

WELCOME



Drafting of Contract

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

IICA- 18.8.2021

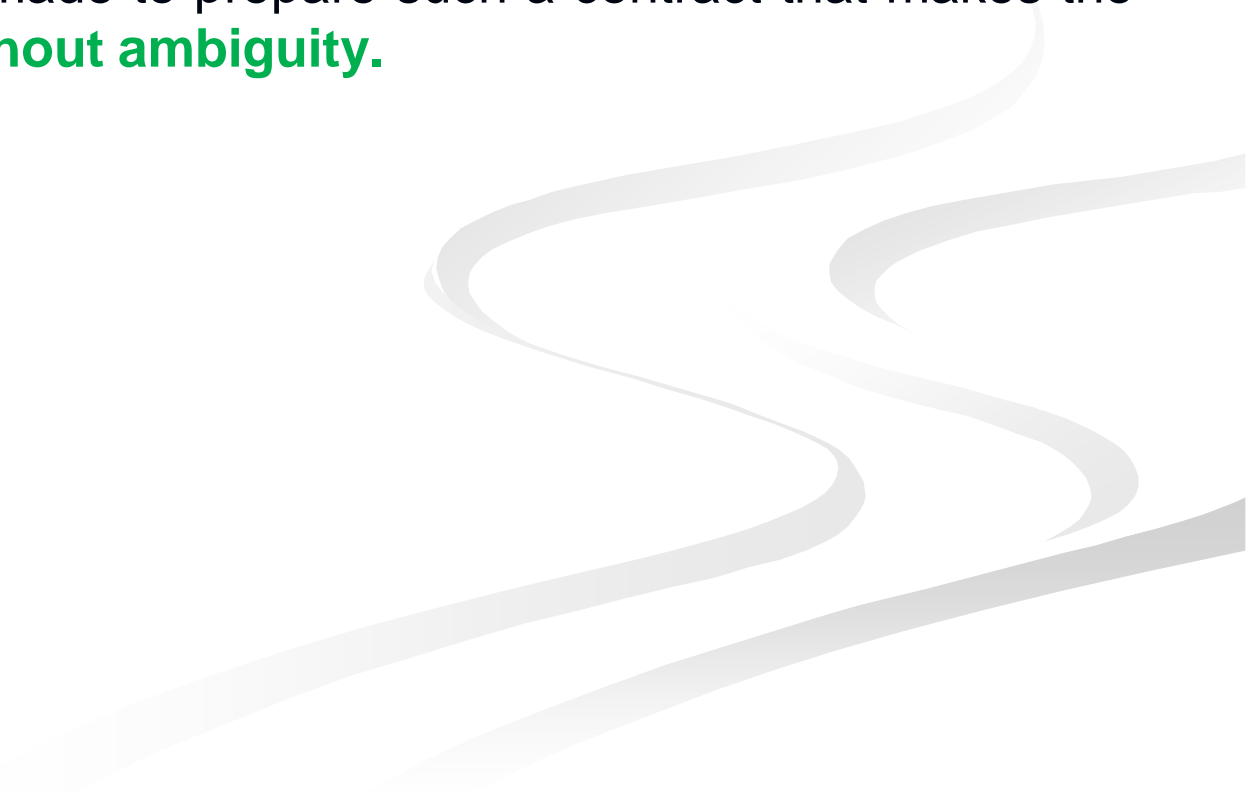
Public Procurement & Contract Management

Cont drafting
Cont Mgmt
Dispute resolution



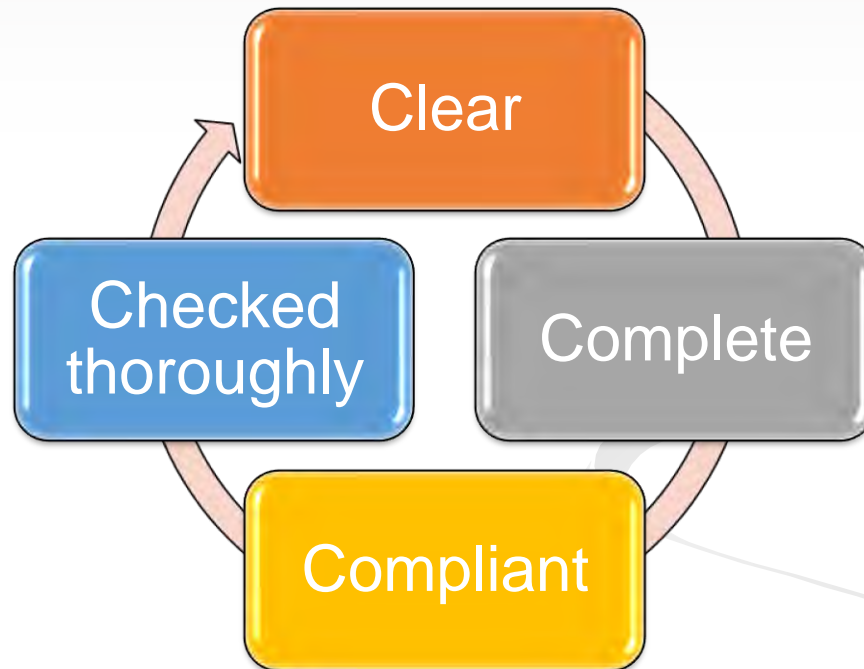
Contracts

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.**
- 
- The bottom right portion of the slide features several thick, light gray wavy lines that curve and flow across the page, serving as a decorative background element.

