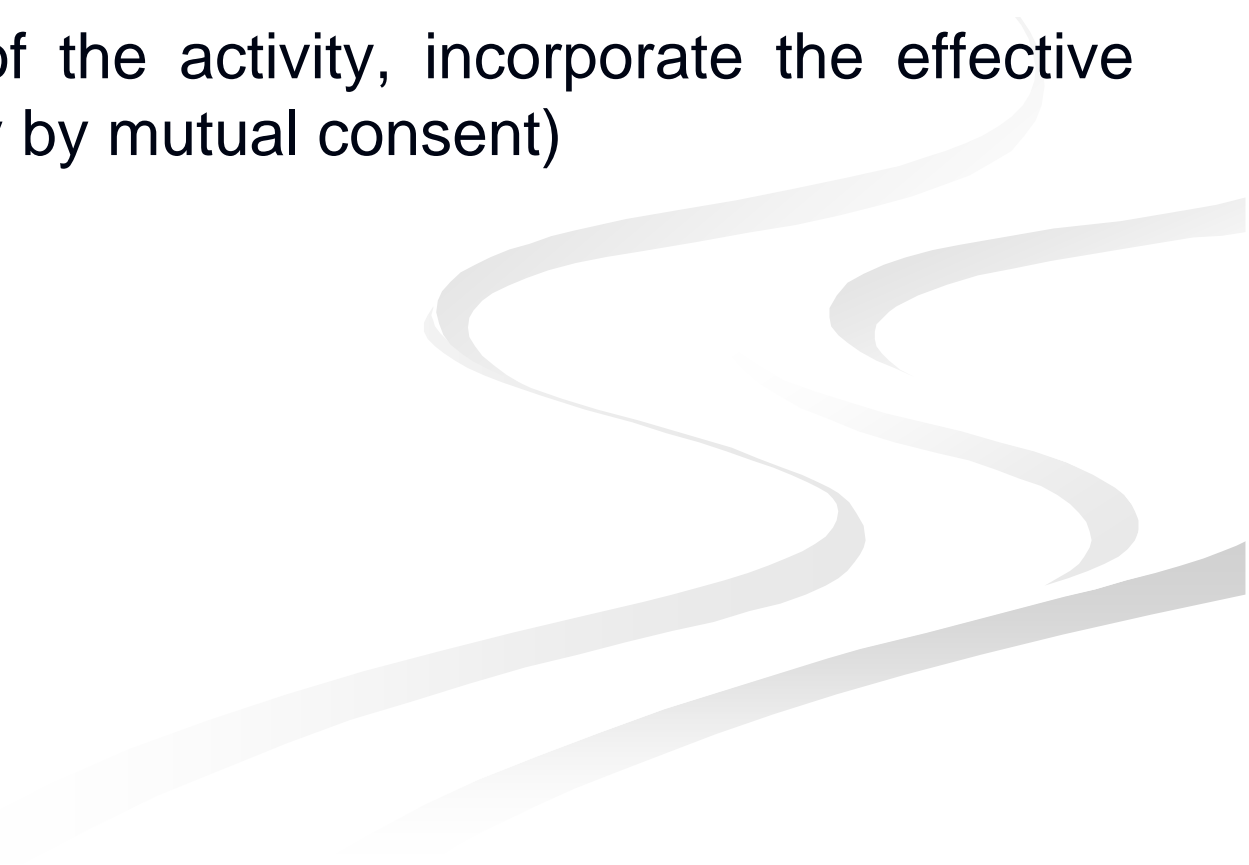
## Applicable Laws and jurisdiction

- State the laws that will govern the contract
  - Specify the court that will have the jurisdiction
  - Incorporate a dispute resolution mechanism: mutual discussion, conciliation, arbitration, litigation
  - Seek written consent for conciliation and arbitration
- 

# Standard clauses

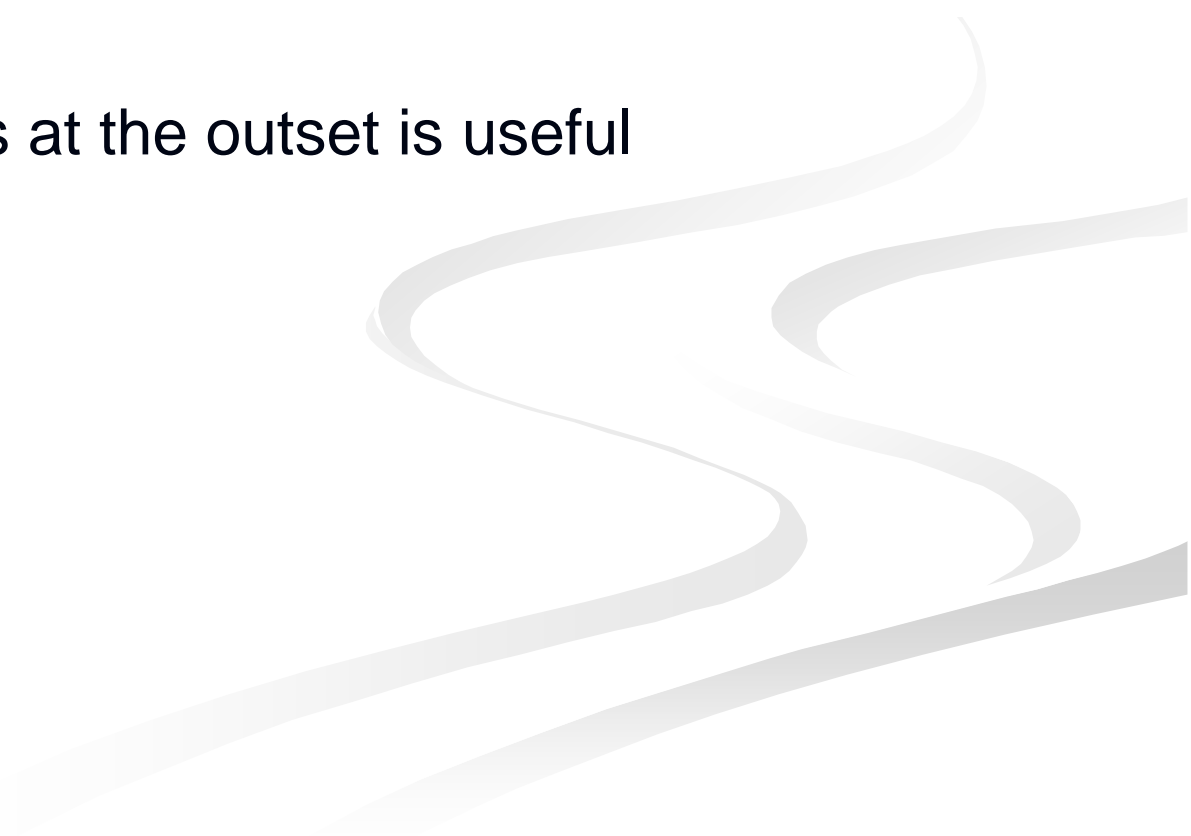
- **Used irrespective of the type of contract as follows:**
    - Definitions
    - Confidentiality clause
    - Time of the essence
    - Assignment
    - Amendments
    - Entire agreement
    - Health & safety clause
    - Joint and several liability clause
    - Force Majeure
    - Notice clause
    - Waiver clause
    - Indemnity
    - Cost and expense clause
    - Dispute resolution clause
    - Jurisdiction clause
    - Governing law clause
- 

## The effective date of contract

- The contract can start with the date of the agreement
  - If there is to be any **linkage** to any activity, take care to stipulate it clearly
  - On completion of the activity, incorporate the effective date(if necessary by mutual consent)
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## The parties to the contract

- Names of the parties should be correctly set out
  - With individuals, full names are advisable
  - With limited companies, the names should exactly match their tender
  - Defining the parties at the outset is useful
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## The parties to the contract

- This agreement for sale and purchase of Gas is executed and dated...

