

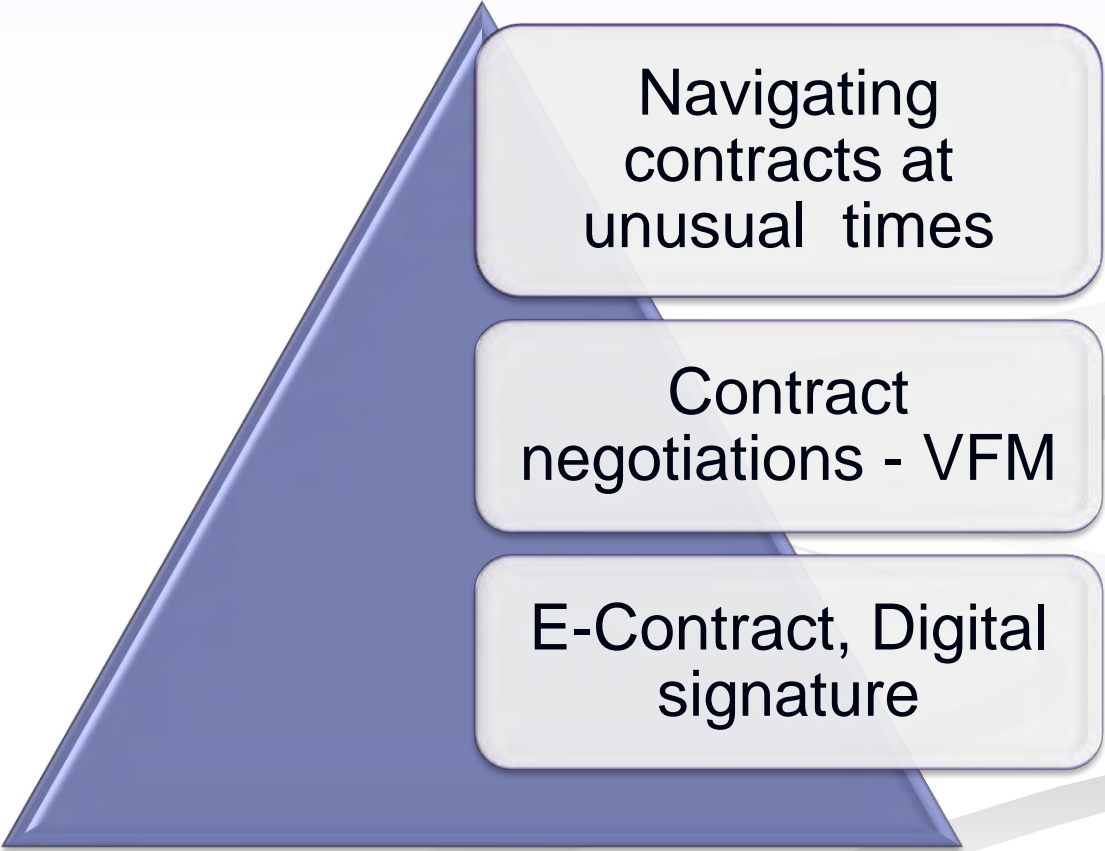
WELCOME



**Negotiating and navigating contracts at
unusual times, Contract negotiations for
VFM, e-Contract, Digital signature,**

IICA – 23.8.21

What to expect today...




Navigating
contracts at
unusual times

Contract
negotiations - VFM

E-Contract, Digital
signature

The entire journey

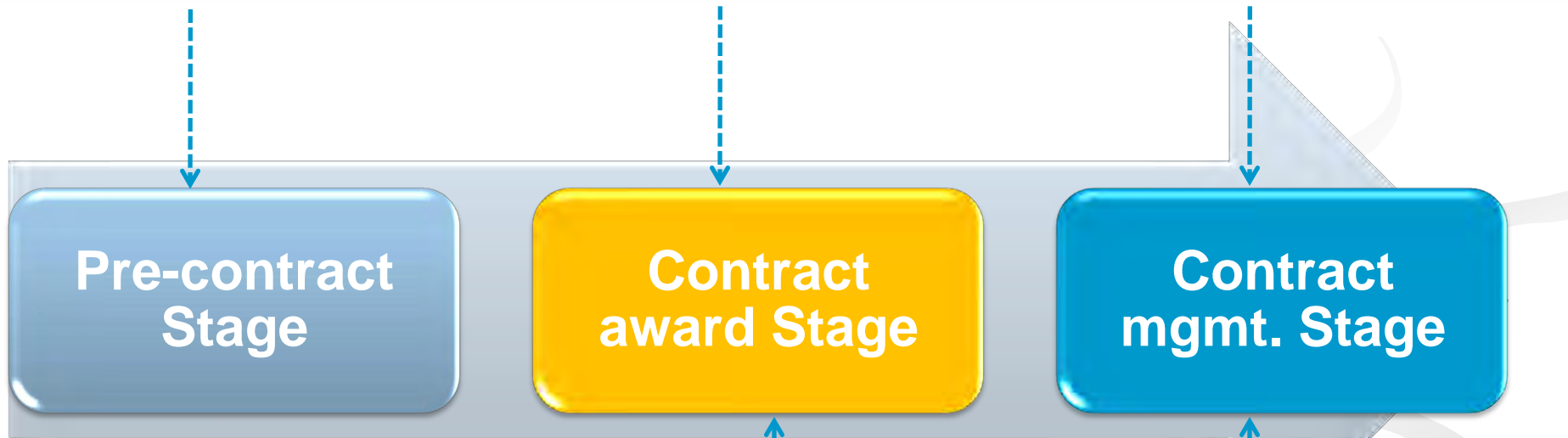
- Issues being faced in the performance of contracts
 - Revising contractual obligations due to Covid-19
 - Negotiation- GFR; Negotiation- CVC guidelines
 - Negotiation process
 - Structured communication
 - Getting VFM
 - e-contract, its importance, Asymmetric key encryption
 - Digital Signature, Digital signature certificate
- 