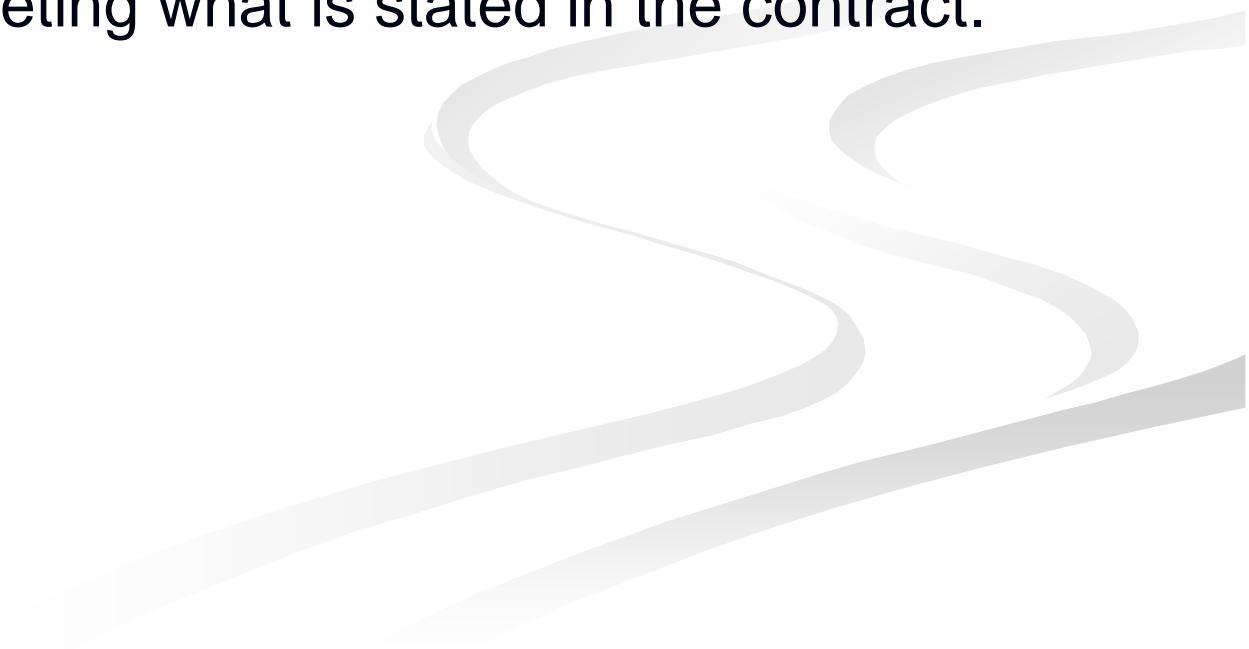
Contract drafting

Top 4 criteria



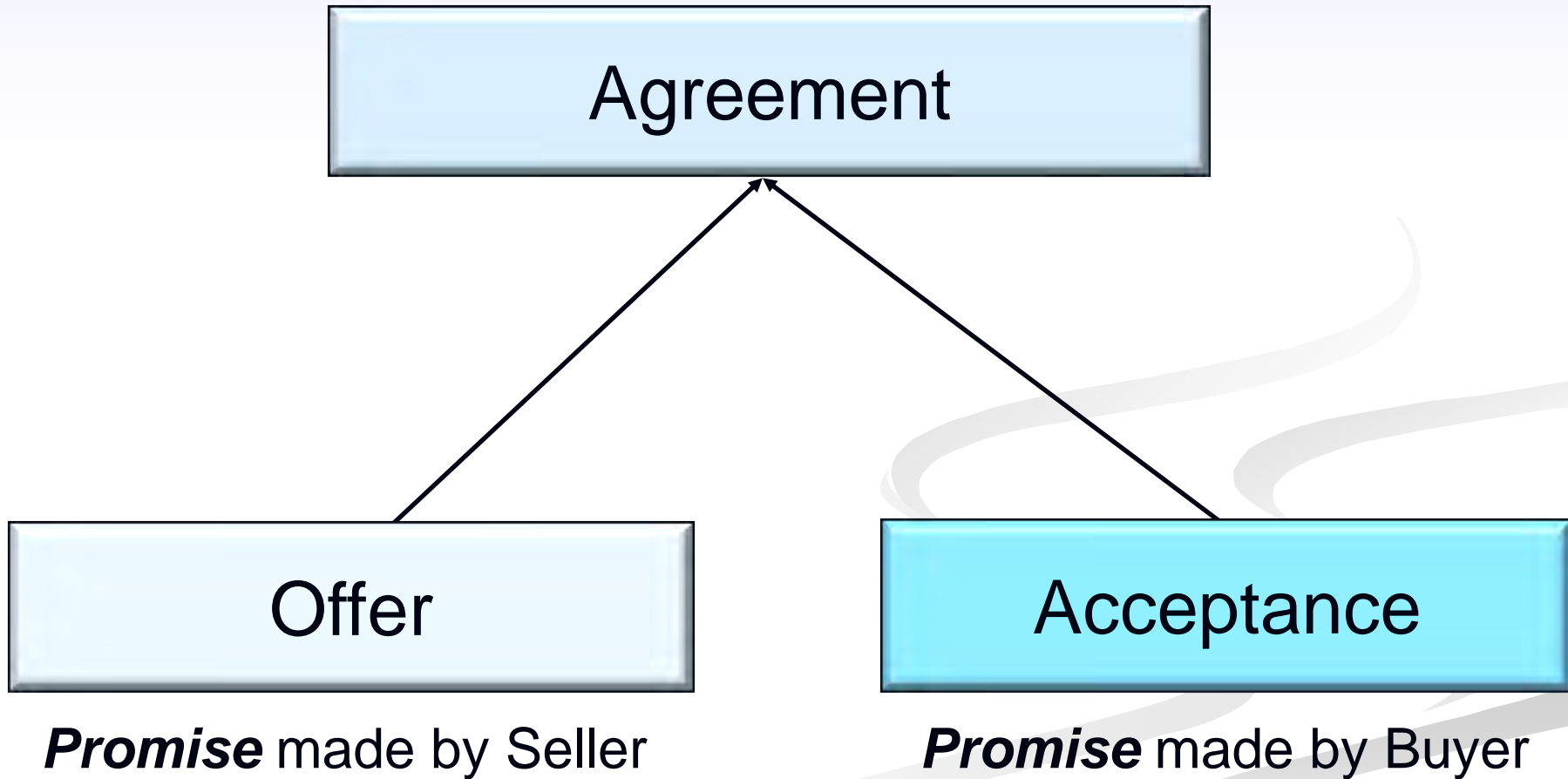
Contracts

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.
- 

What is an agreement?

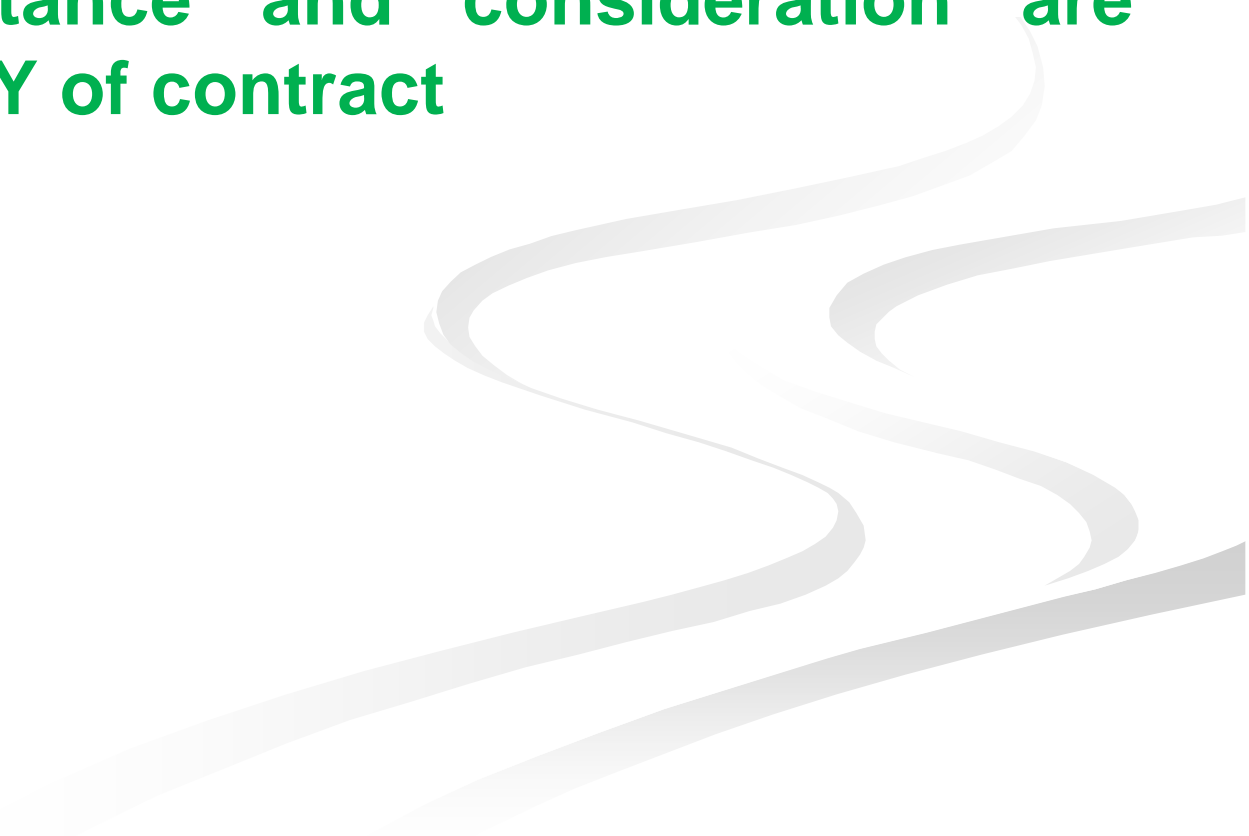
An agreement is a **Set of Promises**



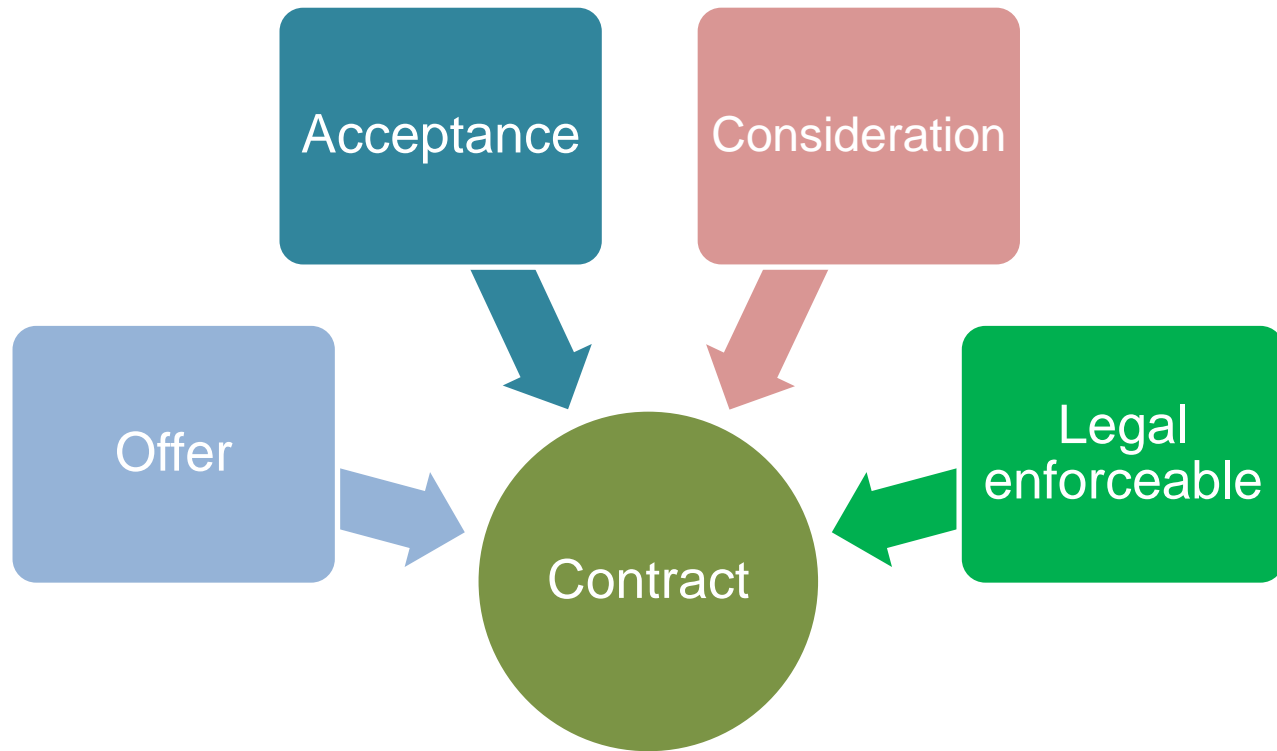
What is a contract?