BETWEEN

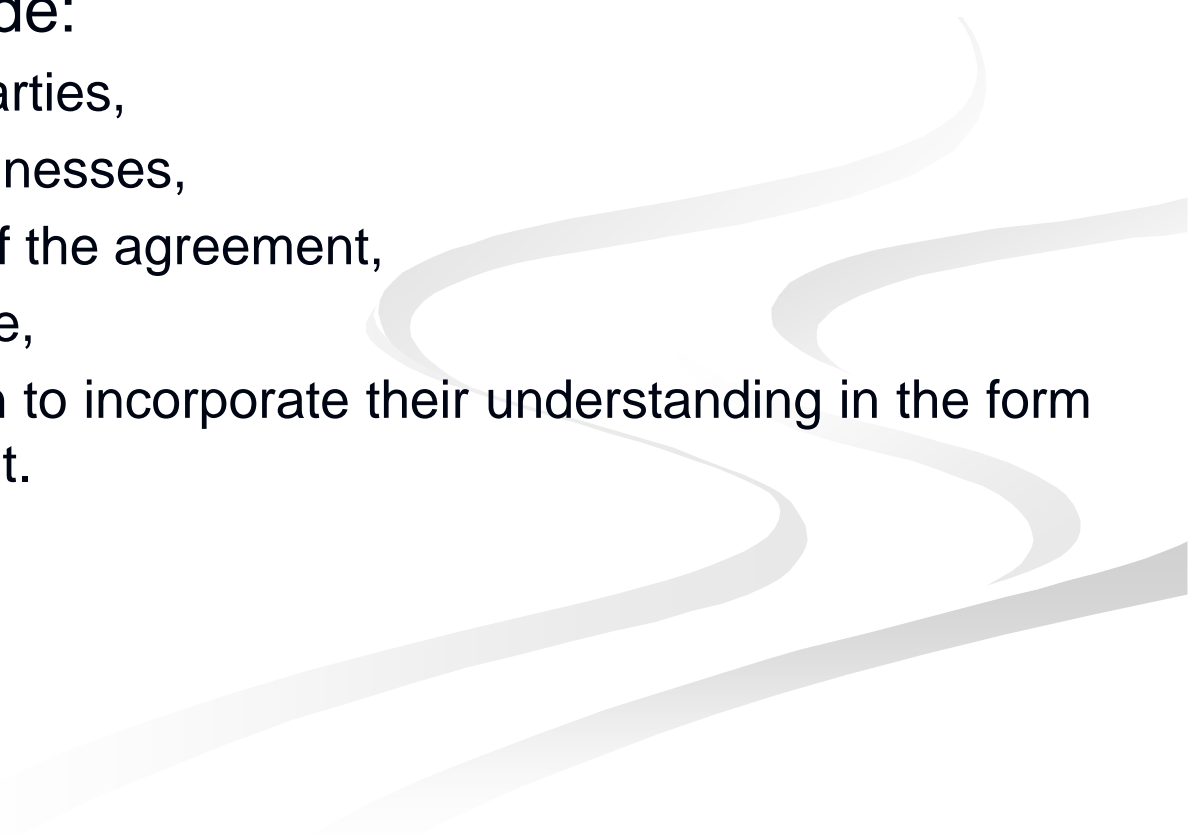
(...) a company

AND

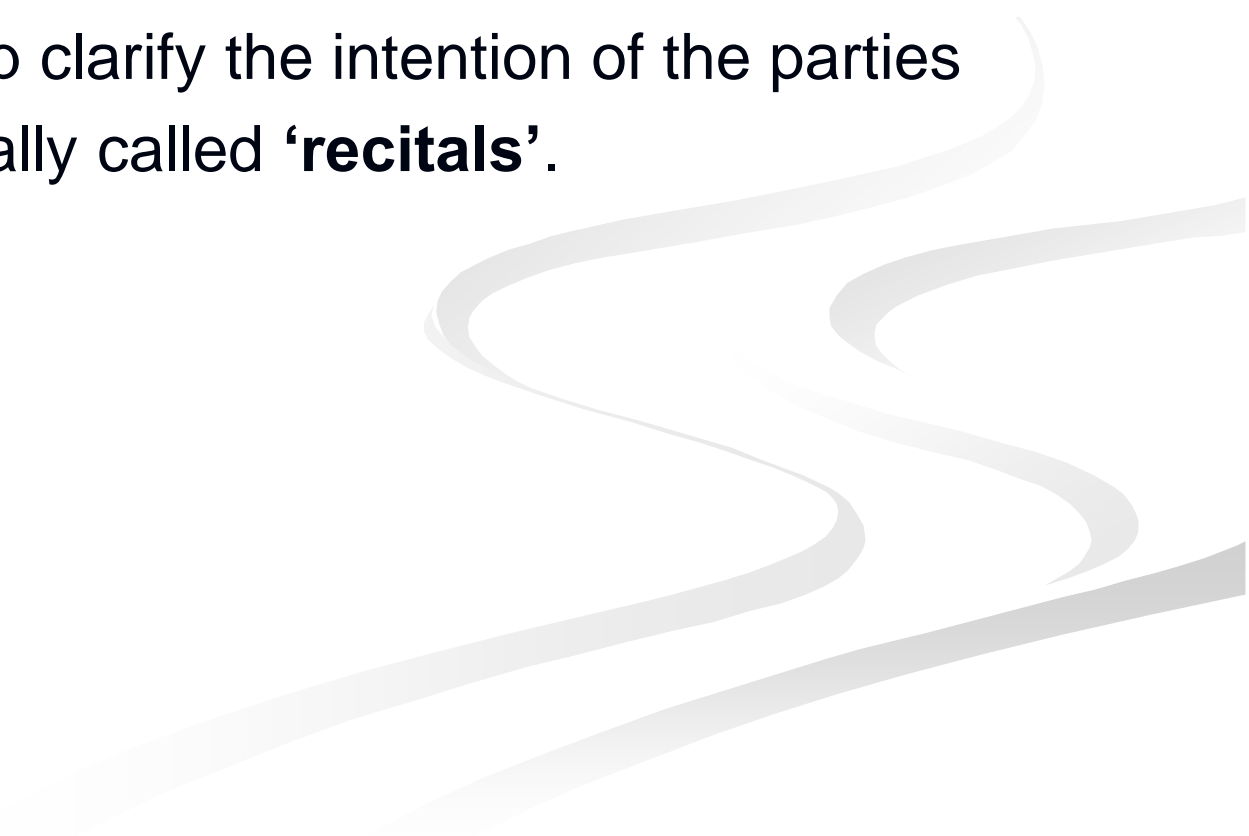
(...) a company



# Preliminary clauses -Recitals

- Recitals depict the background and the summary of the story till the execution of the agreement. It is like a narrator giving you the background before the actual movie starts. These clauses include:
    - Introduction of the parties,
    - Their respective businesses,
    - The subject matter of the agreement,
    - Offer and acceptance,
    - The parties' intention to incorporate their understanding in the form of present agreement.
- 

## Preliminary clauses (Recitals)

- Preliminary clauses, sometimes headed 'whereas' are helpful in explaining (reciting) relevant background to the contract.
  - They can also help clarify the intention of the parties
  - They are traditionally called '**recitals**'.
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## Preliminary clauses-Recitals

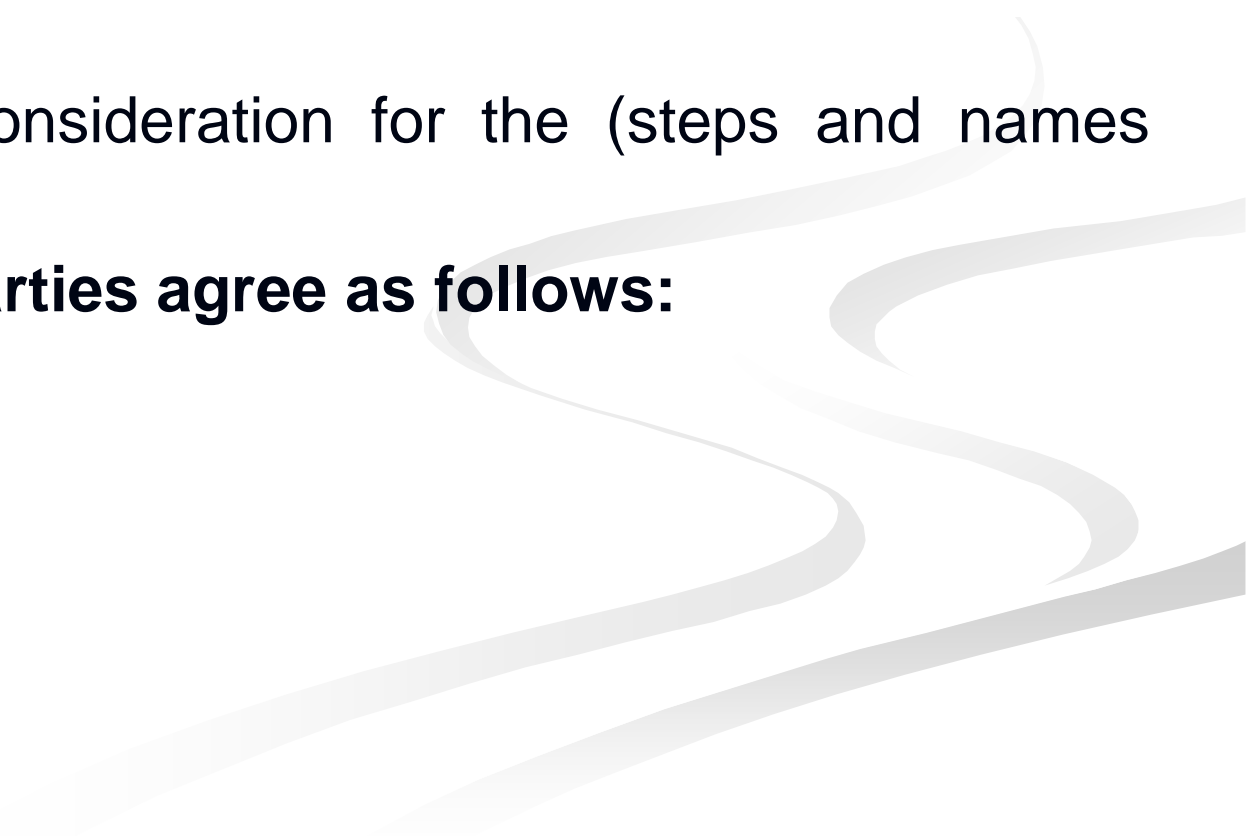
- **Whereas,**
- The Buyer is in the business of.. and desires to purchase Gas (as defined herein below) from the Sellers,
- The Sellers are parties to a PSC with Govt of India and the Sellers desire to supply Gas .. subject to PSC to the Buyer in quantities and subject to terms stated herein,

## Preliminary clauses -Recitals

- The Buyer desires to purchase Gas supplied by the Sellers in quantities and subject to the terms stated therein,
- **Now therefore**, in consideration of understandings set forth in this Agreement, the Parties, hereby, mutually acknowledge the intent to be legally bound and **agree as follows:** or
- **Therefore, the parties agree as follows:**

# Preliminary clauses-Recitals

## In Simple form

- The parties have entered into an agreement on ...
  - The parties have entered into this agreement for....(purpose)
  - As part of the consideration for the (steps and names involved)
  - **Therefore, the parties agree as follows:**
- 

## Defined terms

- **“Agreement”** means this agreement as may be amended from time to time including the Recitals, Annexures and Appendices.
- **“Agreement Period”** has the meaning ascribed thereto in Article---.
- **“BTU”** or **“British Thermal Unit”** means the amount of heat required to raise the temp of one pound of pure water by 1<sup>0</sup>F which is at 60<sup>0</sup>F and absolute pressure of 1013.25mbar (14.695 psi).