Public Procurement & Contract Management

Assessment of need
Proc Planning
Tender invitation

Tender evaluation
Negotiation
Cont award decision

Contract drafting
Contract Mgmt
Dispute resolution



**Pre-contract
Stage**

**Contract
award Stage**

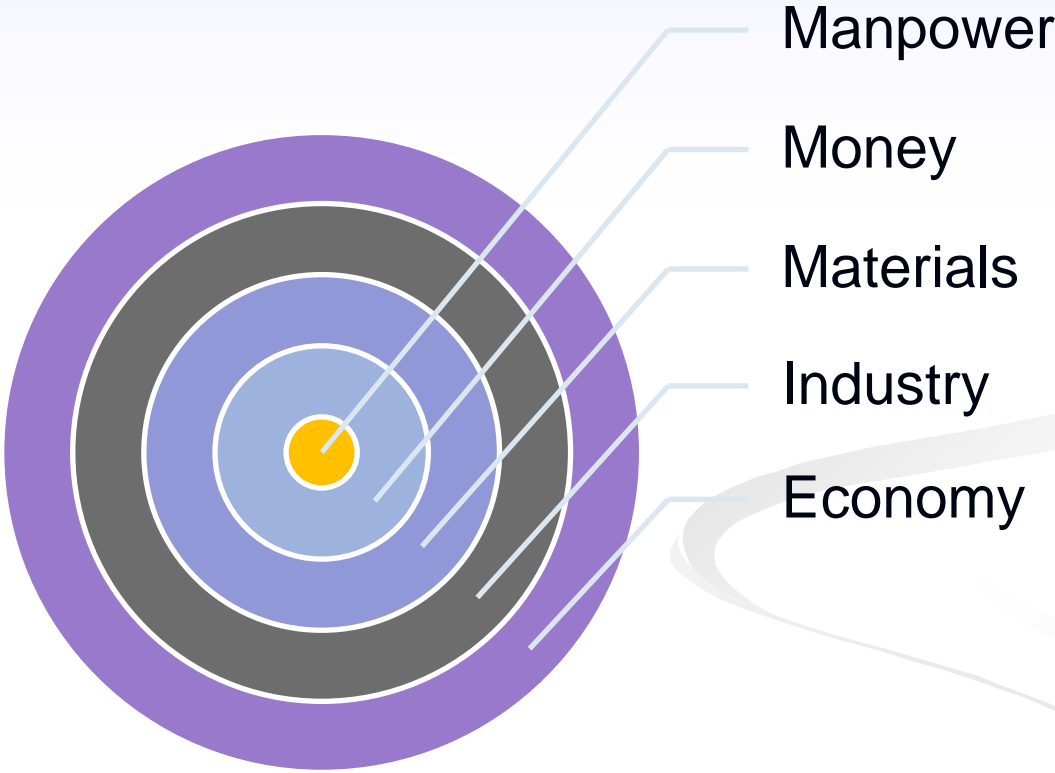
**Contract
mgmt. Stage**

**Negotiating and navigating Contracts
at difficult times; Negotiation process**

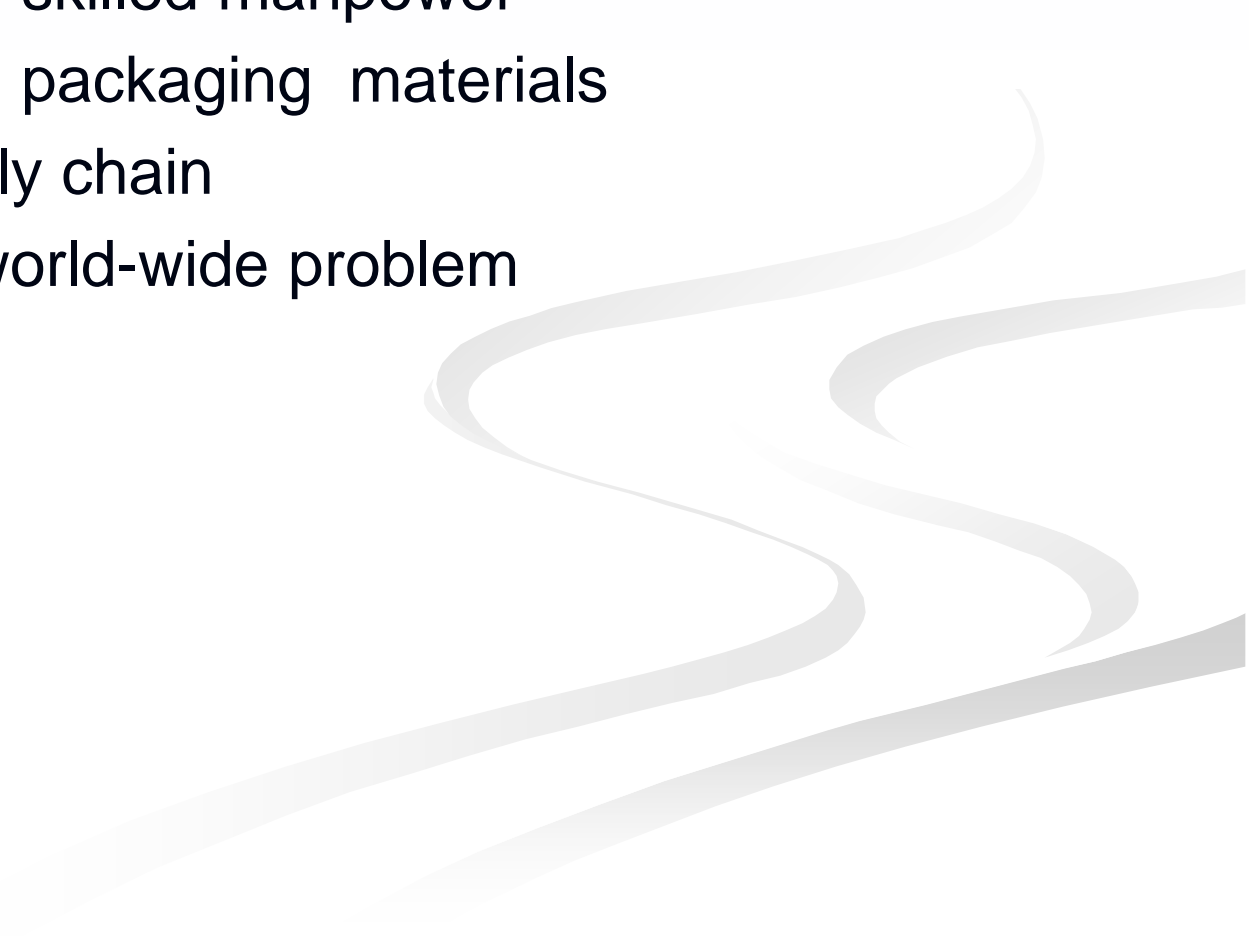
The Covid-19 pandemic

- First, it started as a health crisis
- Then it started impacting almost every sphere of activity
- Industry and economy suffered and continue to suffer
- We hoped things will become normal soon
- It seems 'normalcy' may not come very soon
- So we have to adapt to the situation, We have to accept the challenge, In fact we have done it and continue to do it
- Let us see how does it affect the world of contracts.

Impact of covid-19 pandemic



Issues faced by contractors due to Covid

- Scarcity of raw materials, components etc
 - Shortage of power
 - Difficulty in getting skilled manpower
 - Difficulty in getting packaging materials
 - Disruption in supply chain
 - This, in fact, is a world-wide problem
- 
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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

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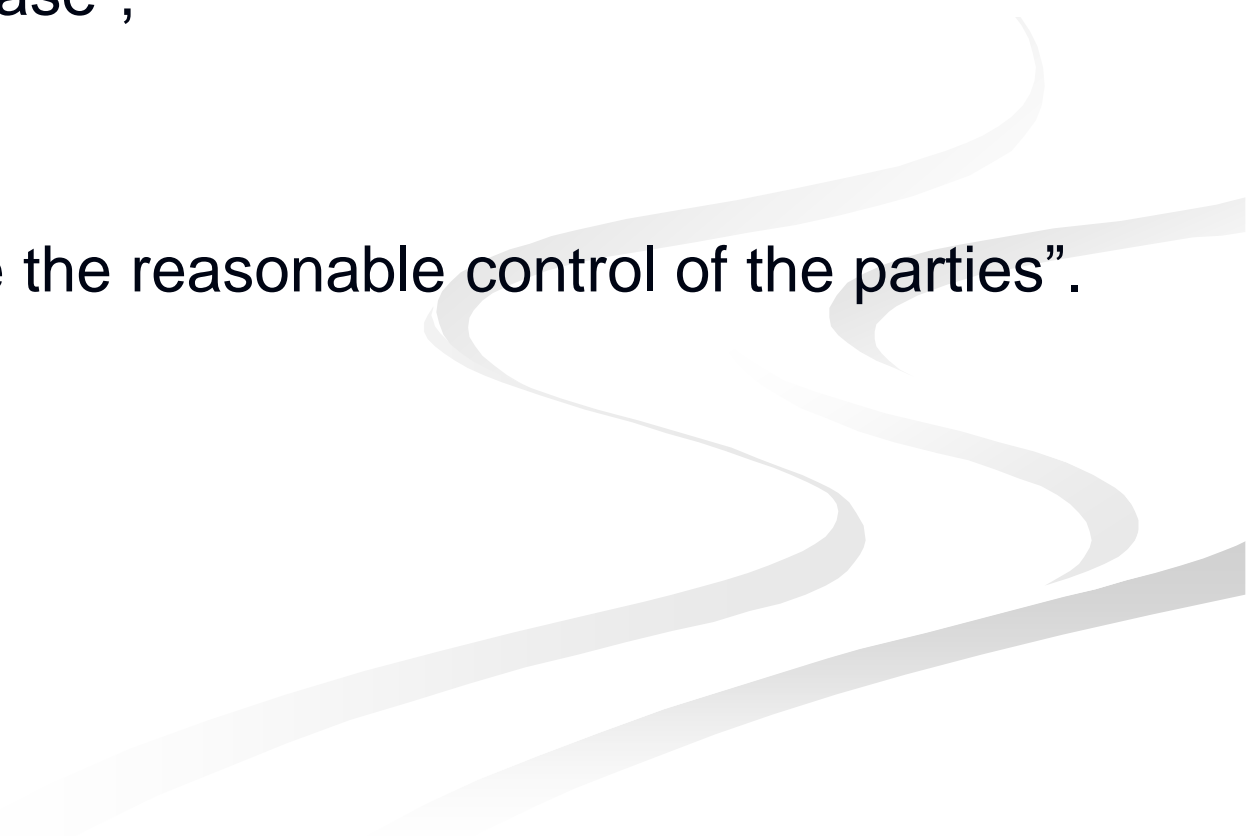
Refixation of DP

- Duration of Event plus set-up time

Termination of contract

- Termination without financial repercussions

Is COVID-19 covered under FM?

- For COVID-19, 'Force Majeure' provisions will apply directly, if the Force Majeure clause of the contract includes events, such as
 - “Infectious disease”,
 - “Pandemic”,
 - “Act of God”,
 - “Events outside the reasonable control of the parties”.
- 

Has COVID-19 caused similar problems like FM?