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

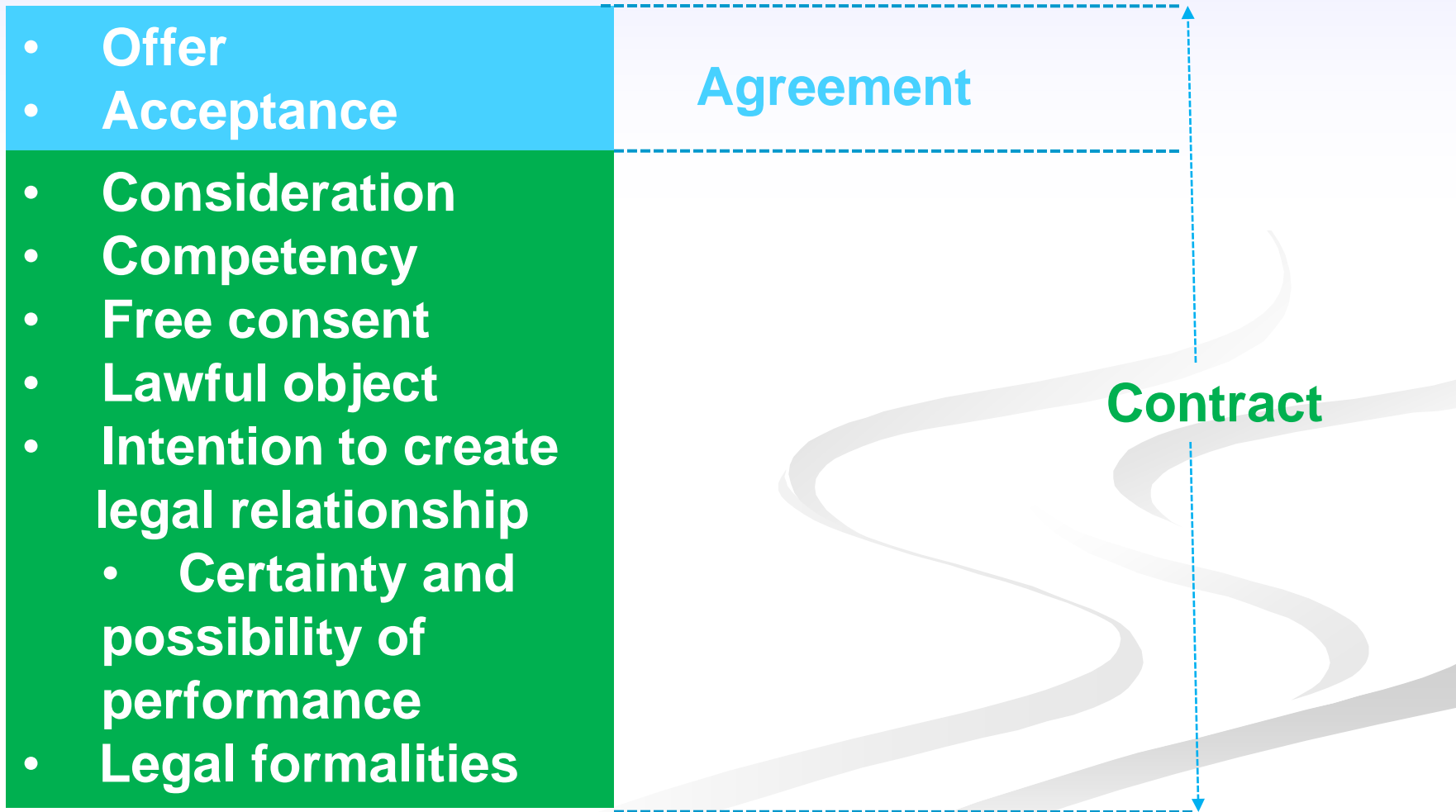
Trinity of contract

- A deal without consideration is called 'nudum pactum'-naked contract- and is **not valid**
 - **Offer, acceptance and consideration are called TRINITY of contract**
- 
- The bottom right portion of the slide features several thick, light gray wavy lines that curve and flow across the page, serving as a decorative background element.

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- steps

- Preparation of LOI / LOA
 - Drafting of clauses of contract
- 
- A decorative graphic consisting of several overlapping, wavy, light gray lines that flow from the bottom right towards the center of the slide.

Main sections of a contract

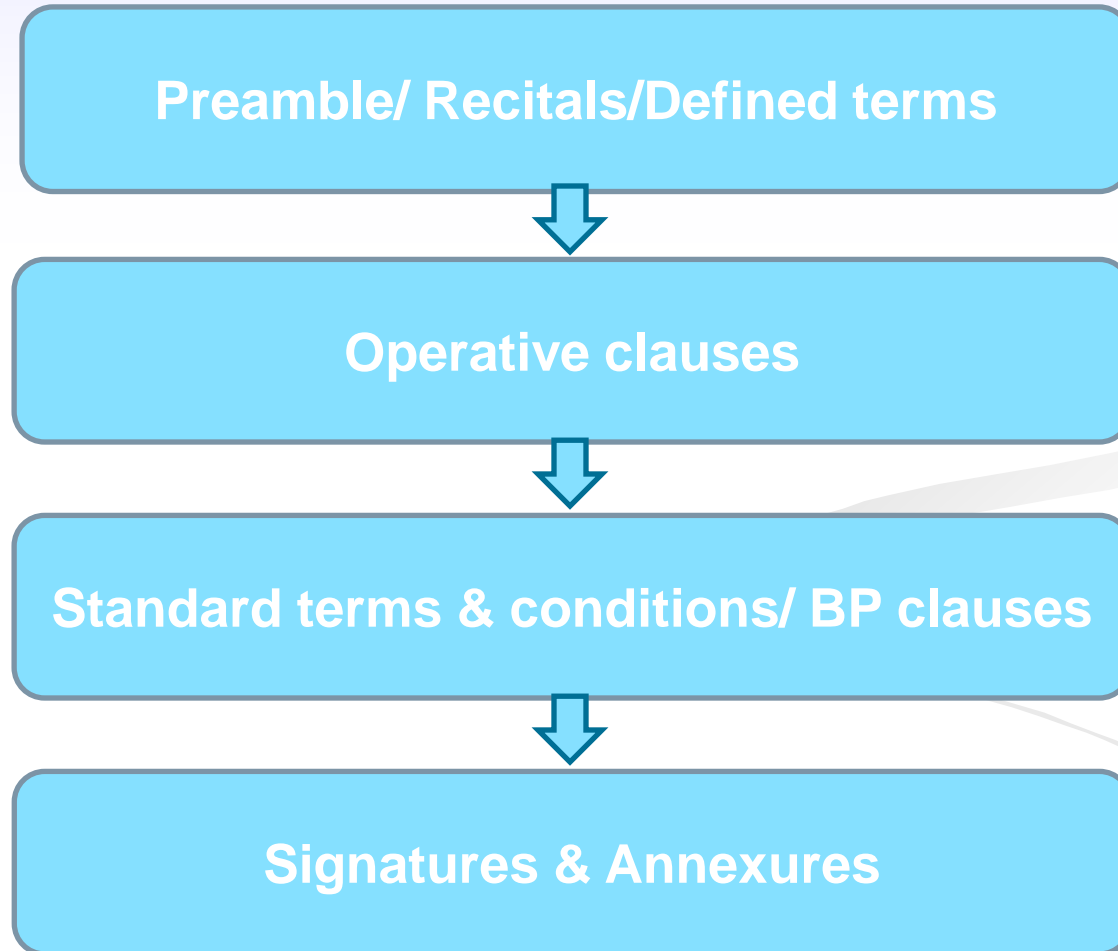
- Preamble - Latin: 'Prae' - before; 'Ambulare'- to go, to walk; it means - to precede; Preamble- preface of a book.
- Recitals – Latin: Recitare – to read out,
- Subject matter of contract/ Scope
- Definitions
- Key commercial & legal clauses (GCC, SCC)
- Signatures {preamble(starting)- signature(ending)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

Is there a typical contract structure?

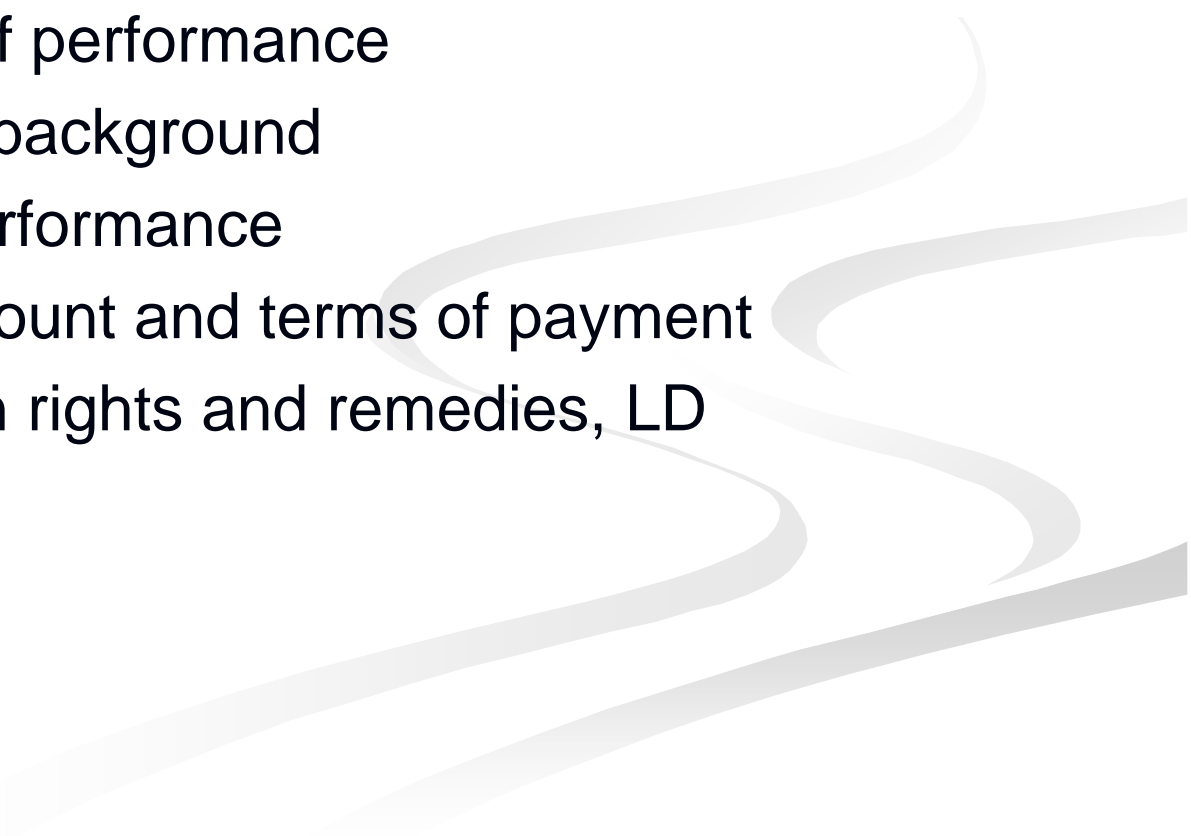
- Contracts can come in all shapes and sizes
 - They need framework like a container holding the contents
 - The effective date of the contract
 - The parties to the contract (Preamble)
 - Any preliminary clauses (Recitals)
 - Defined terms
 - **The main contract clauses**
 - Schedules/ appendices and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