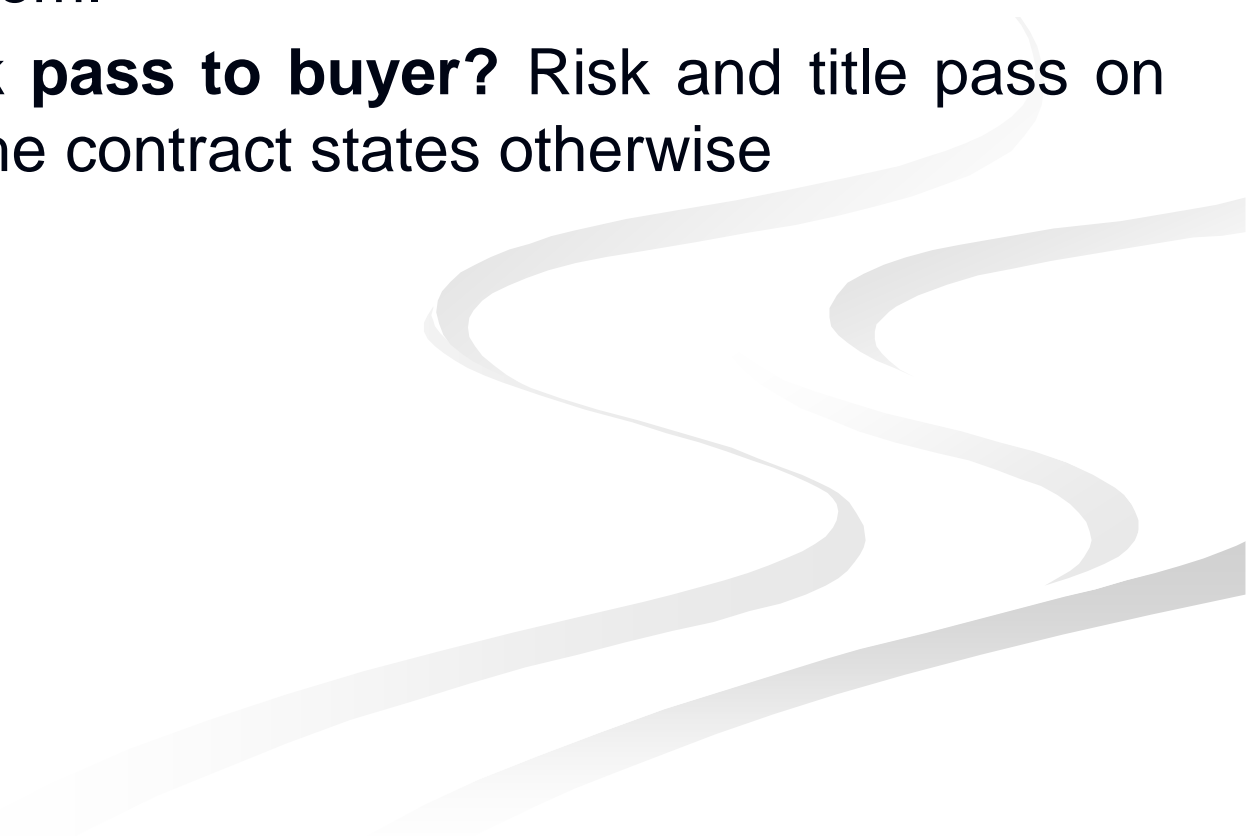
## Defined terms

- **“MMBTU”** means one million British Thermal Unit
- **“Contract”** means this agreement as amended from time to time including the Recitals, Annexures and Appendices.
- **“Standard Cubic Meter”** or **“SCM”** means the volume of gas which occupies one cubic meter of space when such gas is at a temp of 15.5<sup>0</sup>C(60<sup>0</sup> F) and at a pressure of 1013.25mbar(14.695 psi).

## Defined terms

- **“Effective Date”** means – Date when the contract will come into force sometimes irrespective of the date of signature.
- **“Force Majeure”** has the meaning ascribed to that expression in Article--hereof
- **“Kilocalorie”** or **“K cal”** means the amount of heat required to raise the temp of one kilogram of pure water from 14.5<sup>0</sup>C to 15.5<sup>0</sup>C at a pressure of one atmosphere at sea level

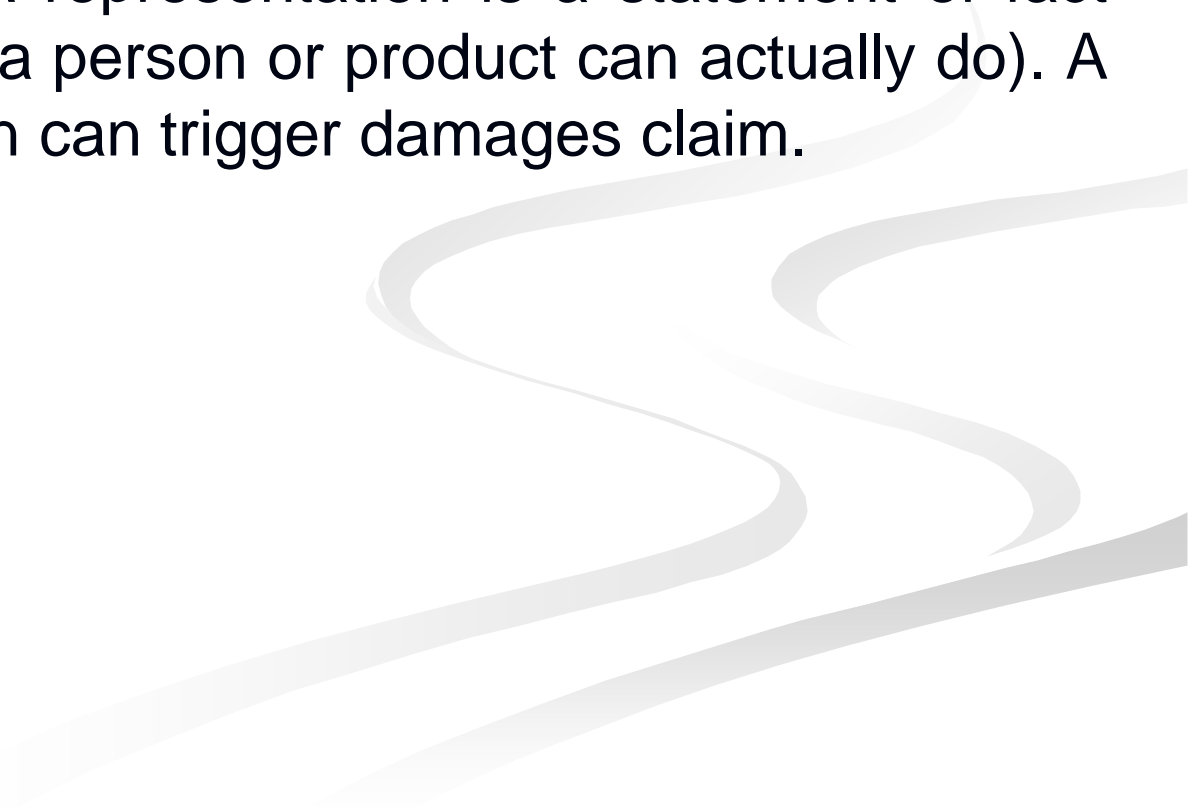
## Key words and phrases

- **Title:** Title means legal ownership of the goods .
  - **Risk in goods:** Risk in the goods means liability for loss or damages to them.
  - **When goes risk pass to buyer?** Risk and title pass on delivery unless the contract states otherwise
- 

## Key words and phrases

- **Breach of contract:** A breach arises when one party **does not comply with the contract**, either by inaction (not doing what is required) or action prohibited by contract.
- **Liability for damages:** **Breach may trigger damages claim if it causes loss to the other party**, either under a specific term(L/D) of the contract or under general law.

## Key words and phrases

- **Condition:** A condition is something that has to be done or fulfilled. Breach or failure to fulfill a condition may be seen as material breach and may justify termination.
  - **Representation:** A representation is a statement of fact or capability (what a person or product can actually do). A false representation can trigger damages claim.
- 

## Key words and phrases

- **Warranty:** It is a statement of fact, often used in conjunction with representation. Breach of warranty can give rise to damages for the actual loss caused, but normally won't justify termination
- **Indemnity:** This is an obligation to pay money to make good a third party claim (hold harmless). Some indemnities are drafted widely, pushing major elements of risk on to the Supplier

## Key words and phrases

- **Assignment:** An assignment is a **transfer** of non-physical property( cont or licence). Most contracts can be assigned without the other party's consent unless a) the contract prohibits this or b) the personal identity of the parties is critical to the deal
- **Sub-contracting:** Sub-contracting is **delegation** of all or part your role whilst **retaining full responsibility**. A sub-licence is a form of sub-contract of intellectual property or similar rights, such as copy right or software rights.

# Key words and phrases

## Assignment

- **Assignment:** An assignment of contract occurs when one party to an existing contract (assignor) hands over the contract's obligations and benefits to another party (assignee). Ideally, the assignor would want the assignee to step into his shoes and assume all his contractual obligations and rights. The consent of the project owner may be required to do this.