- It can also be argued that disruptions caused by COVID-19 lead to occurrence of other events such as:
 - “Govt action”, (restricting No of workers)
 - “Lock down”,
 - “Labour shortage”, materials shortage,
 - “Shortage of industrial O2 and
 - “Collapse of supply chains”.
- In these circumstances, it is impossible to fulfil any previously entered contractual obligations

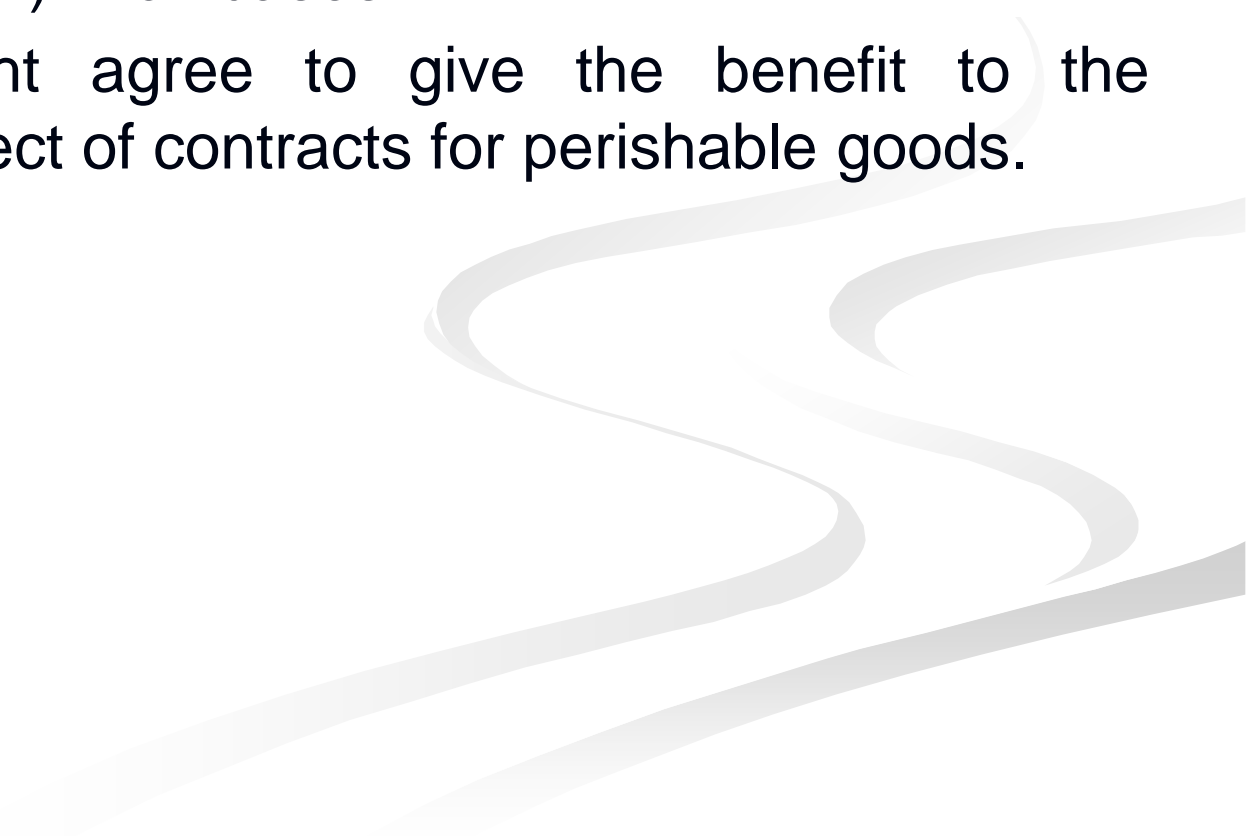
Extracts F M Clause of a major CPSU

- The Force Majeure Clause of the contract reads as follows:
“....The word Force Majeure as employed herein shall mean acts of God, war , revolt, agitation, strikes, riot, fire, flood, sabotage, civil commotion, road barricade (but not due to interference of employment problem of the contractor)and any other cause whether of kind herein enumerated or otherwise, which are not within the control of the party to the contract and which renders performance of the contract by the said party impossible....”

Doctrine of 'Frustration of contract' – Sec 56

- Even if a contract does not contain the FM clause, the affected party can claim relief under the doctrine of frustration as FM derives its authority from this doctrine.
- The doctrine of frustration is embedded in section 56 of Indian Contract Act which states that if a contract is impossible to perform (initial impossibility) or if a contract becomes impossible to perform (subsequent impossibility), such contracts shall be deemed void
- This is based on maxim “Lex non cogit ad impossibilia”. It means **law doesn't compel one to do impossible things.**

Doctrine of 'Frustration of contract' – Sec 56

- Since the outbreak of the pandemic is temporary in nature, the **Courts might be reluctant to accept the Frustration/Impossibility** of contract performance (as per Section 56 of Indian Contract Act) in all cases.
 - The Courts might agree to give the benefit to the contractor in respect of contracts for perishable goods.
- 

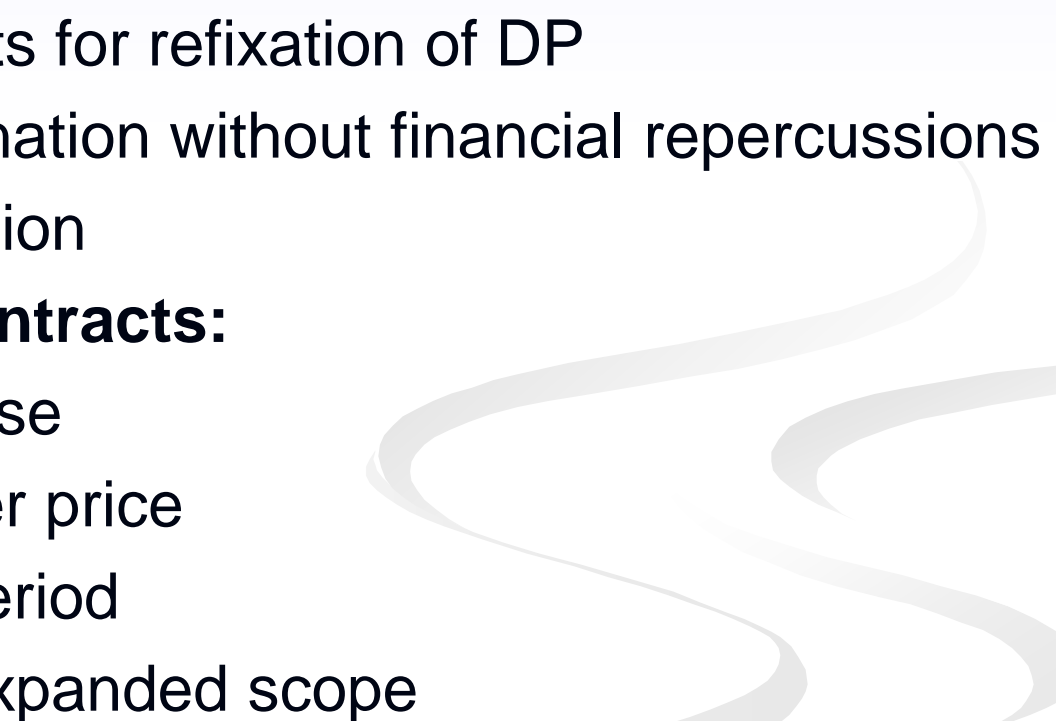
Guidelines for Govt Depts

- Dept of Expenditure, Procurement Policy Division has issued an O M No.F.18/4/2020-PPD on Feb 19, 2020 declaring Covid-19 a **Natural Calamity**. The relevant part of this O M reads as follows:
- “A doubt has arisen if the disruption of the supply chains due to spread of corona virus in China or any other country will be covered in the Force Majeure Clause (FMC). In this regard it is clarified that it should be considered as a case of natural calamity and FMC may be invoked, wherever considered appropriate, following the due procedure as above.”