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

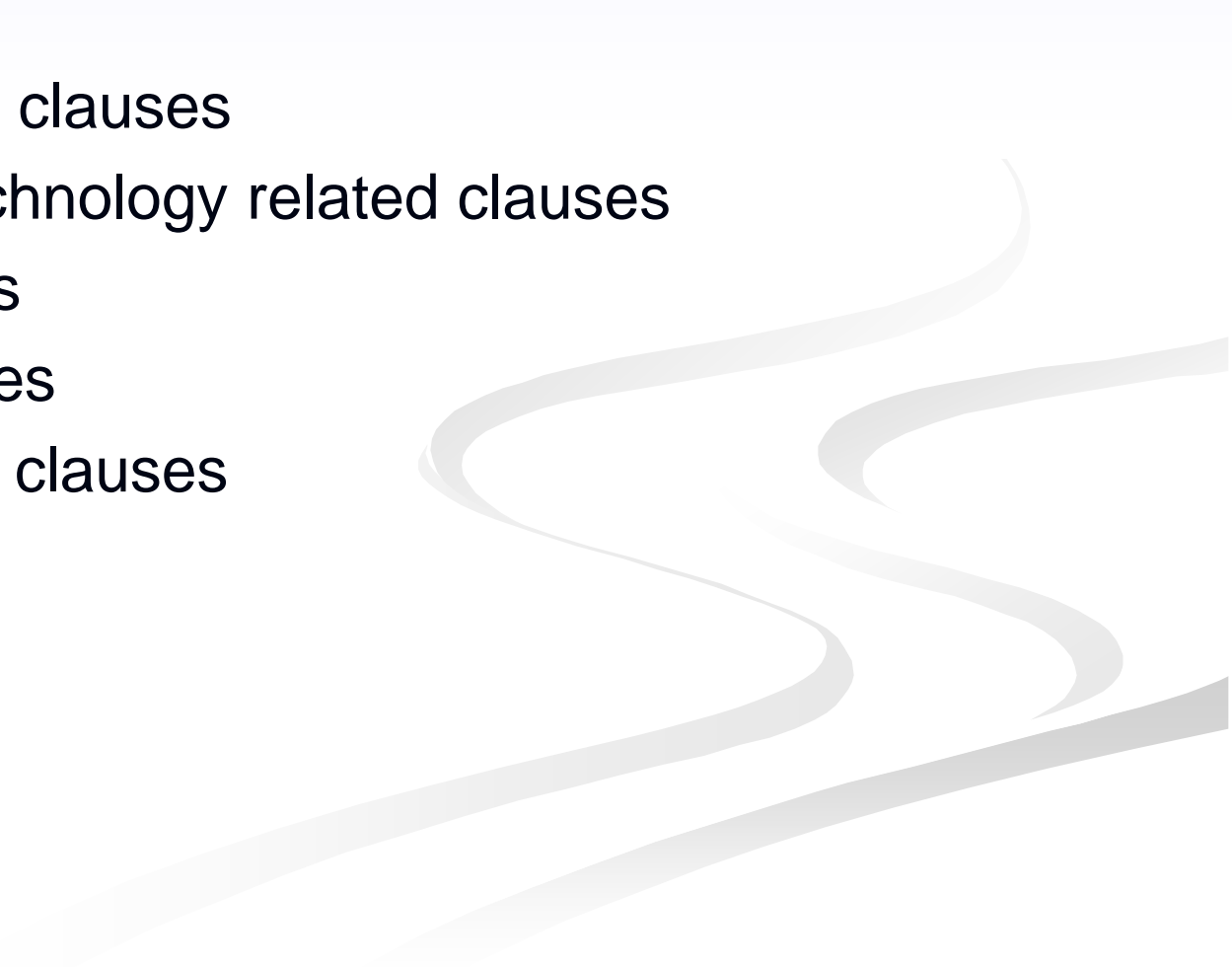
The 'PREAMBLE' of a contract is the introductory paragraph that identifies the parties to the agreement.

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
- 
- A decorative graphic consisting of several thick, wavy, light gray lines that flow from the right side of the slide towards the left, creating a sense of movement and depth.

Key clauses

Clauses

?

More important

Important

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

Inspection
Documentation
Payment

Liquidated Damages
Force Majeure
Termination

Indemnity
Warranty
Dispute resolution

Governing laws
and
Jurisdiction

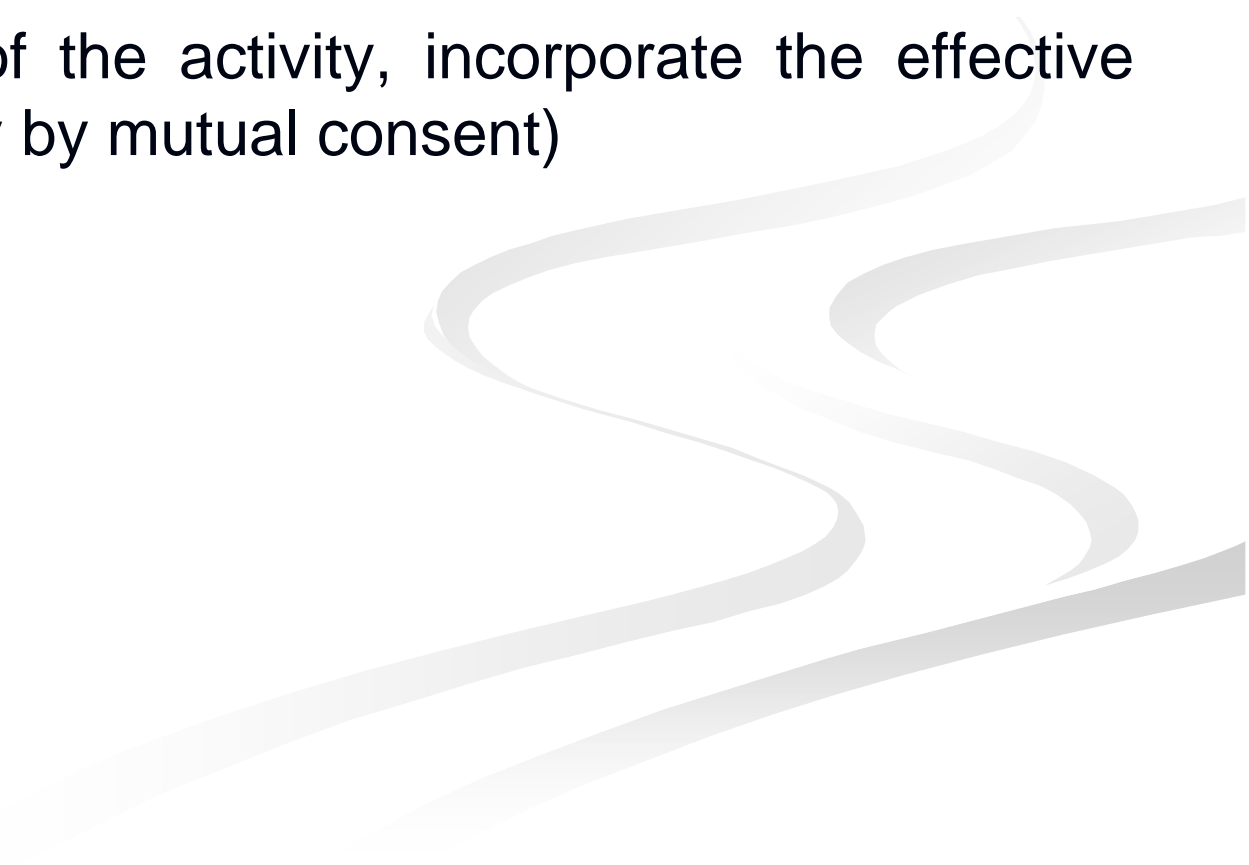
Boilerplate clauses

- Standard clauses of contract
- Used irrespective of the type of contract
- **No set definition** of 'boiler plate clause'
- Term dates back to 1890s when printing plates of text for advertisements were cast in steel and distributed to newspapers in USA. They were called boiler plates because of their resemblance to steel sheets used to make boilers. Subsequently the term 'boilerplate' came to denote standard clauses, which do not change.
 - Definitions
 - Confidentiality clause
 - Time of the essence

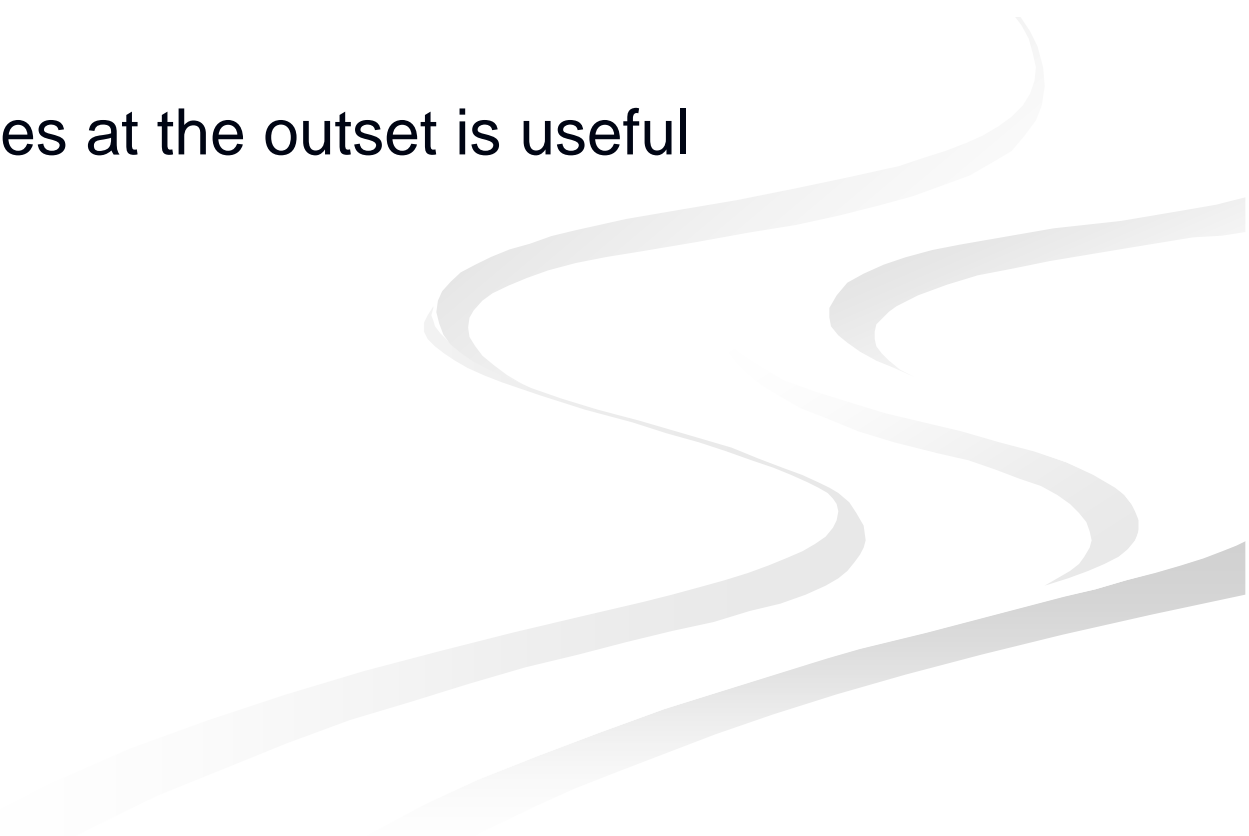
Boiler plate clauses

- Continued:
 - 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)
- 
- The bottom right portion of the slide features several thick, light gray wavy lines that curve and flow across the page, serving as a decorative background element.