# Key words and phrases

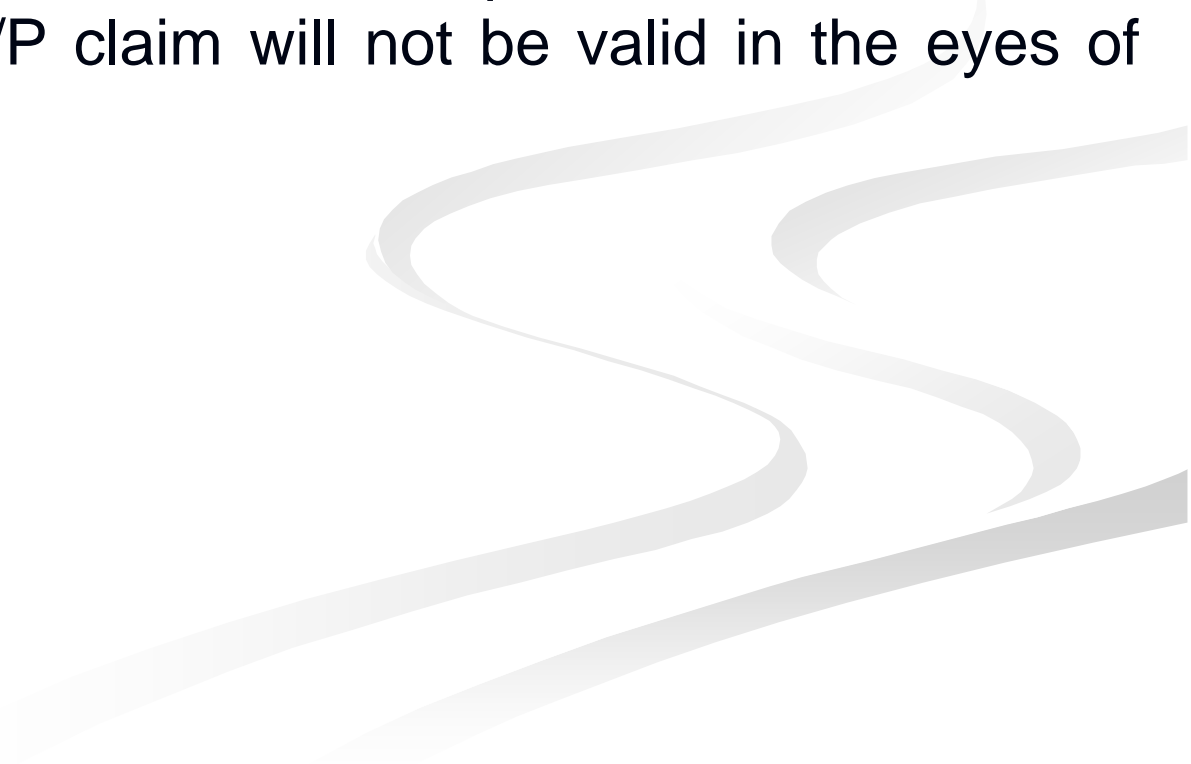
## Sub-contracting

- **Sub-contracting:** Sub-contracting means outsourcing part of the obligations and tasks under a contract to another party, which is called sub-contractor. The consent of the project owner may be required to do this.
- Sub-contracting is a common practice in complex projects, such as construction, Info Technology etc
- Sub-contractors are engaged by the main/principal contractor, who continue to have the overall responsibility for quality and time for project completion etc

## Key words and phrases

- **Jointly and severally** : When contracting with two or more parties- companies or individuals- make their obligations joint and several. This means that each of them is liable for all their joint obligations(breaches)
- **Without prejudice**: If you negotiate a settlement, make sure your discussions are without prejudice. This phrase should prevent any offer being used against you if the case is taken to court.

## Key words and phrases

- **Risk purchase claim(loss):** It's the difference between the initial contract price and what the purchaser had to pay against the fresh contract.
  - **Mitigation of loss :** This demands that the contract victims must take all reasonable steps to reduce their loss. Otherwise, their R/P claim will not be valid in the eyes of law
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# Contract drafting

## Delivery schedule

- Specify when and at what rate the goods are required to be delivered or services to be performed
- Specify the date of commencement and **completion**:
  - Delivery of 300 Nos of computers shall commence on Oct 1, 2022 and shall be completed within 3 months, ie by Dec 31, 2022. **Time is the essence of contract.**

# Contract drafting

## Delivery schedule

- Specify the date of commencement and **completion**:
  - Delivery of 300 Nos of computers shall commence on Oct 1, 2022 and the same shall be completed as follows:
    - (i) 100 Nos of computers by 31.10.2022 (i) 100 Nos of computers by 30.11.2022 (i) 100 Nos of computers by 31.12.2022. **Time is the essence of contract.**

## What is 'Force Majeure'

- **'Force Majeure'** is a situation in which either of the parties is prevented, temporarily or permanently from performing its obligations under the contract due to circumstances **beyond its control**.
- The F M events can be classified into:
  - (i) Acts of God/ Nature- Earth quake, Tsunami
  - (ii) Acts of Sovereign Governments- Banning export
  - (iii) Acts individuals/ Groups- Acts of terrorism

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  - (ii) Acts of Sovereign Govts- War, Banning export
  - (iii) Acts individuals/ Groups- Acts of terrorism