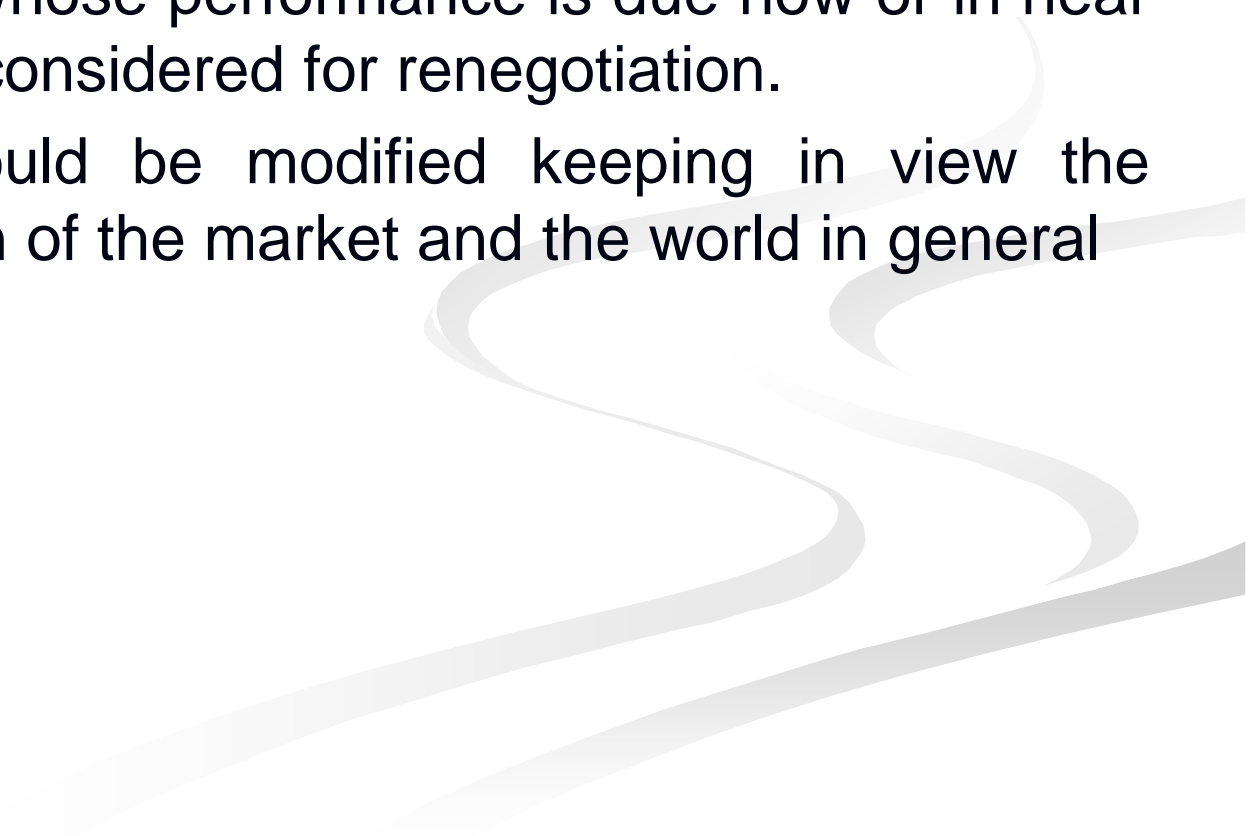
Guidelines for Govt Depts

- Min of New & Renewable Energy (MNRE) O M No. No. 283/18/2020-GRID SOLAR dated Mar 20, 2020 reads as follows
- “This issue has been examined in the Ministry and in line with the above referred O.M. dated 19.02.2020 of Government of India, it has been decided that:
- (a) All Renewable Energy implementing agencies of the Ministry of New & Renewable Energy (MNRE) are hereby directed to treat delay on account of disruption of the supply chains due to spread of corona virus in China or any other country, as Force Majeure.
- (b) The Renewable Energy implementing agencies may grant suitable extension of time for projects, on account of corona virus, based on evidences / documents produced by developers in support of their respective claims of such disruption of the supply chains due to spread of corona virus in China or any other country.”

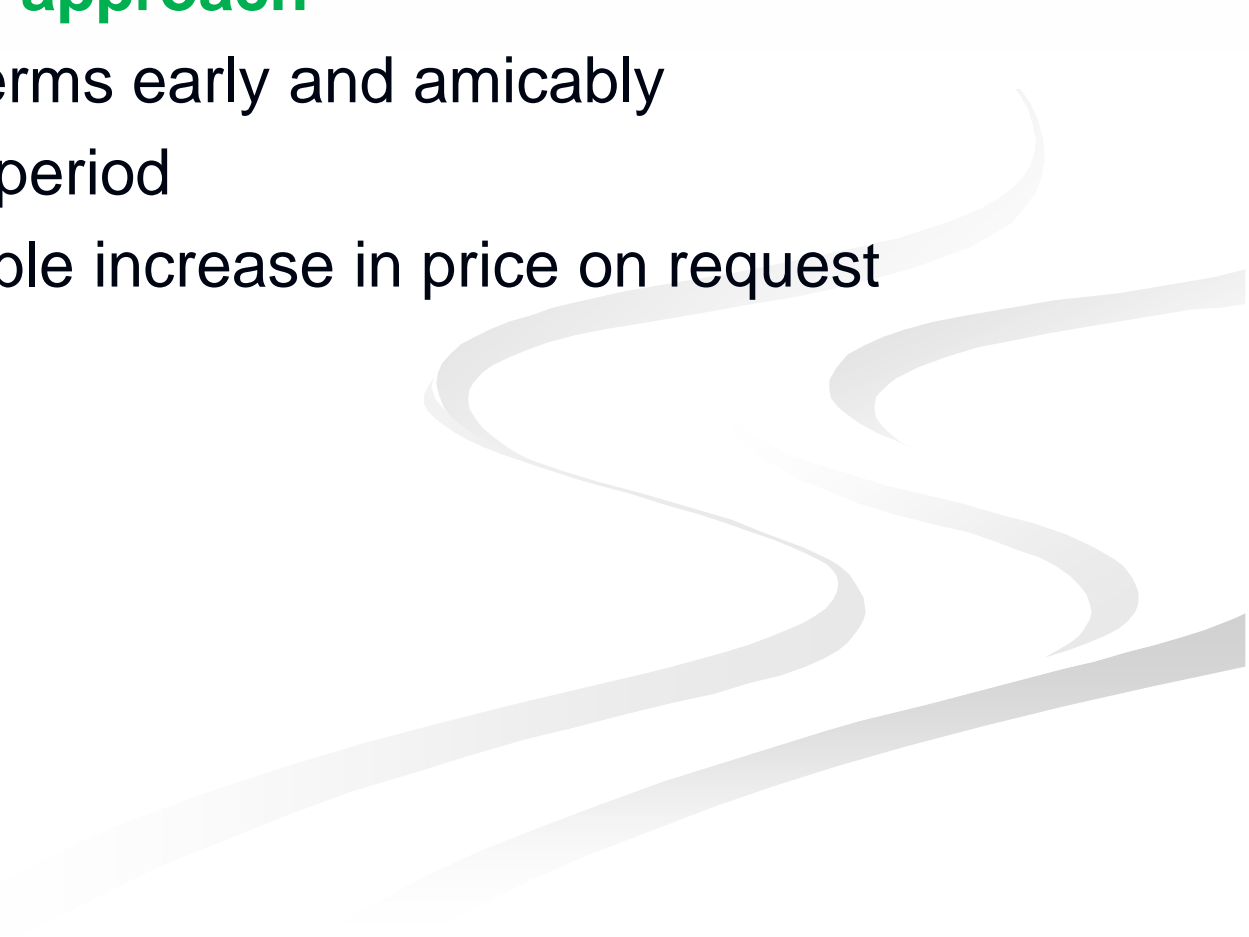
How does Covid-19 affect your contracts?

- **Existing Contracts:**
 - Delay in execution
 - A spate of requests for refixation of DP
 - Request for termination without financial repercussions
 - Arbitration / Litigation
 - **Future Tenders/Contracts:**
 - Lukewarm response
 - Incidence of higher price
 - Longer delivery period
 - F M clause with expanded scope
- 

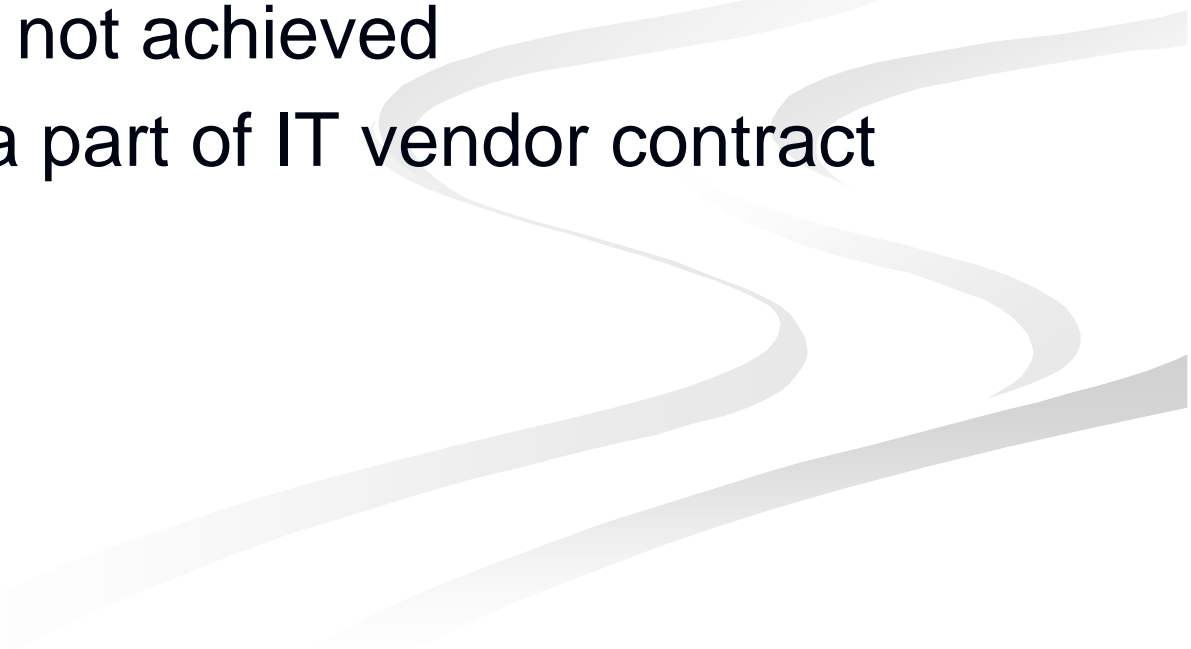
Renegotiation of contract is a wise step

- Looking at the current developments of COVID-19 in India, there remains huge uncertainty about when the normalcy would prevail.
 - So any contract, whose performance is due now or in near future, should be considered for renegotiation.
 - The contract should be modified keeping in view the prevailing situation of the market and the world in general
- 

How to proceed strategically

- Have a dialogue with contractor to see how the contract can be performed as far as possible
 - **Adopt a practical approach**
 - Renegotiate the terms early and amicably
 - Refix the delivery period
 - Consider reasonable increase in price on request
- 

What is SLA?