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
- 
- The bottom right portion of the slide features several thick, light gray wavy lines that curve and flow across the page, serving as a decorative background element.

The parties to the contract

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

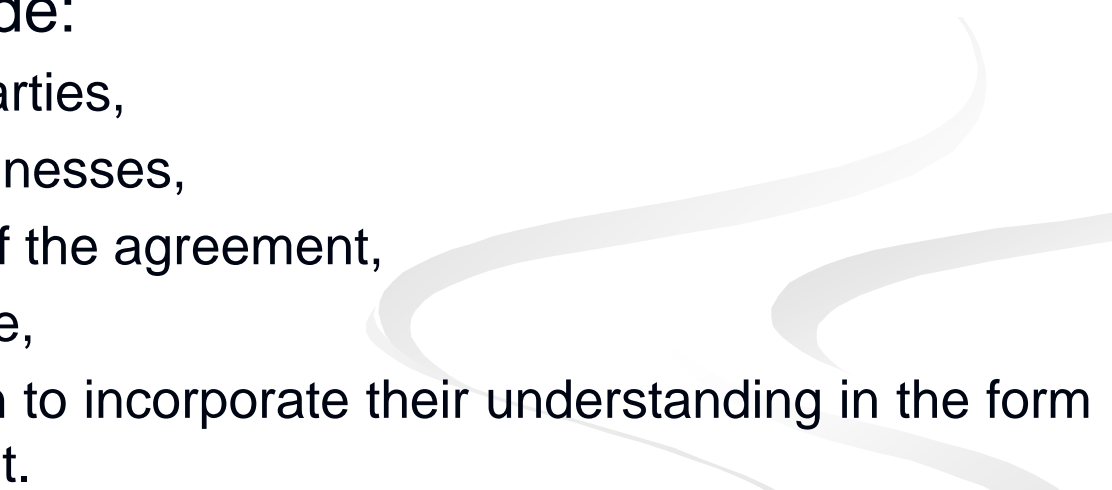
BETWEEN

(...) a company

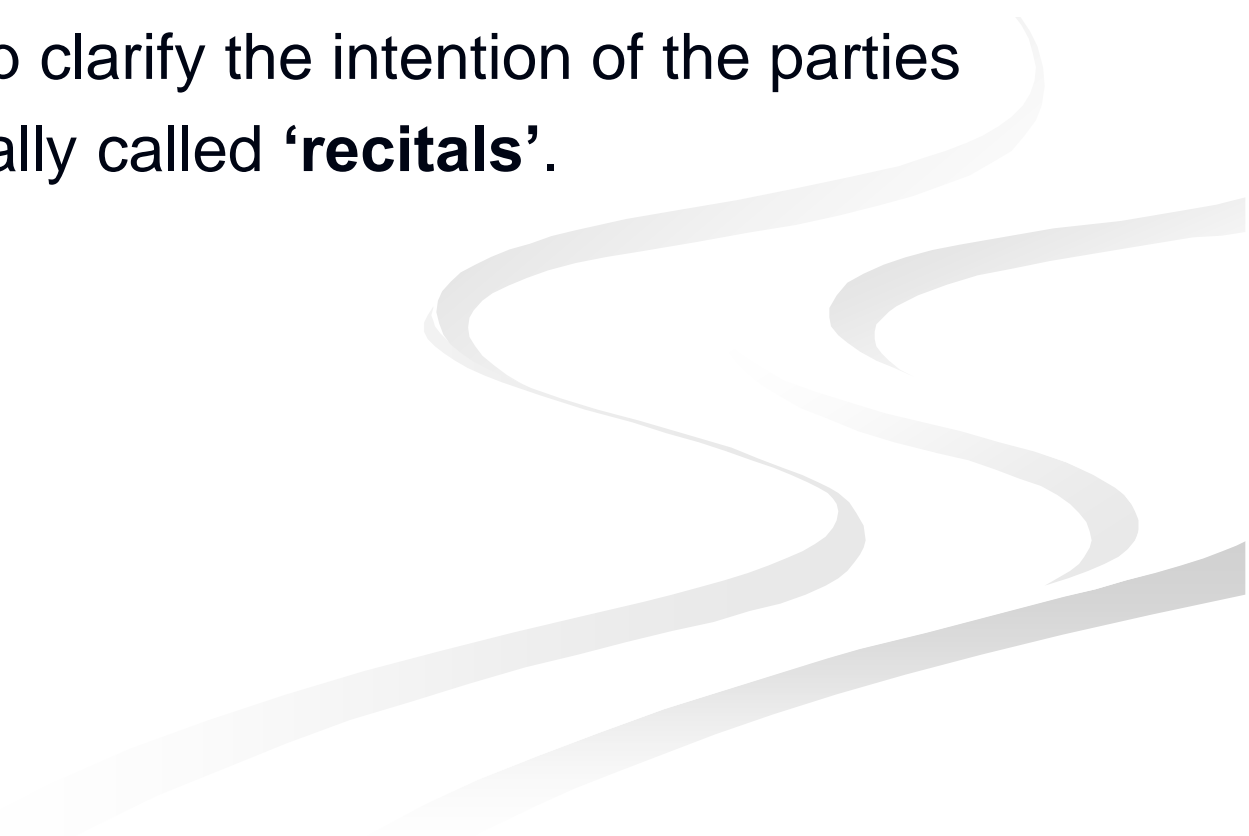
AND

(...) 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**'.
- 
- The bottom right portion of the slide features several thick, light gray wavy lines that curve and flow across the page, serving as a decorative graphic element.

Preliminary clauses-Recitals

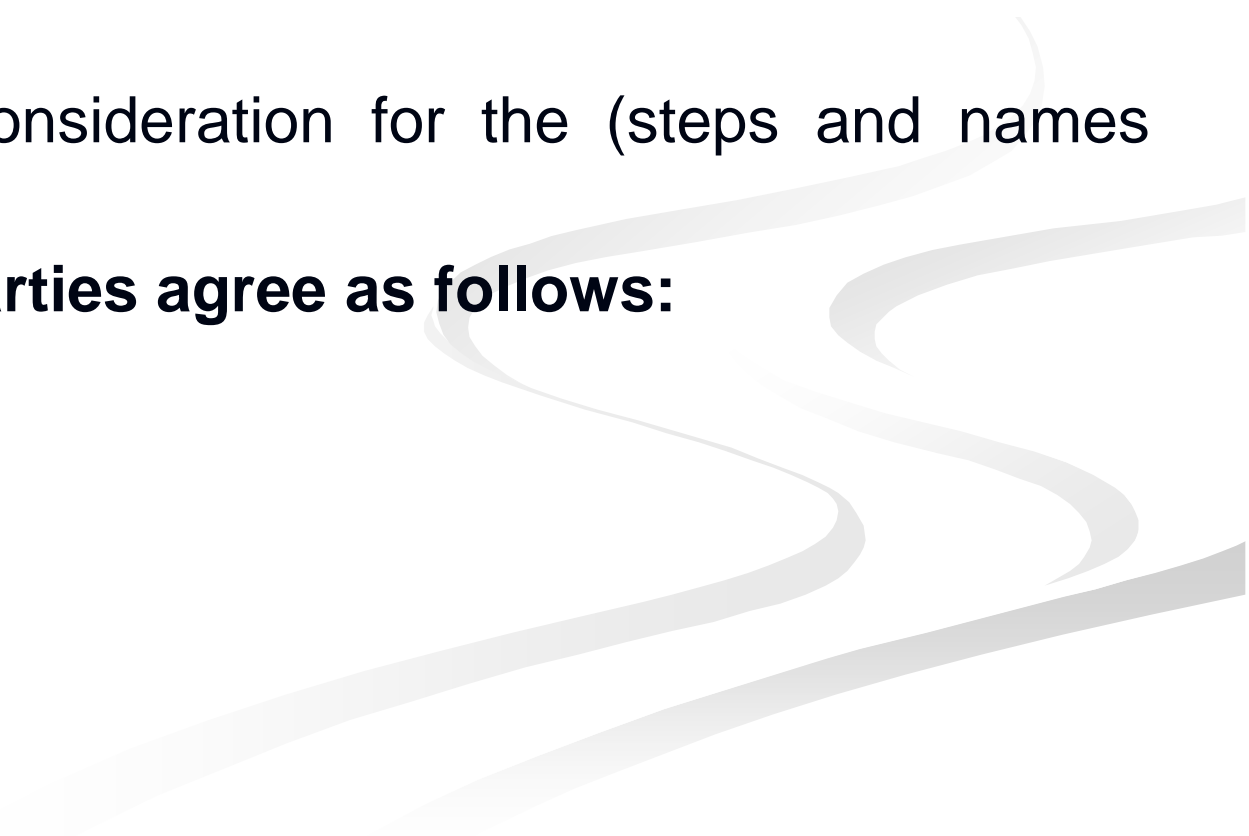
- **Whereas,**
- The Buyer is in the business of.. and desires to purchase Gas (as defined herein below) from the Sellers,
- The Sellers are parties to a PSC with Govt of India and the Sellers desire to supply Gas .. subject to PSC to the Buyer in quantities and subject to terms stated herein,

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

- Defined terms are valuable to **clarify the meaning of the words or phrases** used several times in a contract and to avoid repetition.
 - If the words or phrases are supposedly industry phrases or acronyms, make sure they are clear and agreed, as such things often mean different things to different people
- 
- The bottom right portion of the slide features several thick, light gray wavy lines that curve and flow across the page, serving as a decorative background element.