# The effect of incidence of F M events

**Force Majeure**

```
graph TD; A[Force Majeure] --> B[Refixation of DP]; A --> C[Termination of contract];
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**Refixation of DP**

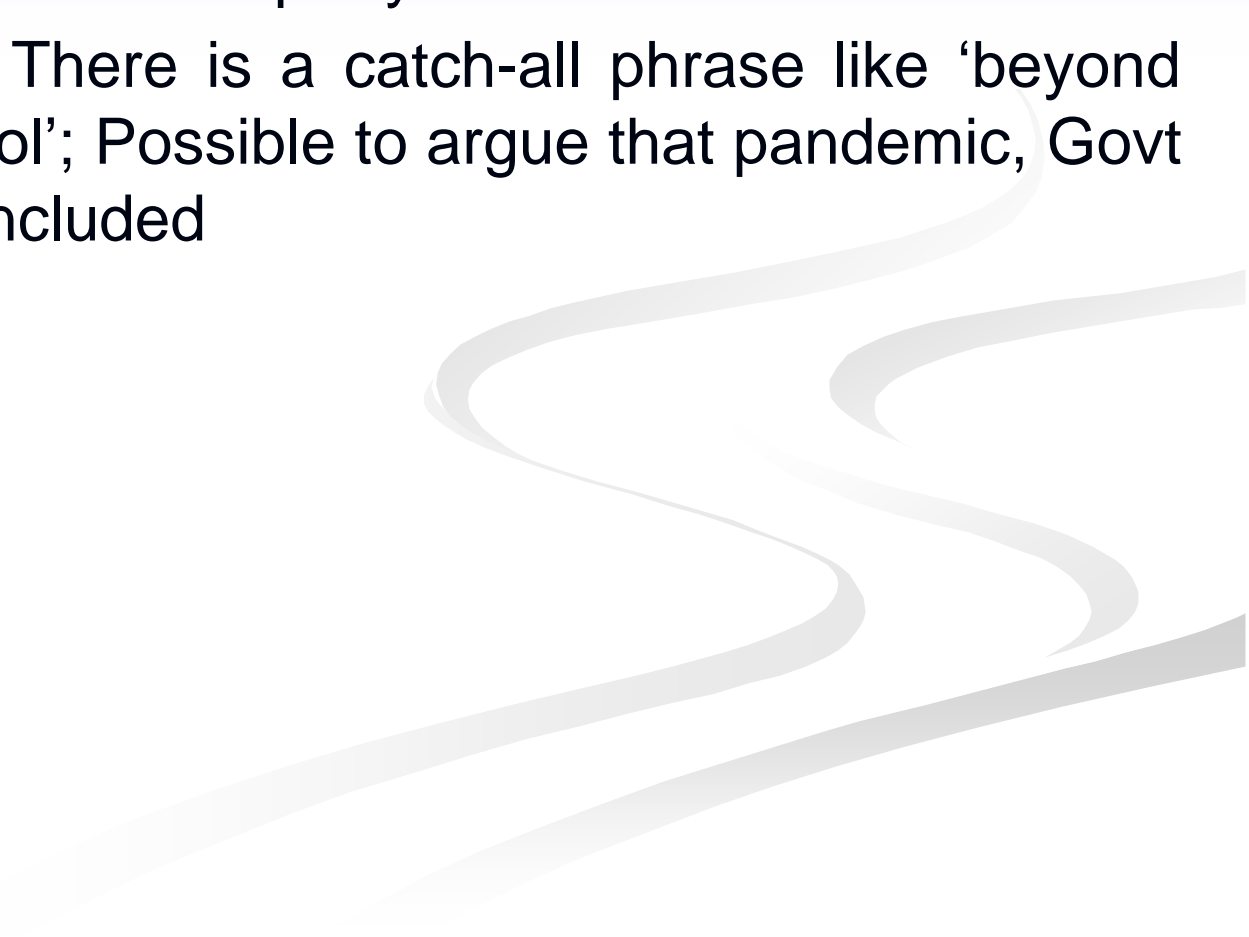
- Duration of Event plus set-up time

**Termination of contract**

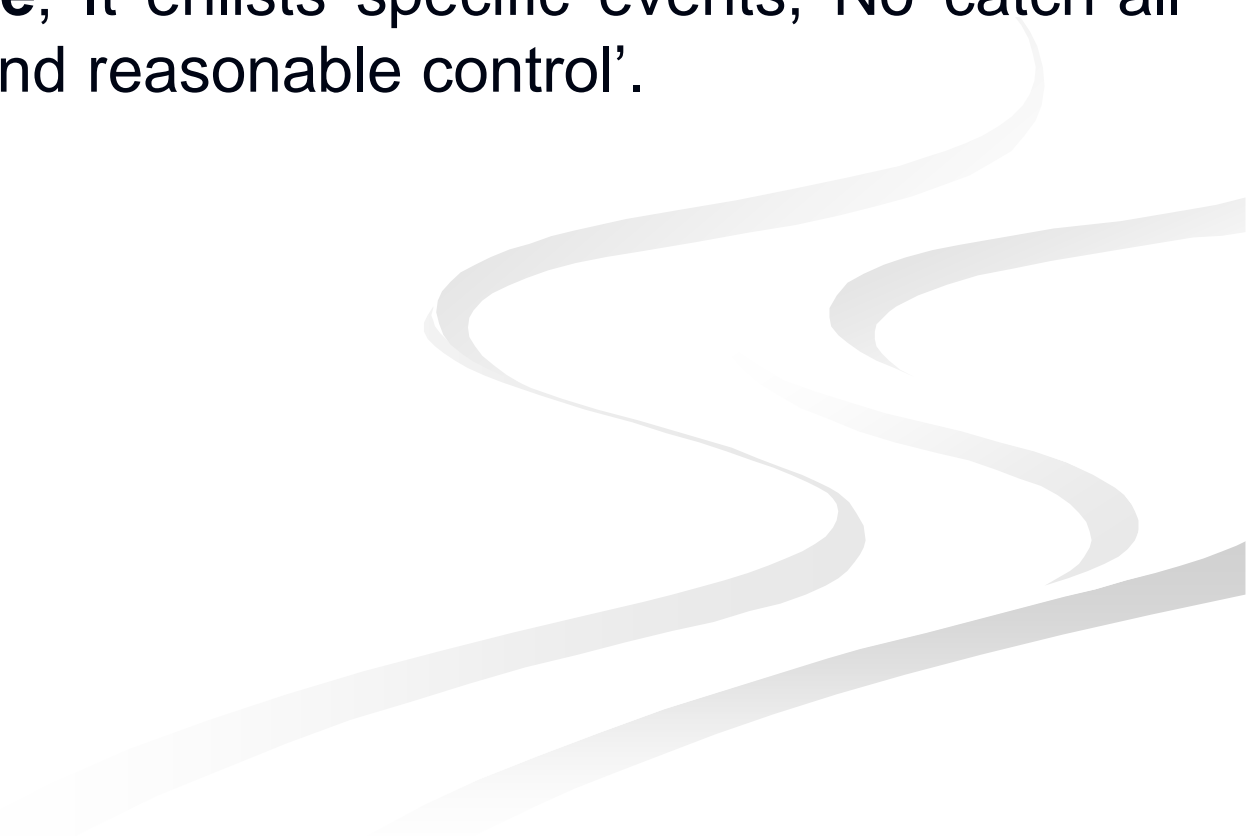
- Termination without financial repercussions



## Drafting of FM Clause-1

- “Force Majeure means any event **including** acts of God or other events beyond the reasonable control of and not attributable to the affected party.”
  - **Wide in scope**; There is a catch-all phrase like ‘beyond reasonable control’; Possible to argue that pandemic, Govt actions etc. are included
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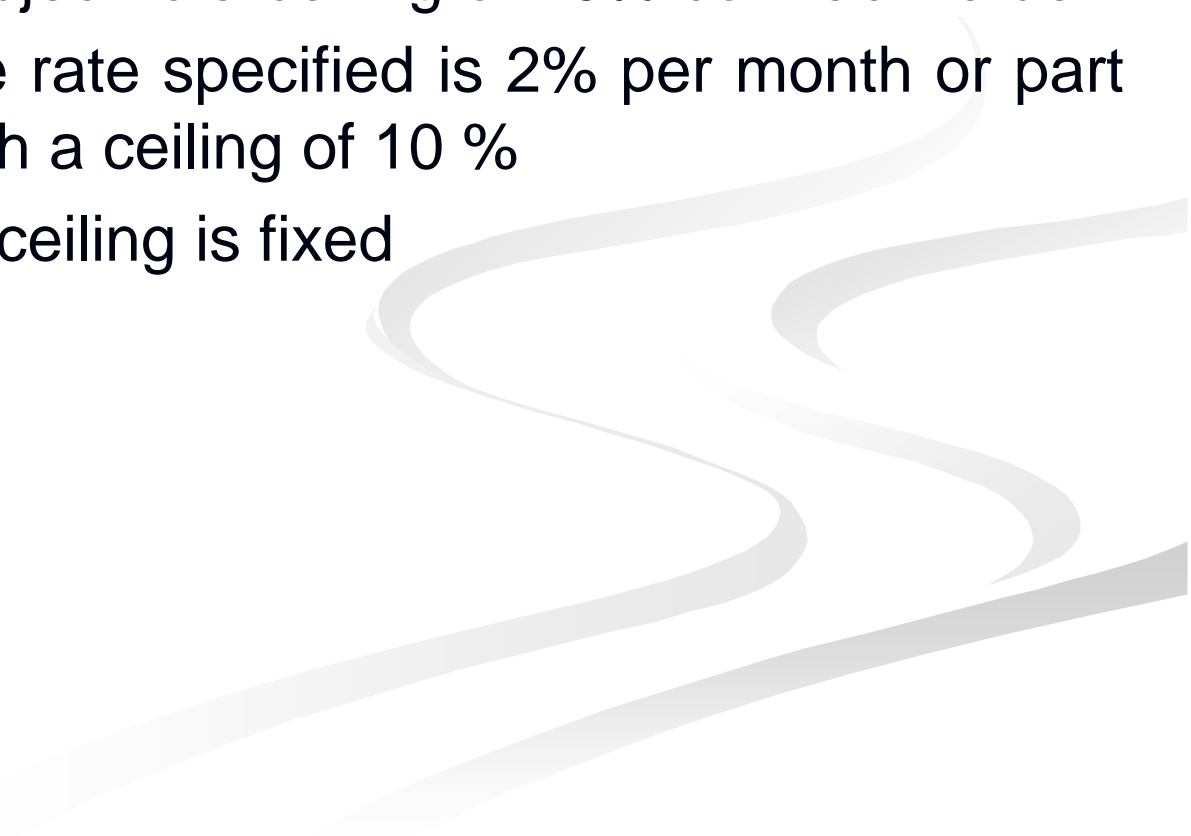
## Drafting of FM Clause-3

- “Force Majeure **shall** mean war, armed conflict, flood, terrorist acts, cyclone, typhoon, tornado, natural disaster, fire and acts of God any event including acts of God.”
  - **Narrow in scope**; It enlists specific events, No catch-all phrase like ‘beyond reasonable control’.
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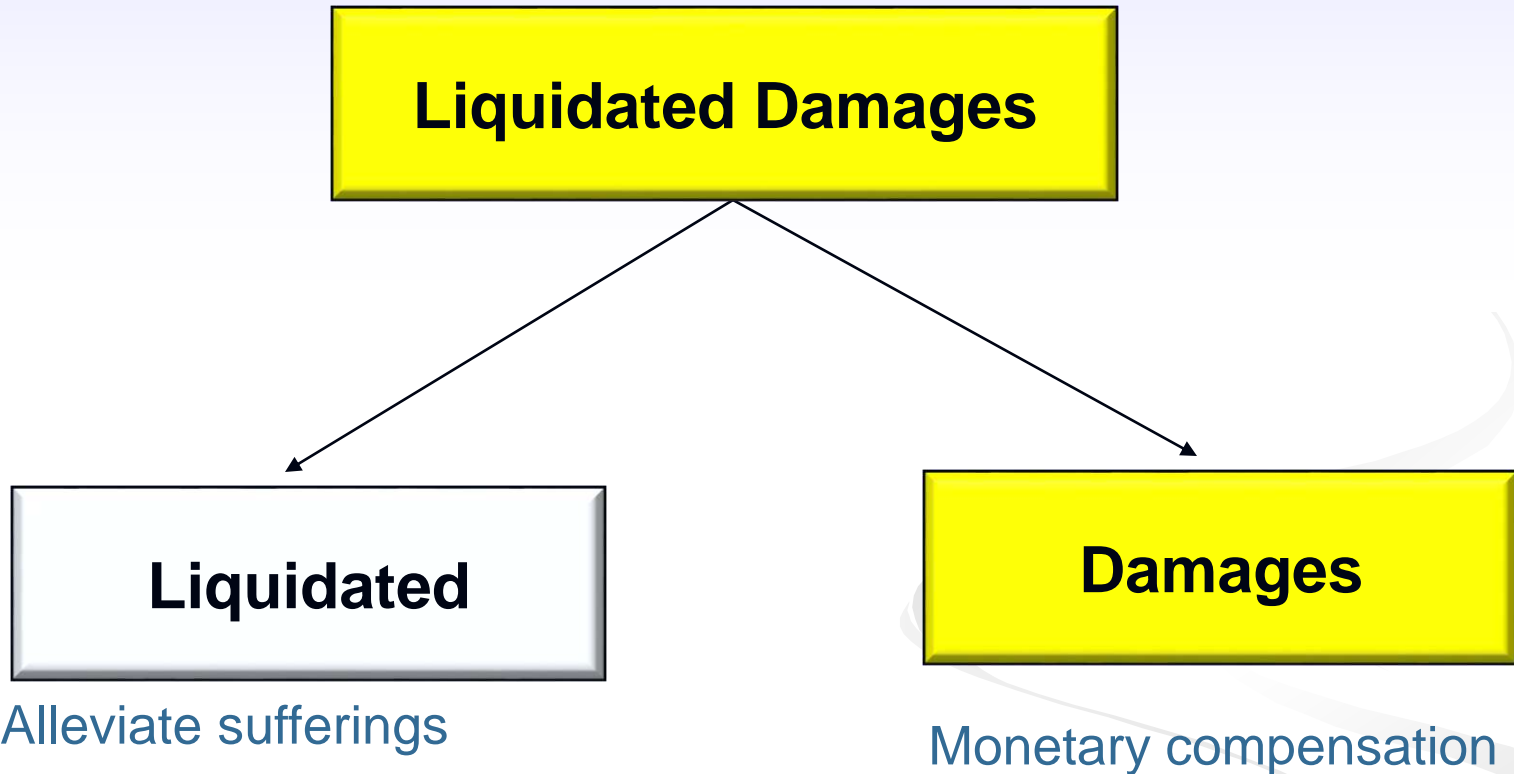
## Drafting of FM Clause-2

- “Force Majeure means and includes earthquake, cyclone, flood, volcanic eruptions, war, strikes and all other events beyond the reasonable control of and not attributable to the affected party.”
- **It is a mix of Clause 1 and 3;** It is commonly adopted; Moderately wide in scope; There is a catch-all phrase like ‘beyond reasonable control’;
- Possible to argue that Tsunami is included because flood is enlisted; Similarly, terrorism could be included because war is enlisted; This is based on the maxim:- ‘ejusdem generis’, which lays that the catch-all phrase will take the colour/meaning from the words appearing before it.

## Liquidated Damages clause in a contract

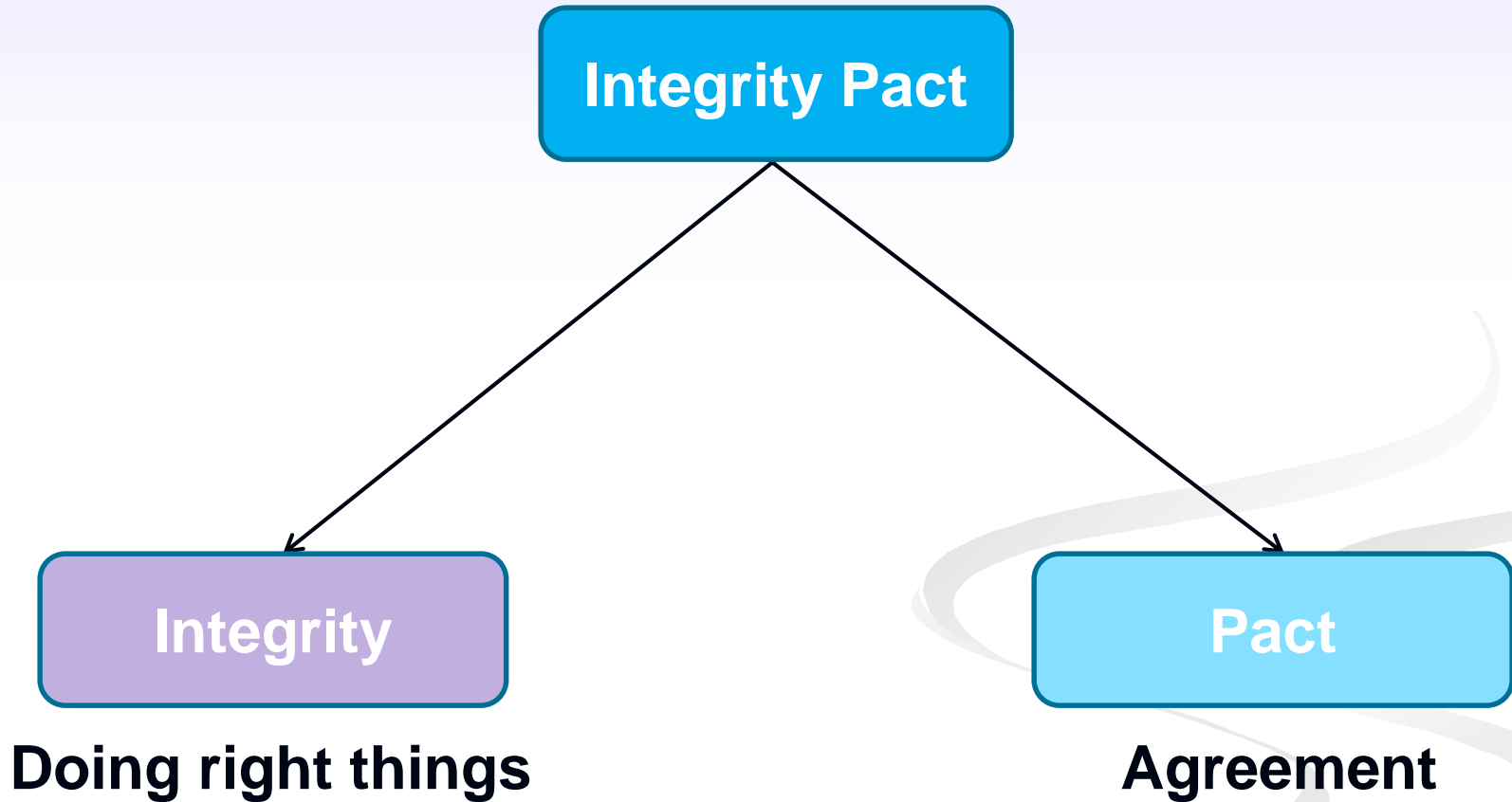
- The clause, usually, states that in the event of delay in performance under the contract, liquidated damages shall become leviable at the rate of  $\frac{1}{2}$  % per week or part thereof of delay subject to a ceiling of 10% contract value.