- Service Level Agreement is a contract between a service provider and customer that defines the level of service expected of the service provider.
 - It specifies how the service will be measured as well as the remedies or the penalties if the agreed level of service is not achieved
 - Usually, it forms a part of IT vendor contract
- 

Permitted downtime for different service level

Service level measured monthly

Total (mins)	Uptime SLA	Downtime (mins)
43200	95%	2160
43200	99%	432
43200	99.9%	43.2
43200	99.99%	4.32

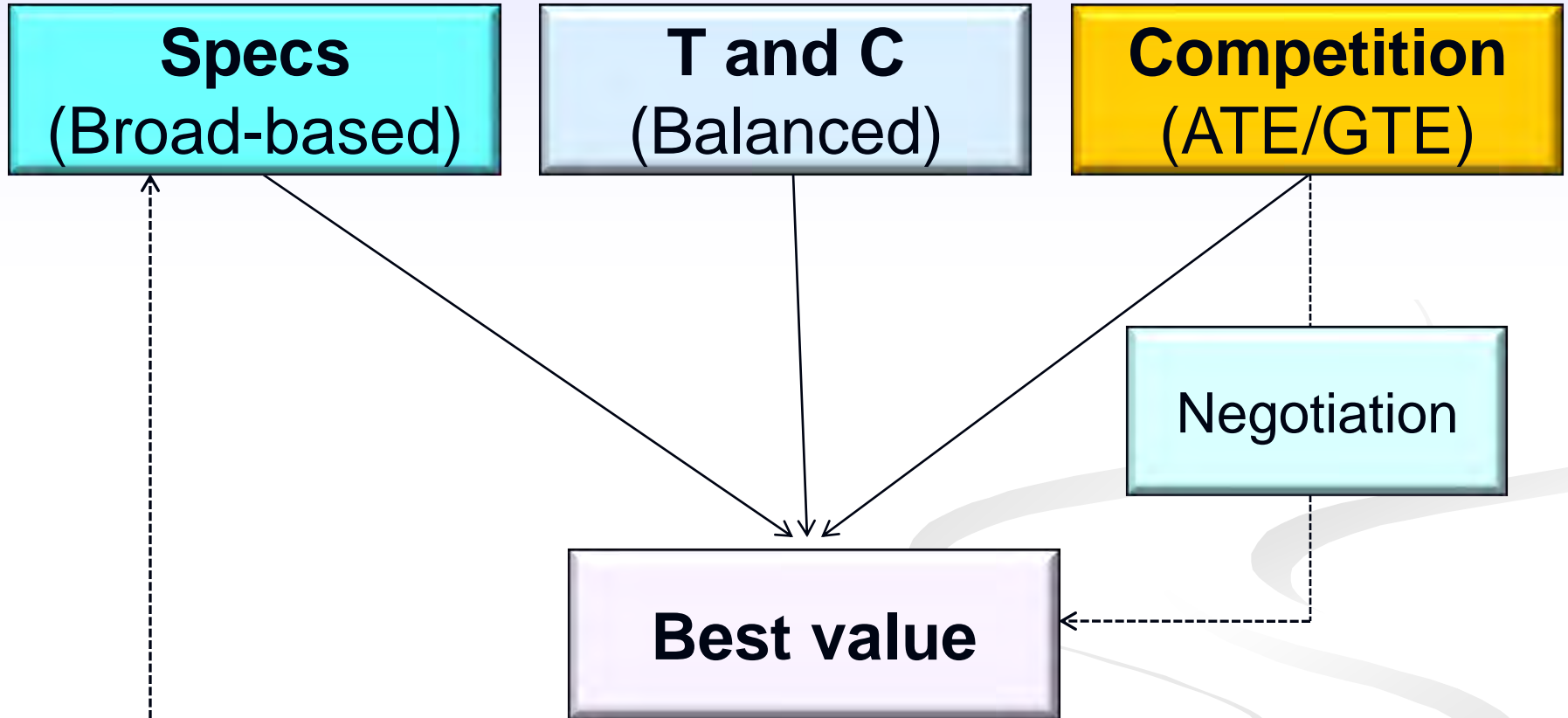
Negotiation-GFR

- Negotiation with bidders must be severely discouraged. However in exceptional circumstances, where price negotiation is necessary due to some unavoidable circumstances, the same may be resorted to **only with the lowest evaluated responsive bidder (L1)-Rule: 173(xiv)**

Negotiation- CVC

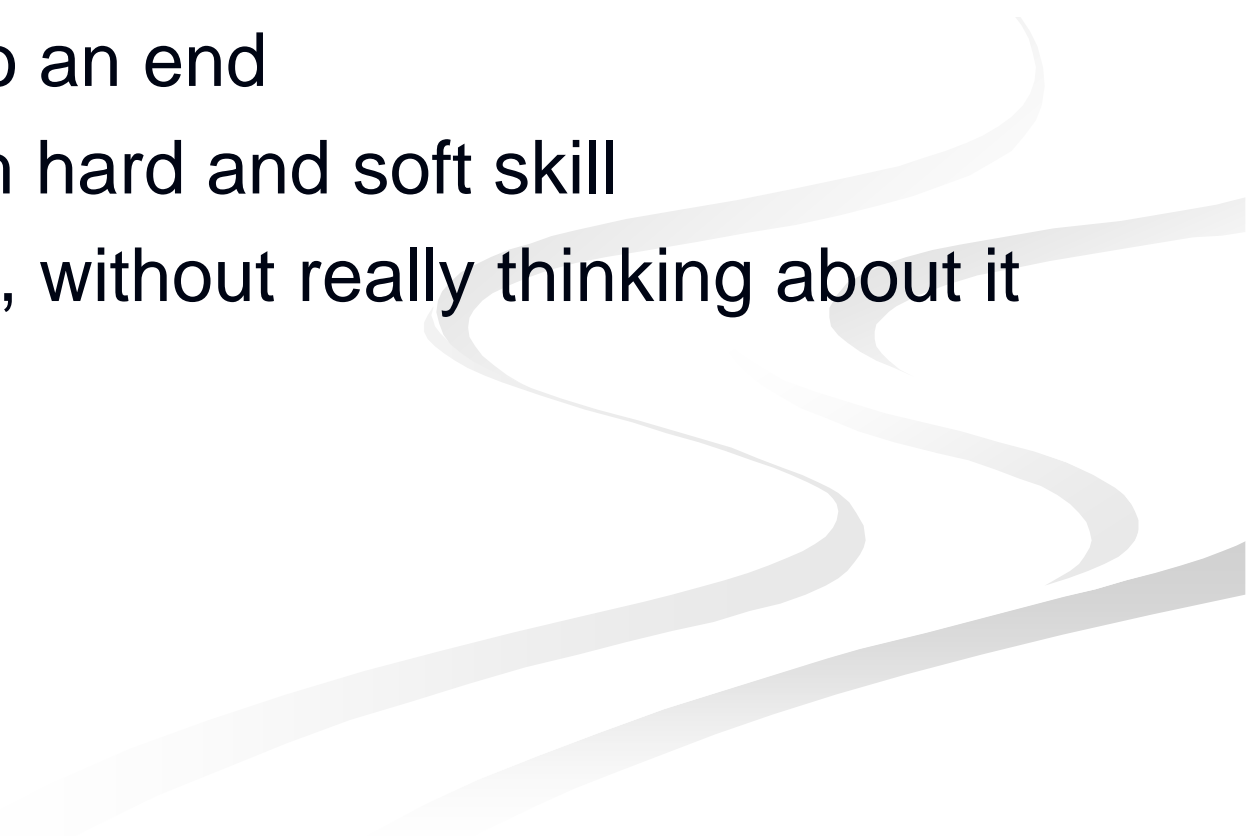
- As post tender negotiations could be a source of corruption, post tender negotiations are banned with immediate effect **except in the case of negotiations with L-1**
- “There should be no post tender negotiations with L1 except in exceptional situations.”
- “Such exceptional situations would include, procurement of proprietary items, items with limited sources of supply and items where there is suspicion of a cartel formation.”- CVC No. 005/CRD/012, Circular No.4/3/07 Dt 3.3.2007