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 1⁰F which is at 60⁰F and absolute pressure of 1013.25mbar (14.695 psi).

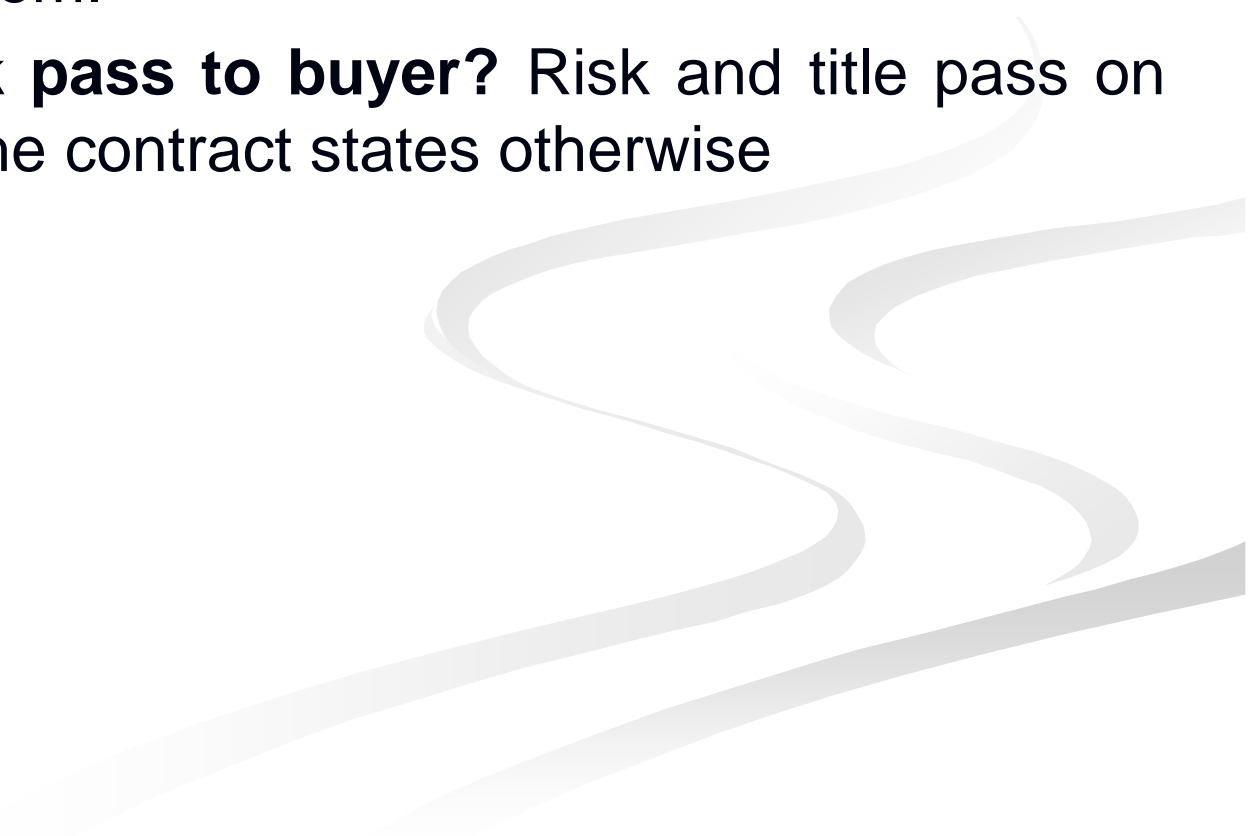
Defined terms

- **“MMBTU”** means one million British Thermal Unit
- **“Contract”** means this 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 15.5⁰C(60⁰ F) and at a pressure of 1013.25mbar(14.695 psi).

Defined terms

- **“Effective Date”** means -- (1.1.2020)
- **“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 14.5⁰C to 15.5⁰C 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

- **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

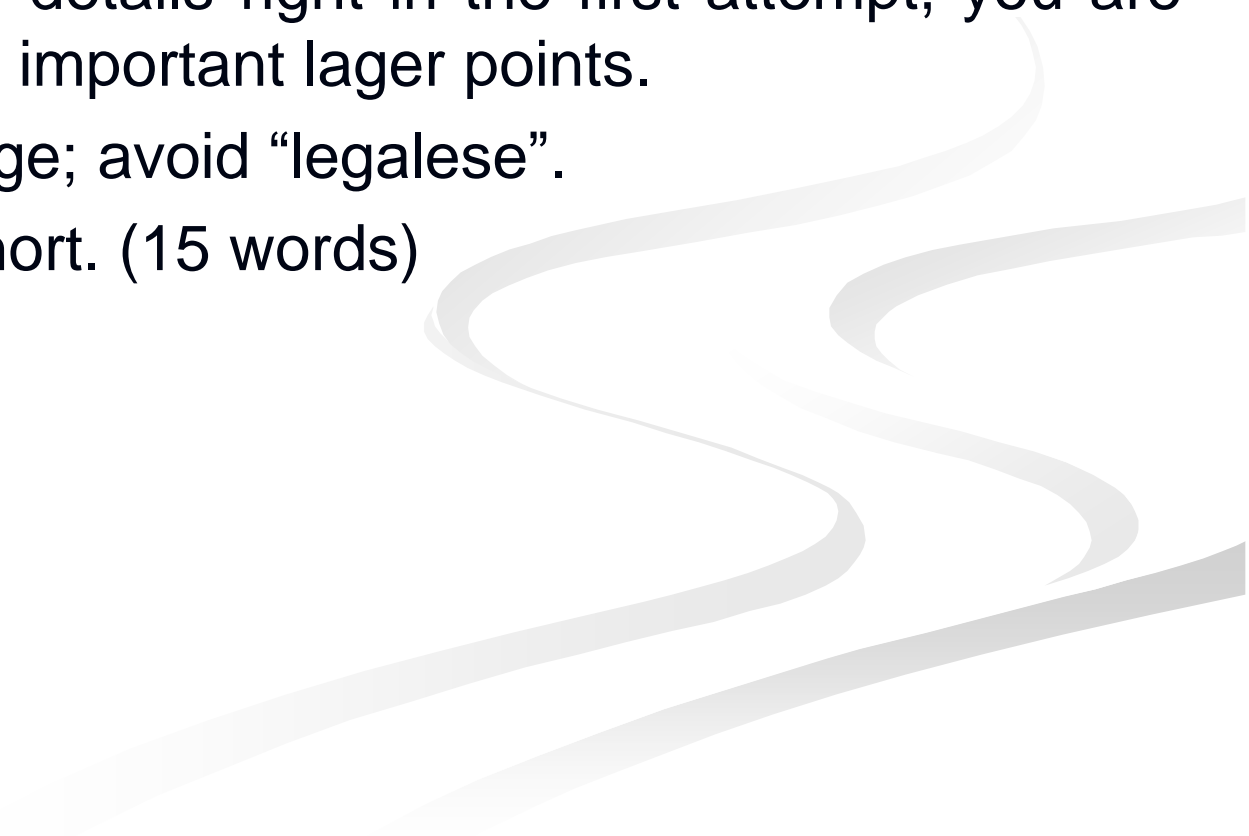
- **Risk purchase claim(loss):** It's the difference between the initial contract price and what the purchaser had to pay against the fresh contract.
- **Mitigation of loss :** This demands that the contract victims must take all reasonable steps to reduce their loss. Otherwise, their R/P claim will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

Boilerplate clauses

- “Boiler plate” clauses are standard clauses. They are ready-made, all-purpose clauses inserted into most commercial contracts under the headings standard, Miscellaneous or General
- Sometimes they appear in tiny print at the end of a contract. We, consumers, routinely ignore small print when buy software, join a website or sign credit card agreements

Contract drafting

Principles

- Reconcile yourself to preparing a draft, revising and polishing it
 - If you try to get all details right in the first attempt, you are likely to miss some important larger points.
 - Use simple language; avoid “legalese”.
 - Keep sentences short. (15 words)
- 
- A decorative graphic consisting of several thick, wavy, light gray lines that flow from the right side of the slide towards the left, creating a sense of movement and depth.

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.