  - In some cases, the rate specified is 2% per month or part thereof of delay with a ceiling of 10 %
  - In some cases, no ceiling is fixed
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# What are Liquidated Damages (L/D)



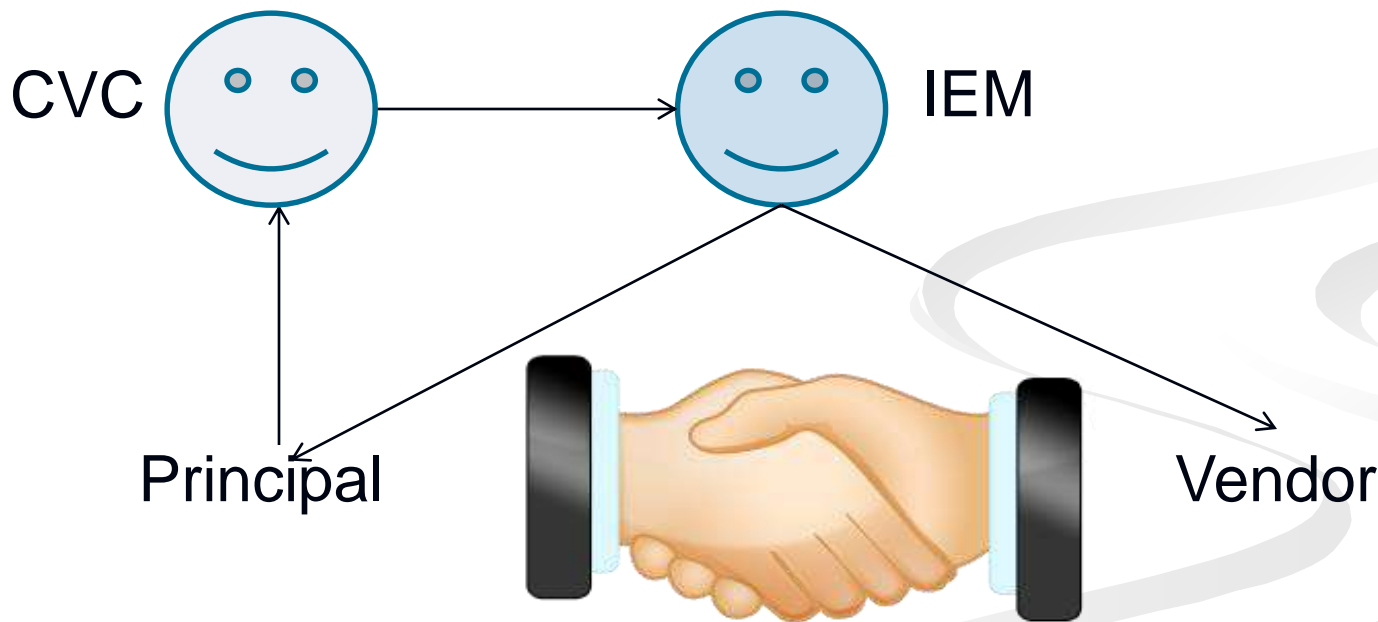
- Where a party suffers due to breach of contract it has a right to claim damages thereof. S-73

# What is integrity Pact?

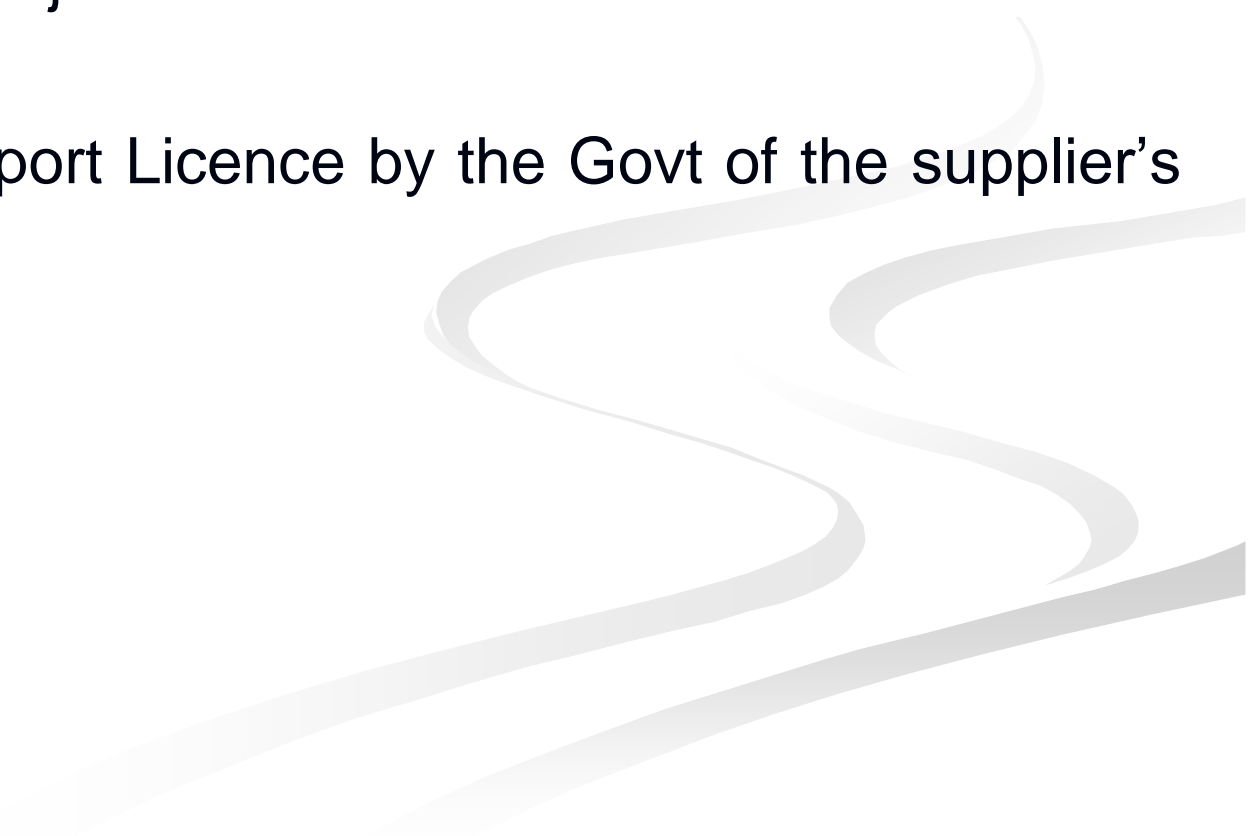


# Who are the parties to IP?

- IP is an agreement entered into by the Principal and the Vendor for each contract
- Independent External Monitor (IEM) is appointed for monitoring its implementation




# Termination of Contract

- During the implementation of a contract, there are normally the following three events which may lead to termination of contract:
  - Prolonged Force Majeure situation
  - Prolonged default
  - Cancellation of Export Licence by the Govt of the supplier's country
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# Termination of Contract

- In these cases, the final remedy provided to the Purchaser is a right to terminate the contract.
  - This clause gives the purchaser, through a written notice sent to the supplier, a right to terminate the contract in whole or in part.
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# Contract Dispute resolution

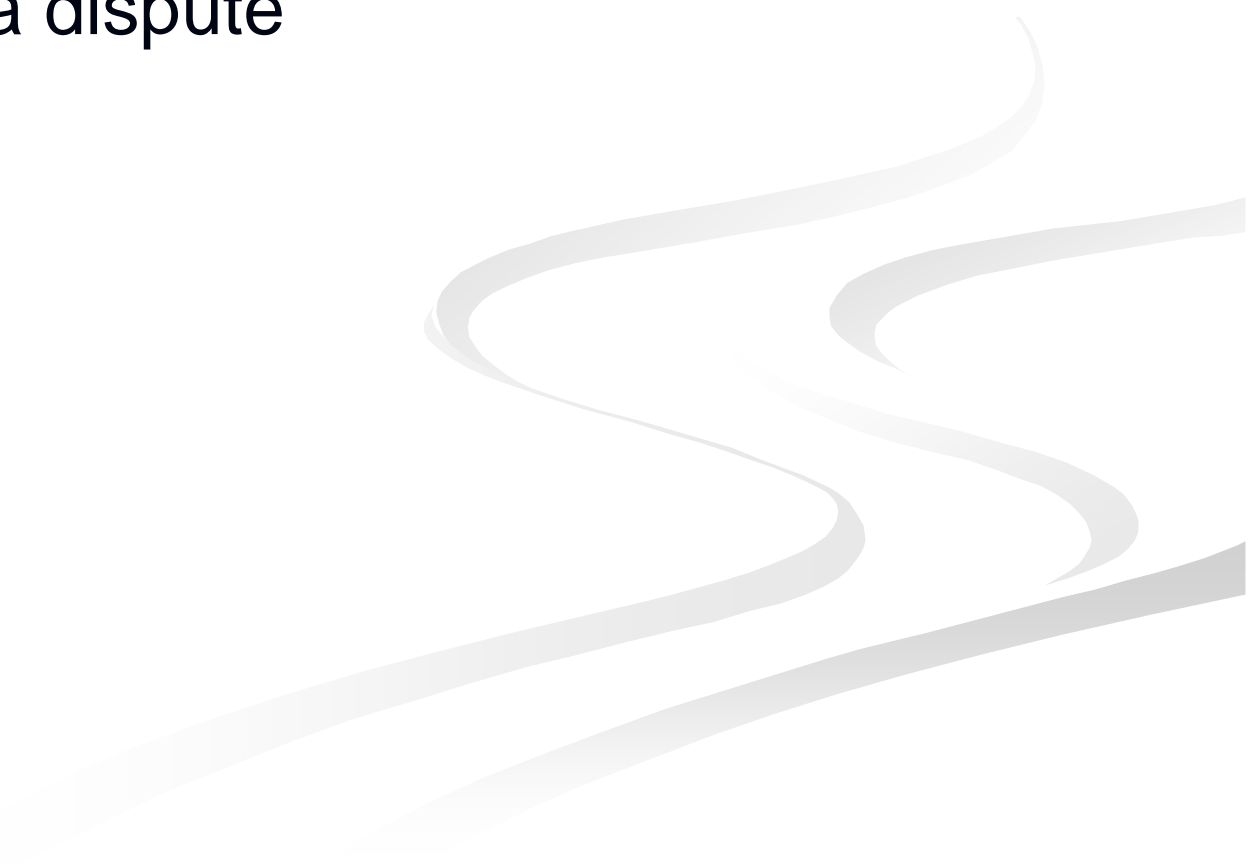
**Strategy for dealing with disputes**

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graph TD; A[Strategy for dealing with disputes] --> B[Prevention of disputes]; A --> C[Settlement of disputes];
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**Prevention of disputes**

**Settlement of disputes**


# What is a dispute?

- A dispute mean an assertion of a right (claim) by one party and **repudiation** thereof by another
  - A claim and counter-claim(w/o repudiation) does not constitute a dispute
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# Prevention of Dispute

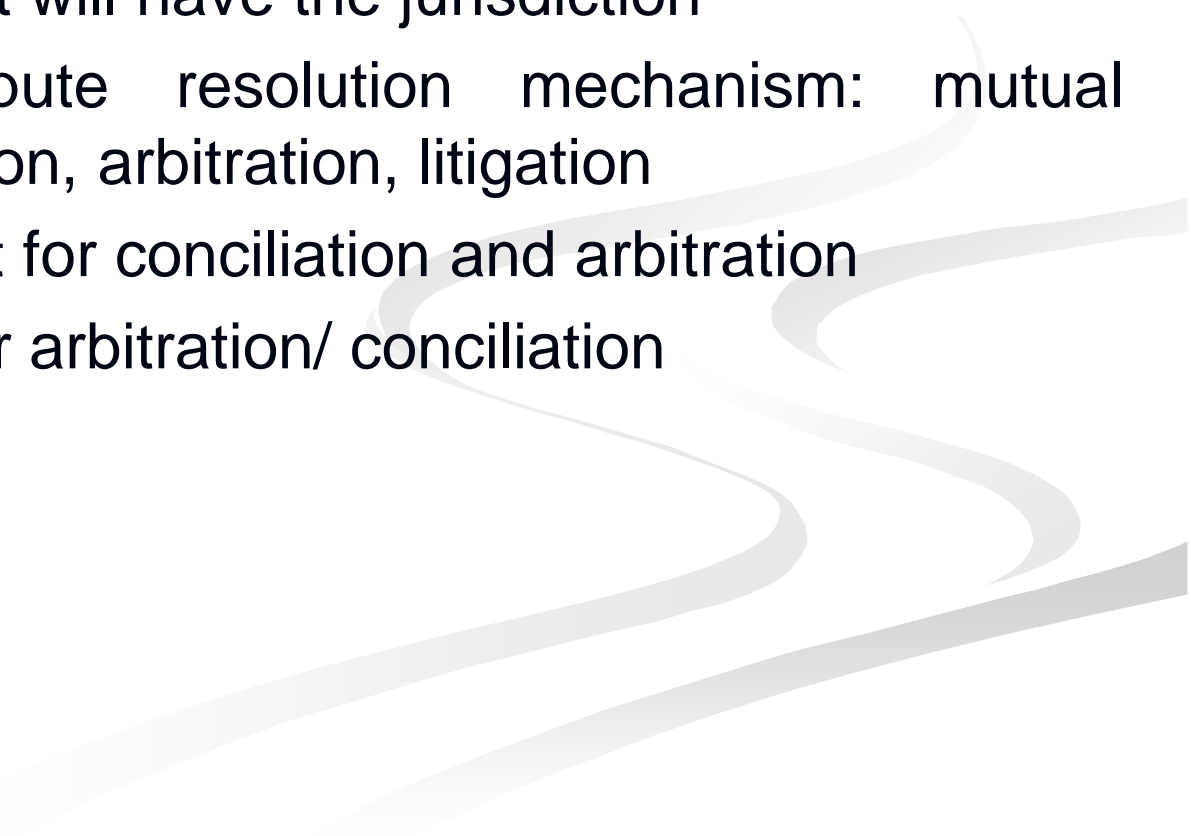
- Fair allocation of contract risks
  - Unambiguous drafting of key clauses