Best value- Getting VFM

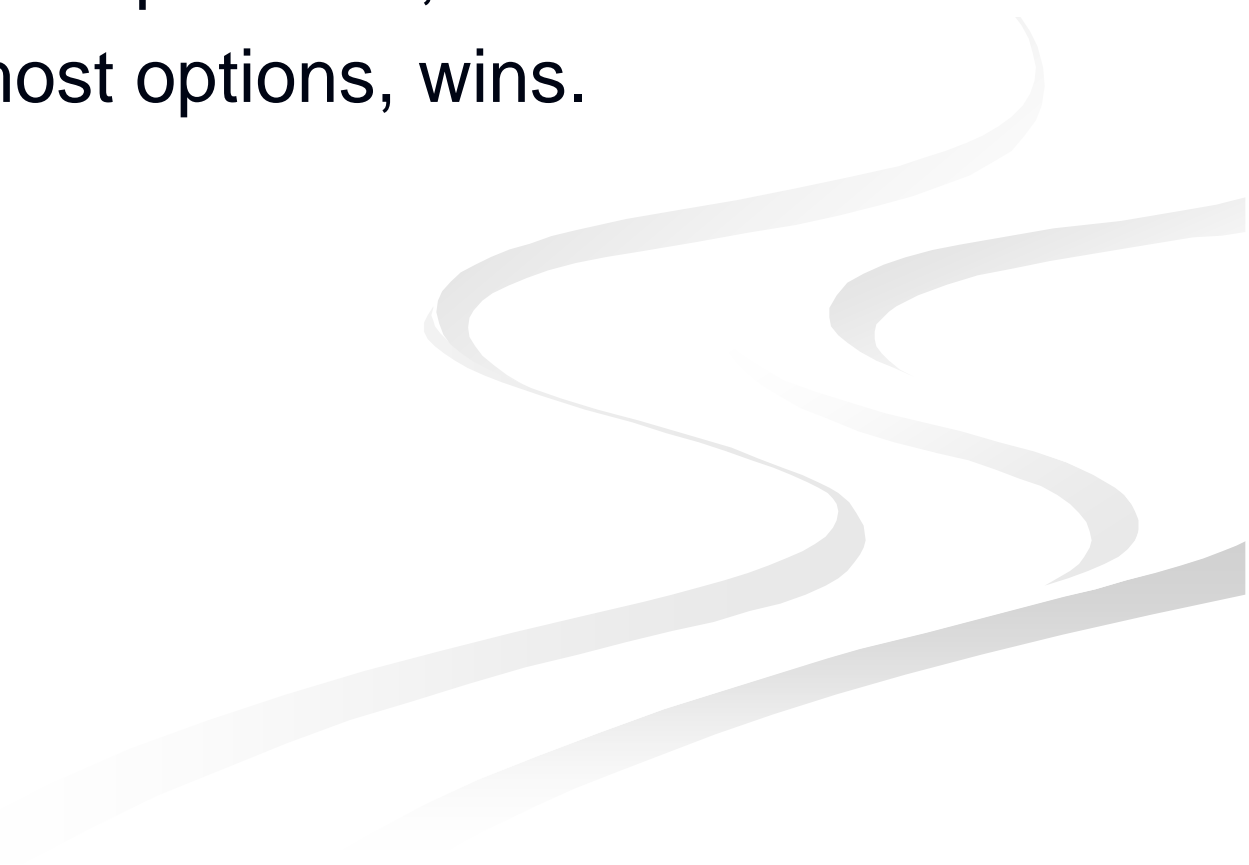


GFR 144 (ii) :
**Specs to exclude superfluous
and non-essential features**

What is negotiation

- Negotiation is:
 - a process
 - a **structured conversation**
 - a means to an end
 - It requires both hard and soft skill
 - We do it often , without really thinking about it
- 

For successful negotiation, you need...

- He, who is good at **communication**, wins
 - He, who has most **information**, wins
 - He, who has most **patience**, wins
 - He, who has most **options**, wins.
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We're judged by how we communicate

There are four ways, and only four ways, in which we have contact with the world. We are evaluated and classified by these contacts:

- **How we look,**
- **What we do,**
- **What we say and**
- **How we say it.**

Dale Carnegie

Communication is never easy

The single biggest problem
in communication is
the illusion
that it has taken place

George Bernard Shaw

We need to improve our communication as

70% of our communication efforts are:

- misunderstood
- misinterpreted
- rejected
- distorted or
- not heard

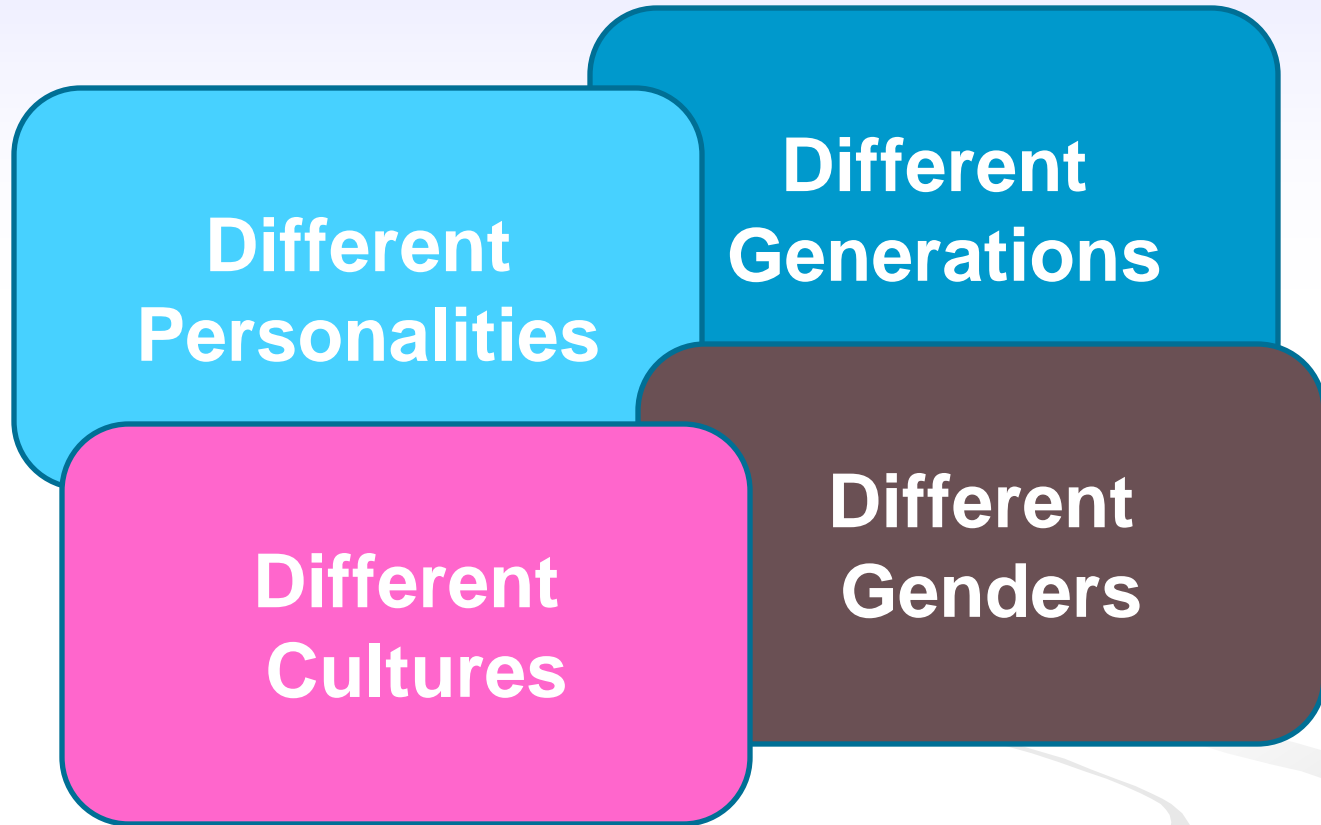
70%

Thank You for reading this sentence



- Finished files are the result of years of scientific study combined with the experience of many years.
- Pls find the Number of 'F' and 'f' in the above sentence