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

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 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];
```

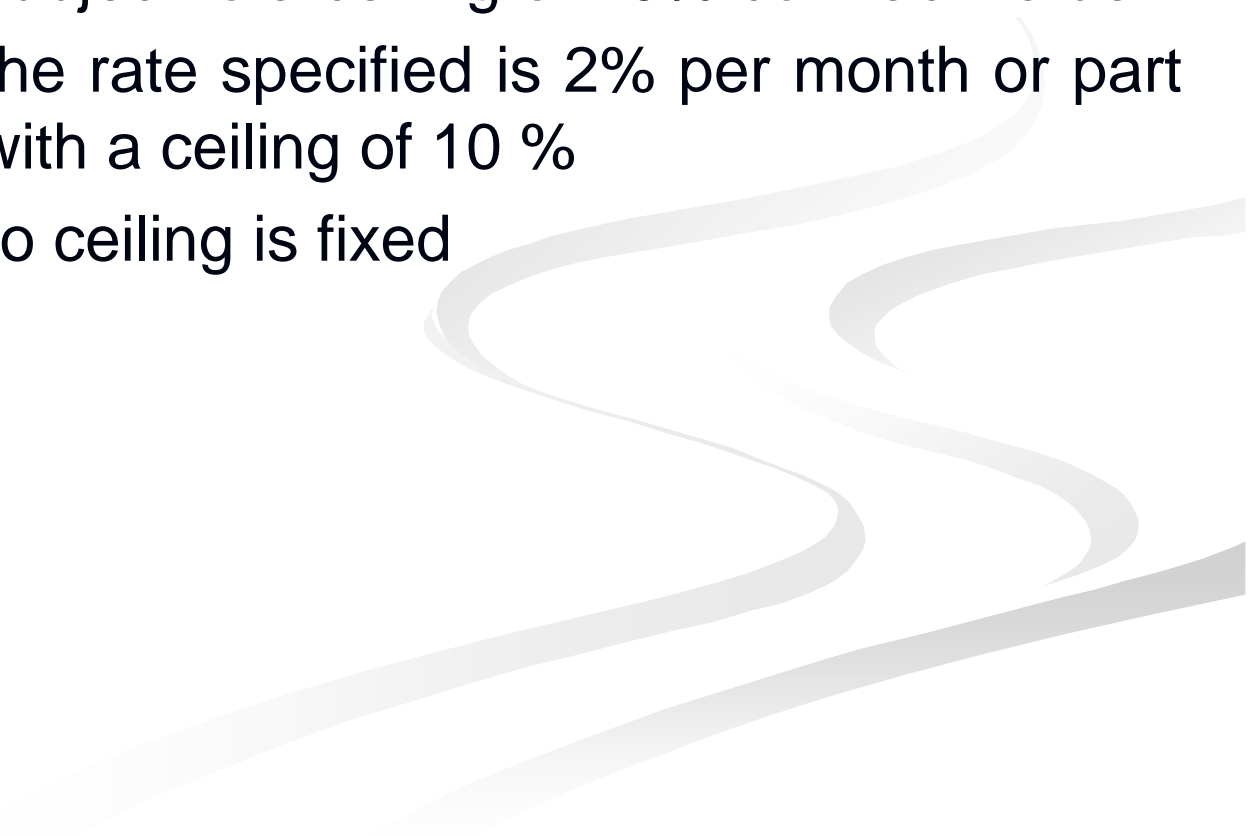
Refixation of DP

- Duration of Event plus set-up time

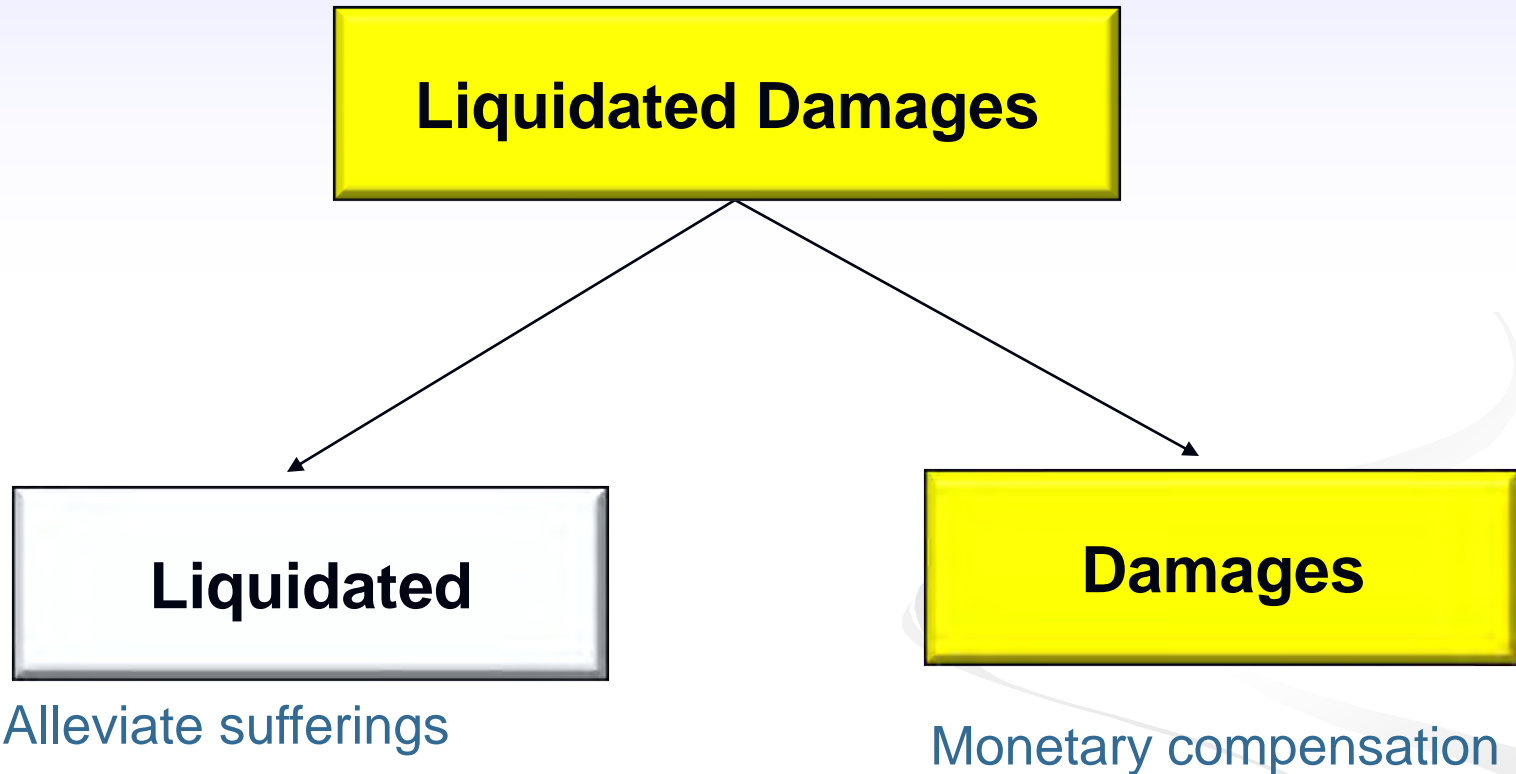
Termination of contract

- Termination without financial repercussions

Liquidated Damages clause in a contract

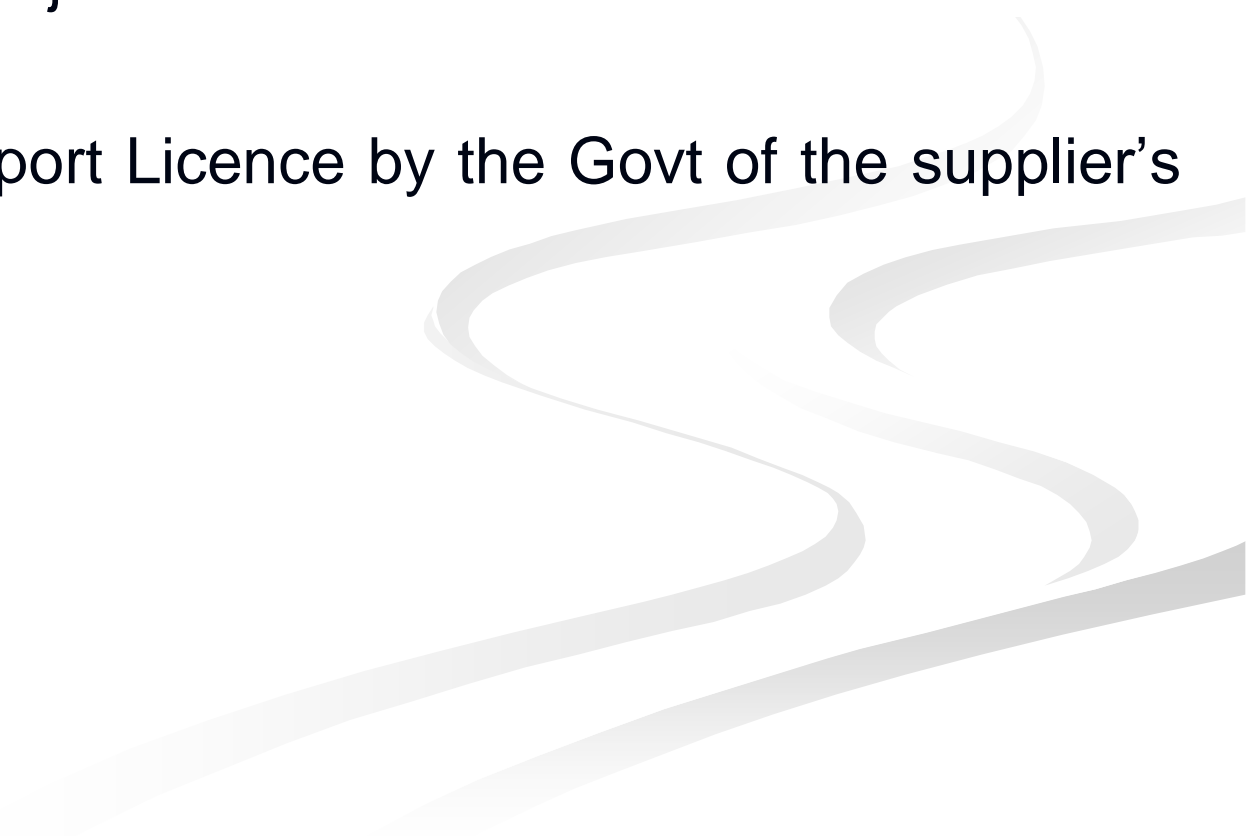
- The clause, usually, states that in the event of delay in performance under the contract, liquidated damages shall become leviable at the rate of $\frac{1}{2}$ % per week or part thereof of delay subject to a ceiling of 10% contract value.
 - In some cases, the rate specified is 2% per month or part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

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

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
- 

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.
- 
- The bottom right portion of the slide features several thick, light gray wavy lines that curve and flow across the page, serving as a decorative background element.

Contract Dispute resolution

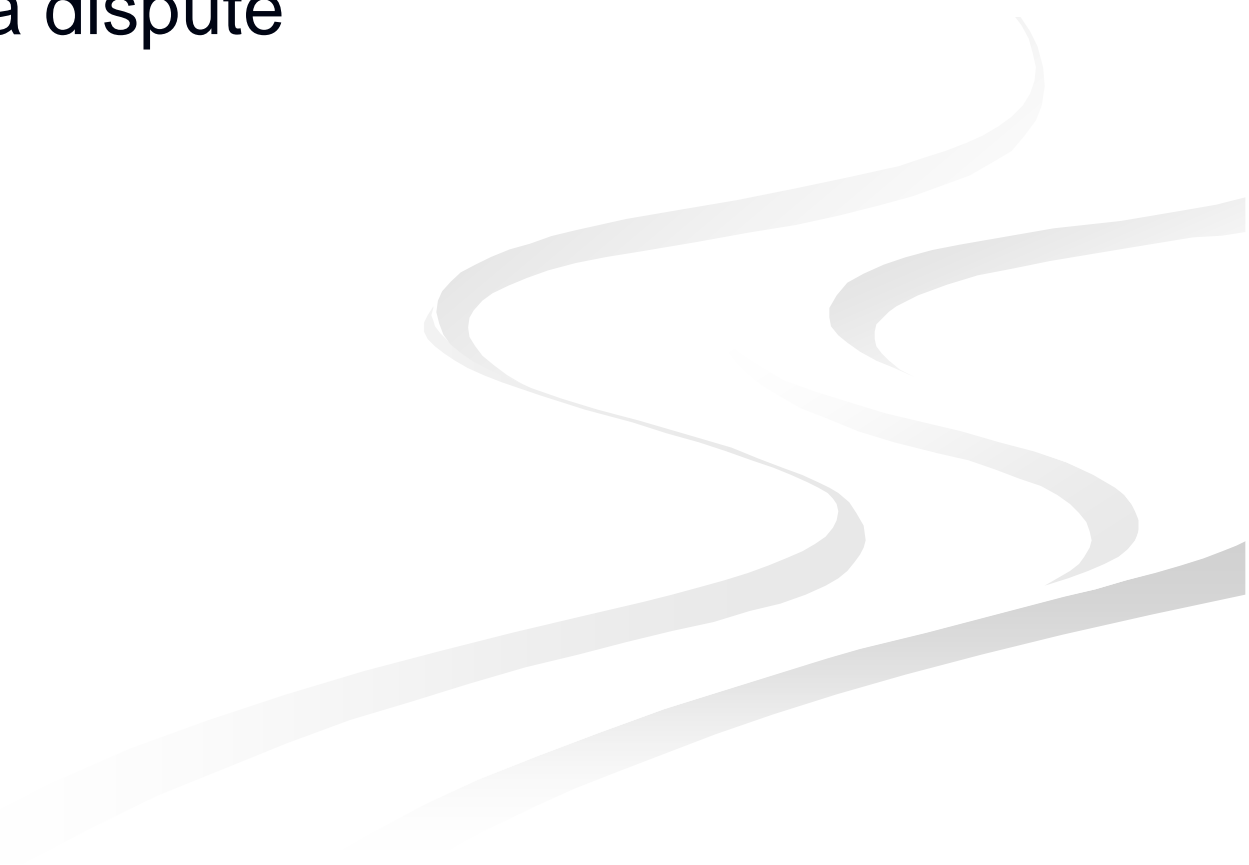
Strategy for dealing with disputes

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


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
- 
- The bottom right portion of the slide features several thick, light gray, wavy lines that curve and flow across the page, serving as a decorative background element.

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)
- 
- The bottom right portion of the slide features several thick, light gray, wavy lines that curve and flow across the page, serving as a decorative background element.