  - Timely action by the parties
  - Team approach
  - A standing DRB (prevents growth of a dispute)
- 

# Modes of dispute resolution

- Bilateral settlement/ negotiation
  - Mediation
  - Conciliation
  - Arbitration
  - Litigation
- 
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# The 'laws' of Contract

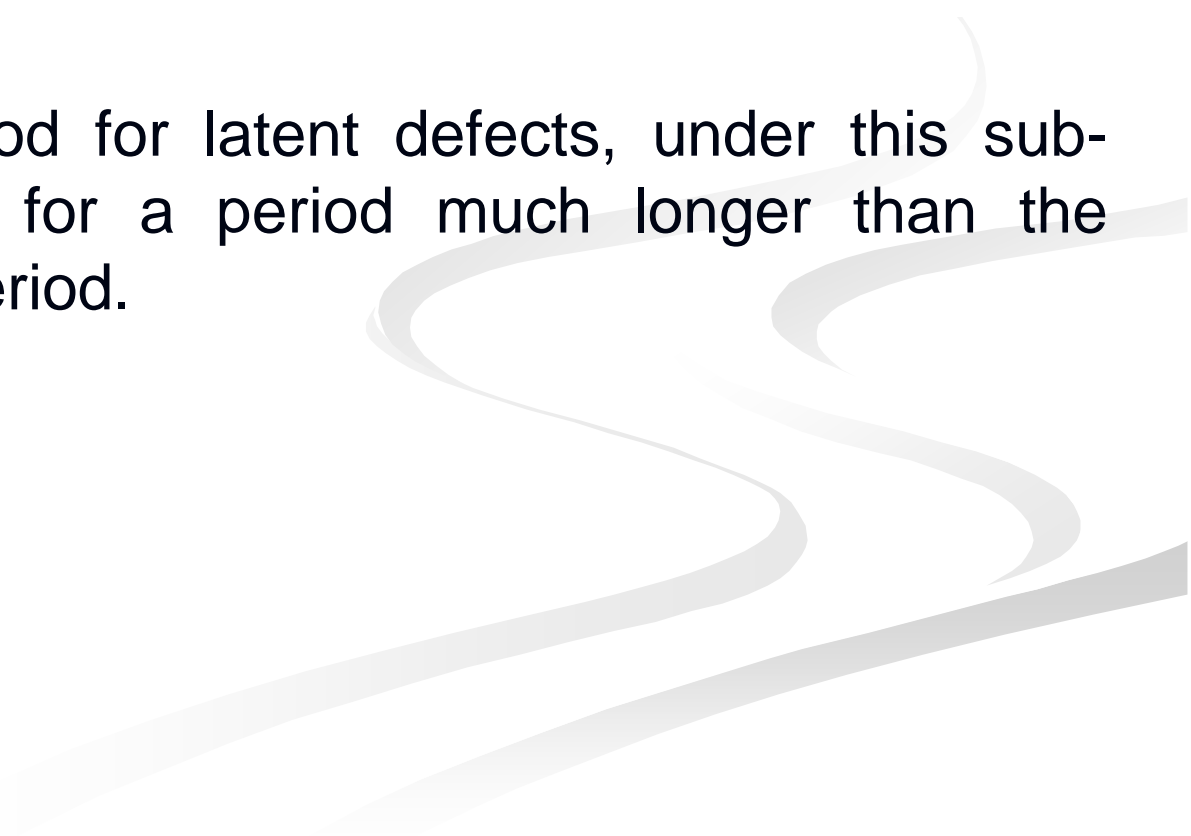
## Applicable law and court jurisdiction

- State the laws that will govern the contract
  - Specify the court that will have the jurisdiction
  - Incorporate a dispute resolution mechanism: mutual discussion, conciliation, arbitration, litigation
  - Seek written consent for conciliation and arbitration
  - Specify the venue for arbitration/ conciliation
- 

# Warranty

- **Warranty:** A period after delivery during which the seller has express or implied liability to the buyer for defects in the goods.
- The seller gives assurance regarding proper design, materials, Manufacturing and Workmanship and promises to rectify/ replace the equipment free of cost if the equipment does not function properly.
- The period of warranty, usually, ranges between 1 to 5 years

## Longer warranty for latent defects

- **Latent defects:** In some contracts of heavy equipment such as railway locomotives, power generation equipment, a latent defect sub-clause is included as part of warranty clause.
  - The warranty period for latent defects, under this sub-clause, is sought for a period much longer than the normal warranty period.
- 



# Difference b/w Warranty and Guarantee

Warranty

Repair or Replace

Guarantee

Repair or replace or  
refund

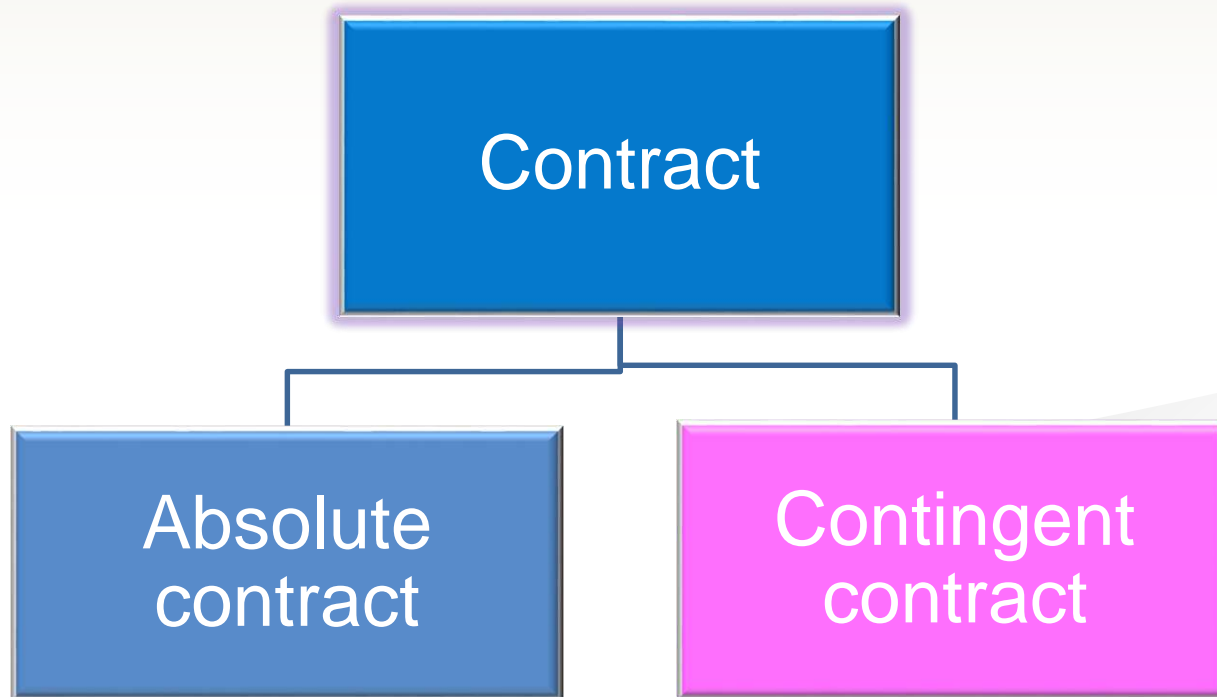


# Warranty v Guarantee

Aspects	Warranty	Guarantee
What is it	It is an assurance	It is a commitment
Offered on	Products offered for sale by Seller: 5 yrs warranty on Comp in Refrigerator	Products and services: Premium quality, 100% satisfaction guaranteed, money back
Liability	Repair or replace	Repair or replace or refund
Form	Written form	Written or oral

# Types of contract

## Based on condition



# What is a Contingent Contract?

- Section 31 of ICA,1872- “A contingent contract is a contract to do or not to do something, if some event collateral to such contract does or does not happen.”