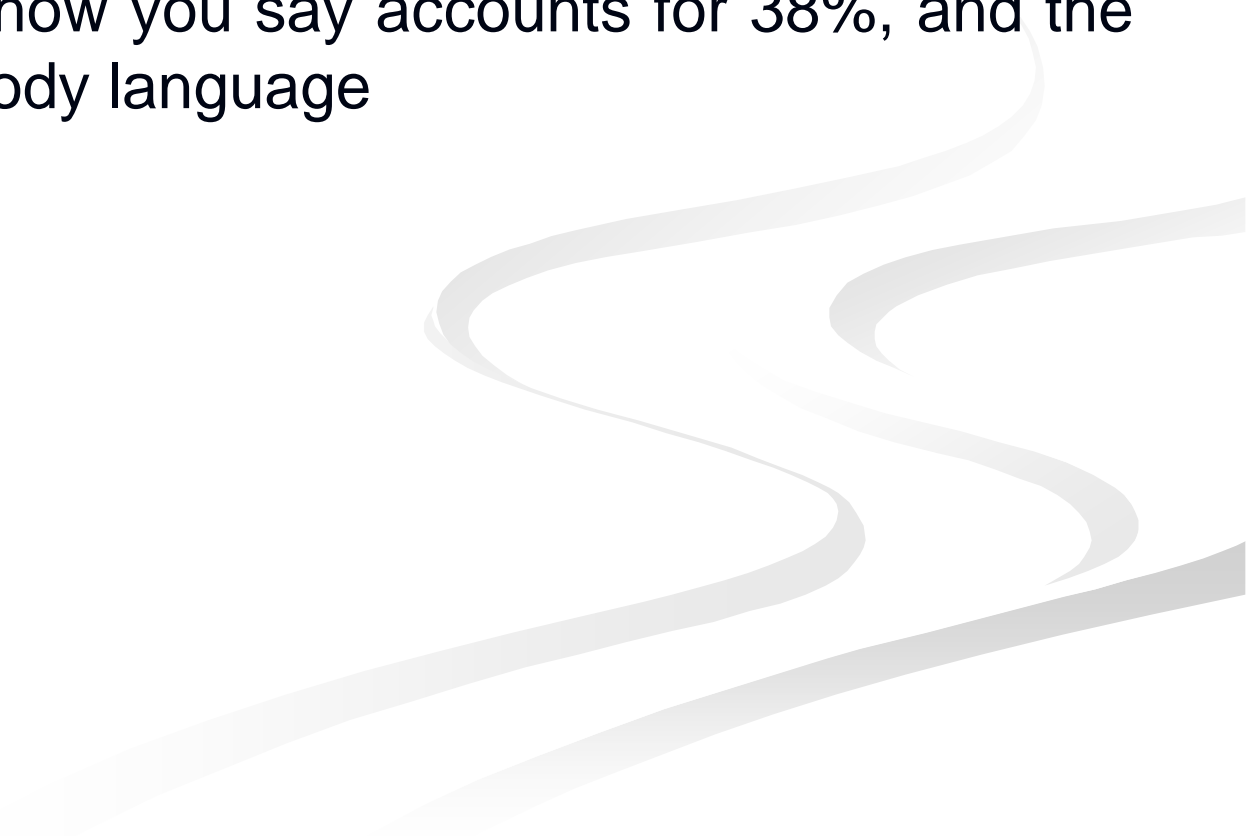
Road-blocs in Communication



- Add to it Stress, Personal issues etc and the problem increases



The 7-38-55 Rule of negotiating

- There is a golden rule of negotiation- called 7-38-55 rule- that says words matter far less than how you deliver them and your body language.
 - Put simply, words make 7% of the impact of your communication, how you say accounts for 38%, and the rest is down to body language
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Visual impact- *How you appear*

**Personal
Grooming**

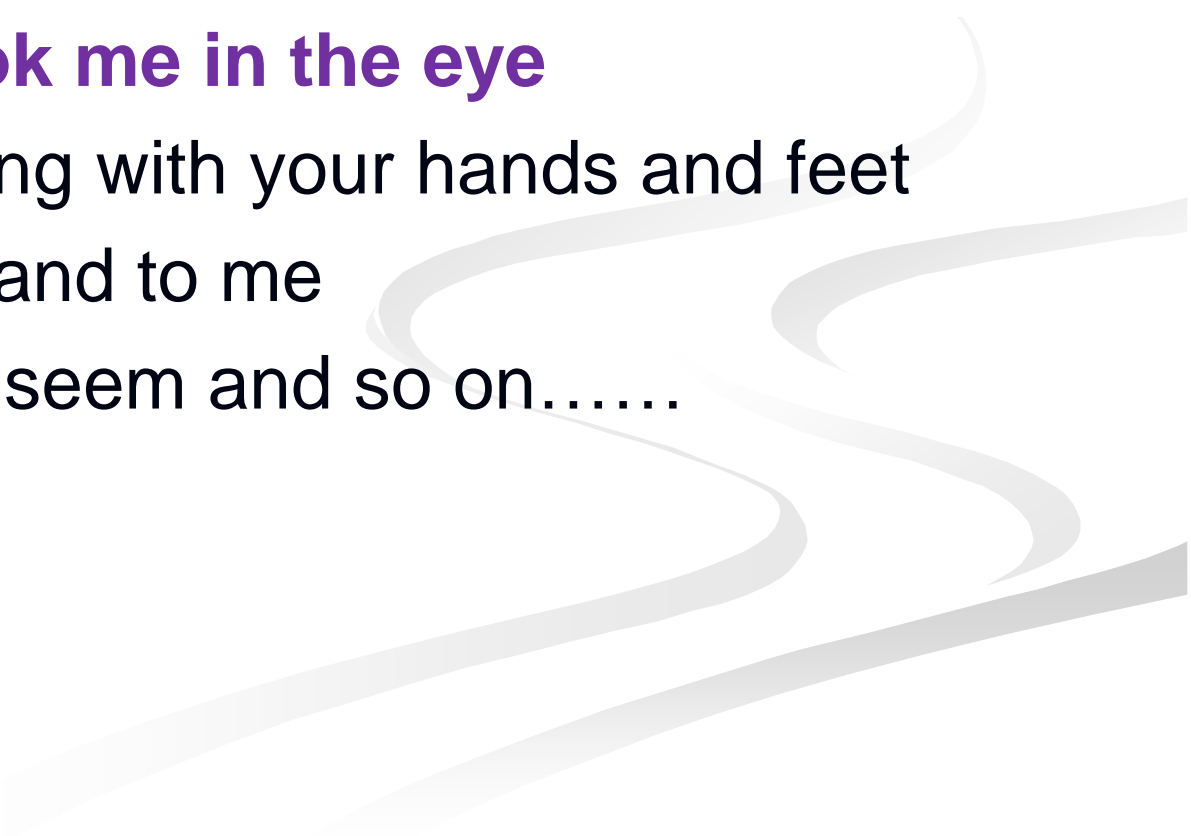
Dress

Stance

**Body
Language**

**Facial
Expressions**

Body language includes

- How are you standing or sitting or walking
 - What are you wearing
 - **Expressions on your face (smile)**
 - **Whether you look me in the eye**
 - What are you doing with your hands and feet
 - How close you stand to me
 - How relaxed you seem and so on.....
- 

Incorrect Posture puts heavy load on spine



Incorrect Posture causes neck pain....



Thumb rules of Communication

- **Keep**
- **It**
- **Short and**
- **Simple**

- **Always**
- **Be**
- **Courteous**

“Genius consists in turning the complicated into the **simple**”- Dwight Eisenhower

Negotiation process

Step 1

Planning- 'Cases are won in advocate's chambers' is the guiding principle in pre-negotiation stage



Step 2

Opening
The parties outline their preferred option



Step 3

Conferring- A series of offers/ suggestions/ new ideas as parties discuss and modify their preferred option