Modes of dispute resolution

- Bilateral settlement/ negotiation
 - DRB/OEC/ESC/SAC
 - Mediation
 - Conciliation
 - Arbitration
 - Litigation
- 
- The bottom right portion of the slide features several thick, light gray, wavy lines that curve and flow across the page, serving as a decorative background element.

The 'laws' of Contract

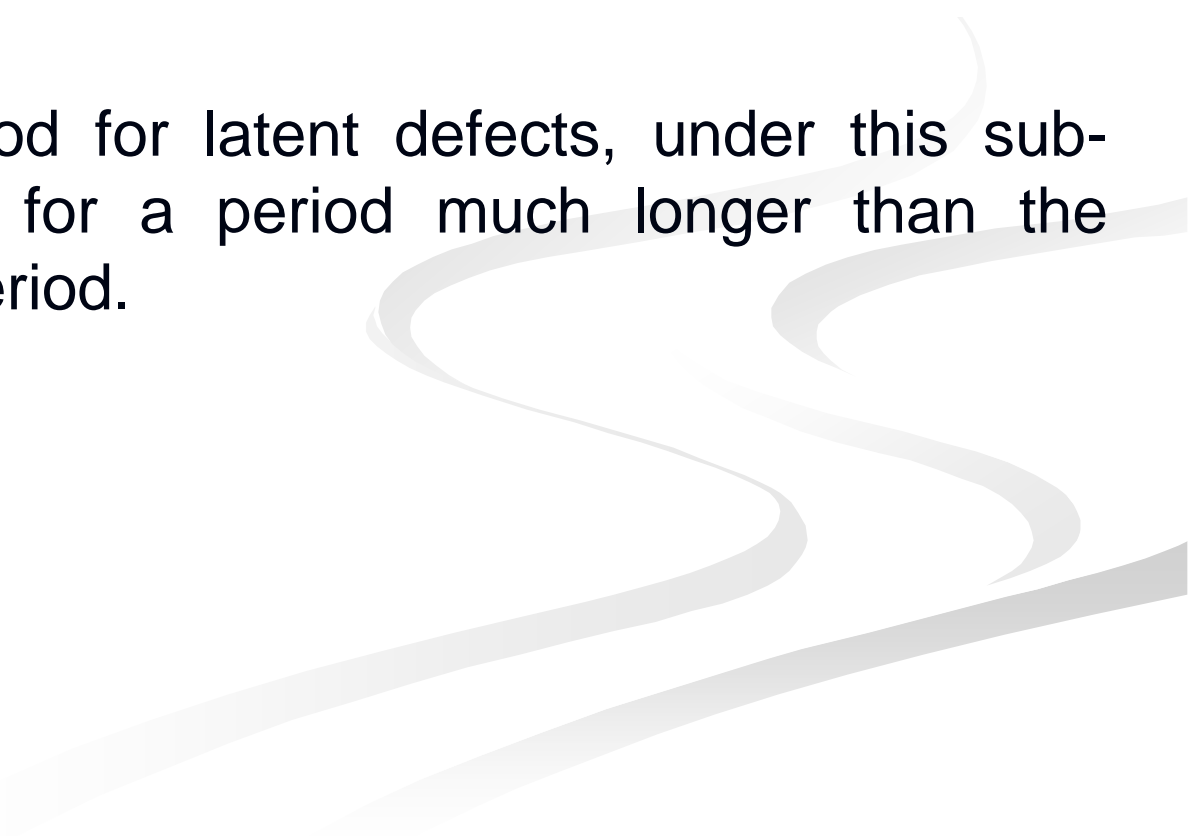
Applicable law and court jurisdiction

- 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.
- 

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

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.

Quasi Contract (s 68-72)

- It is an obligation which the **law creates** in the absence of an agreement
- Quasi Contracts are based on principle of equity, justice and good conscience. There should be no unjust enrichment, no one shall enrich himself at the expense of other

Contract of Indemnity- Protection against loss

- 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 patty.
S124

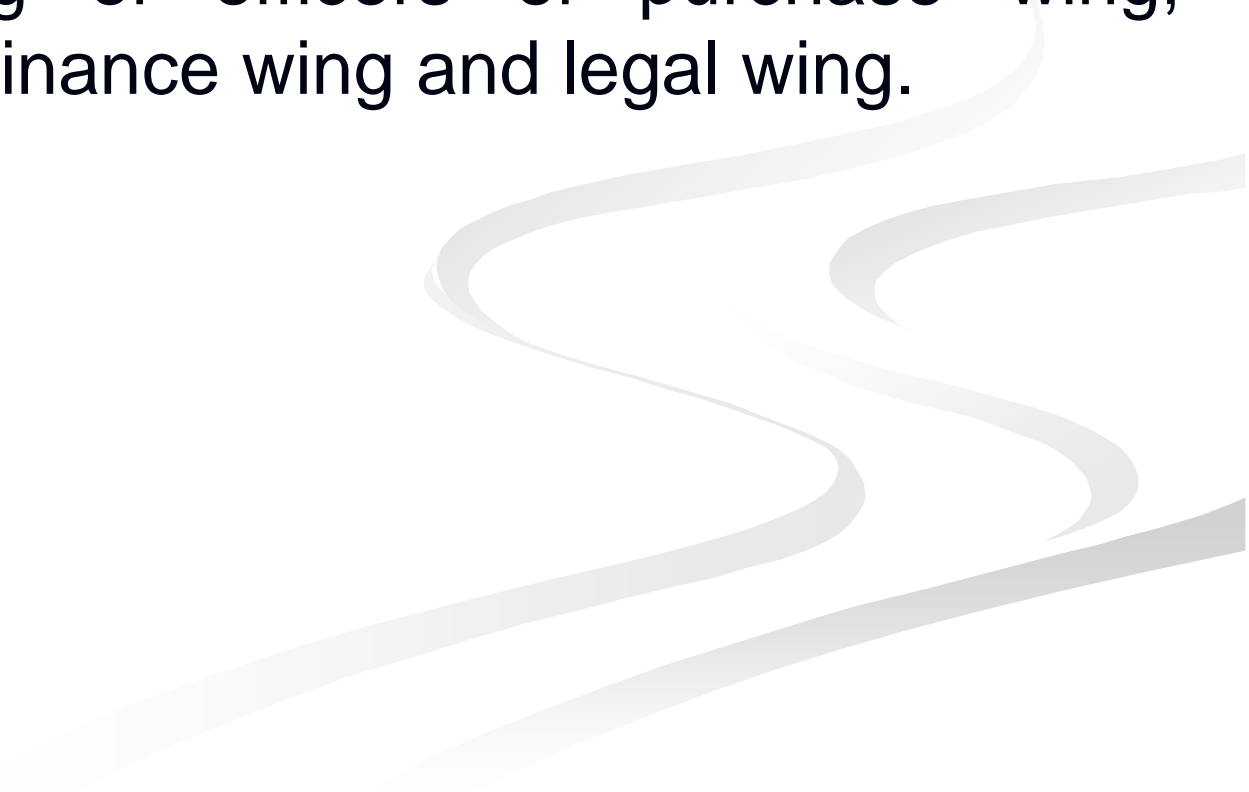
What is a Contingent Contract?

- 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.

Are Wagering agreement valid?

- Literally , the word ‘wager’ means ‘a bet’, something stated to be won or lost on the result of a doubtful issue and therefore a wagering agreements are ordinarily betting agreements.
- **Sec 30 of ICA reads as “agreements by way of wager are void.”**

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.
- 
- The bottom right portion of the slide features several thick, light gray wavy lines that curve and flow across the page, serving as a decorative background element.

Thank you so much

for active participation