- ‘A’ contracts to pay ‘B’ Rs 100000 if B’s house is burnt. This is a contingent contract
- A contingent contract is an **if-then agreement**.
- It is called contingent because the terms are based on certain events occurring.

# Contract of Indemnity

Protection against loss

Sec 124-125 of ICA, 1872

- A contract of indemnity is a contract whereby one party promises to save the other from loss caused to him by the conduct of promiser himself or by the conduct of any other party. S 124
- Example- Fire insurance of house, marine insurance
- Life insurance is **NOT** a contract of indemnity

# Indemnity v Guarantee

- Indemnity and guarantee are a type of contingent contracts.
- Indemnity implies protection against loss in terms of money to be paid for the loss. Indemnity is when one party promises to compensate the loss occurred to the other party, due to the act of the promisor or any other party
- On the other hand, Guarantee is when a person assures the other party that he will perform the promise of the third party, in case he defaults.

# Review of Contract before signature

- In line with the laid down guidelines, the draft contract should be reviewed clause by clause by a team consisting of officers of purchase wing, technical wing, finance wing and legal wing.
- Particular attention is paid to clauses: Scope, Specs, Price, Statutory levies, Delivery schedule, Terms of delivery, Liquidated damages, Force Majeure, Termination, Jurisdiction & applicable laws, Dispute resolution

Whereas in **Trimex International Fze Limited v. Vedanta Aluminium Limited** 2010 (1) SCALE 574, the Hon'ble Supreme Court took a contrary view in typical fact and circumstances of the case. *It is held that a contract is said to be **concluded** when parties **agree** as to the 'essential terms' of the contract though minor details can be left over for them to decide later, albeit subject to satisfaction of other requirements as provided by **S.10: without such essential terms being decided, contract cannot be enforced by law as it is deemed to be incomplete.***