Step 4

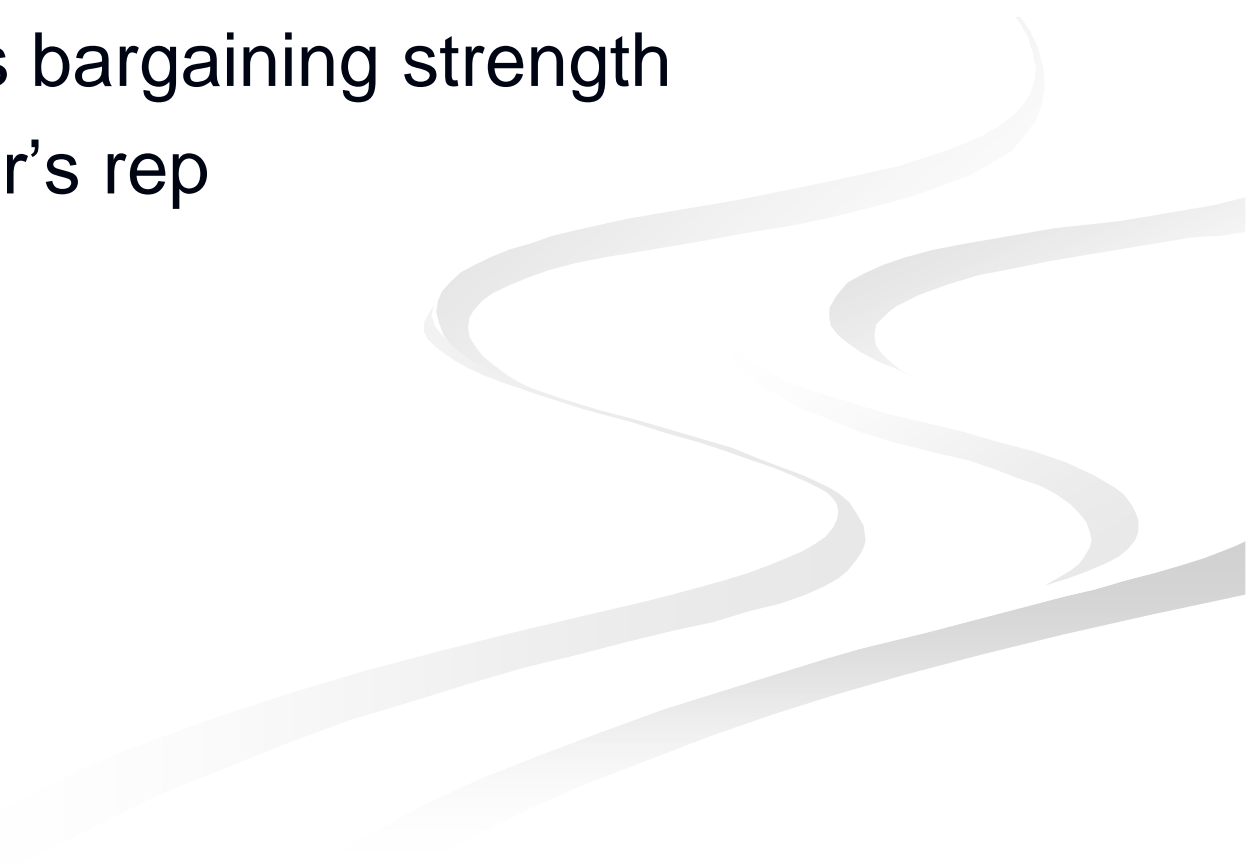
Closing
The parties reach an agreement

The impact of planning

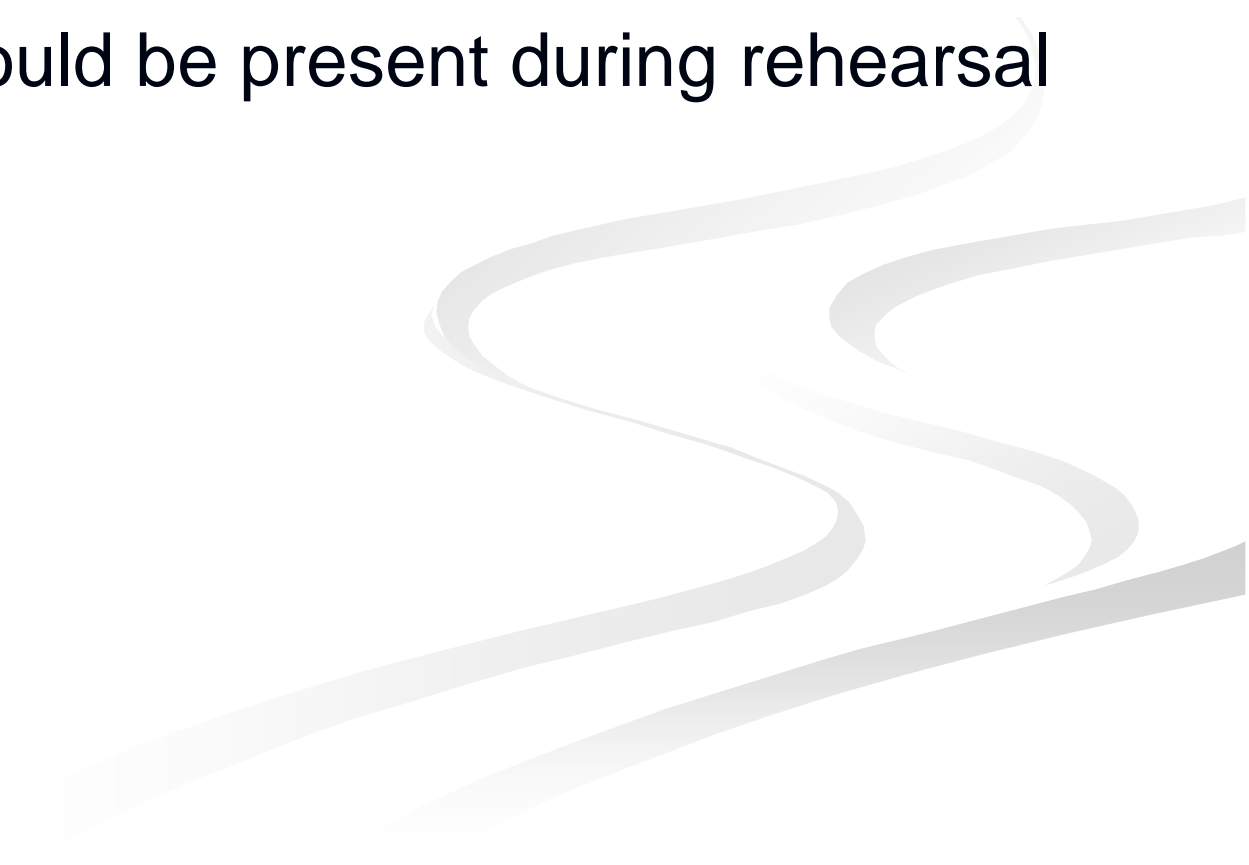
**“IF YOU FAIL TO PLAN,
YOU PLAN TO FAIL.”**

Abraham Lincoln

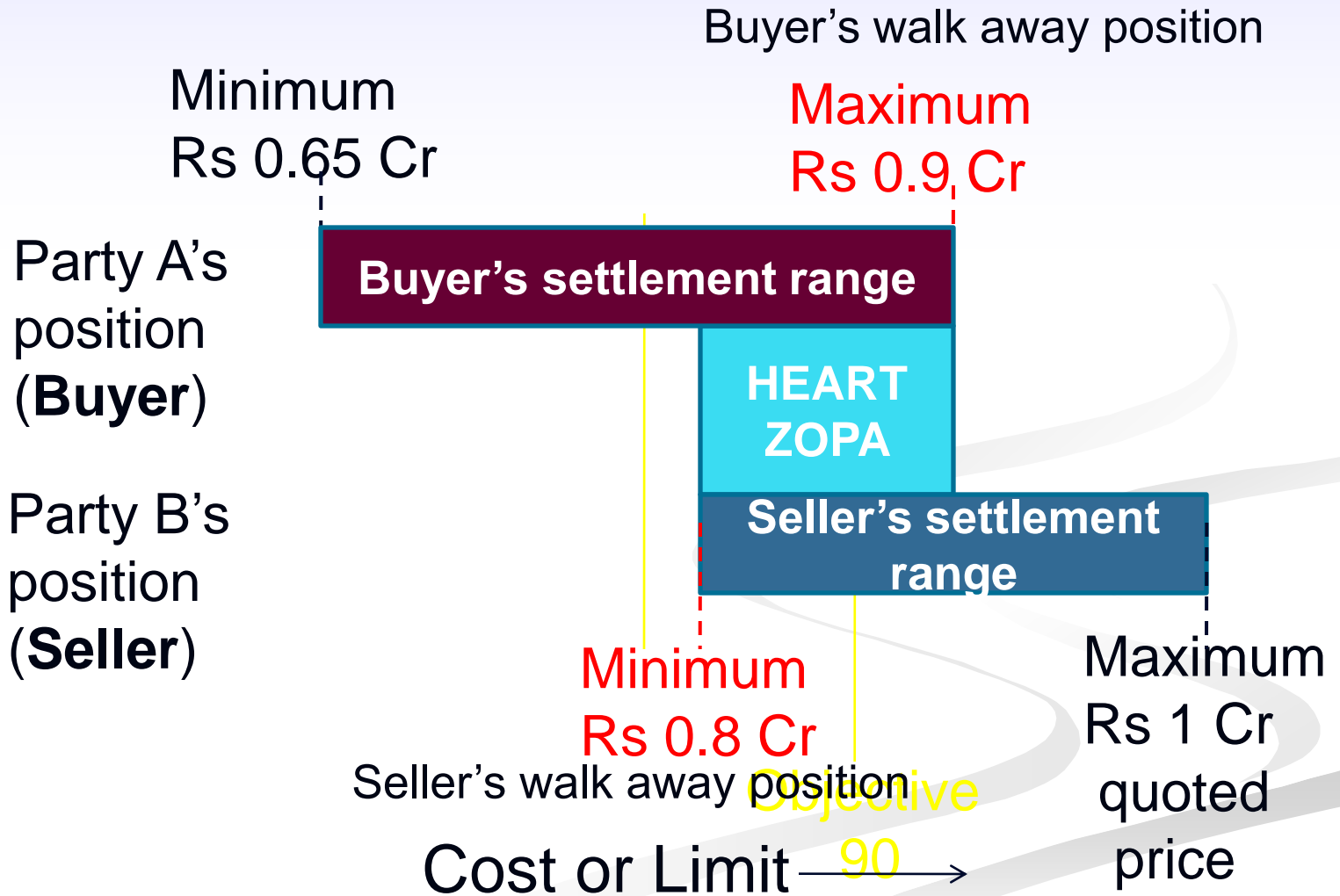
Negotiation-Planning phase

- Know the item
 - Collect information regarding cost
 - Assess your bargaining strength
 - Assess seller's bargaining strength
 - Know the seller's rep
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Negotiation-Planning phase

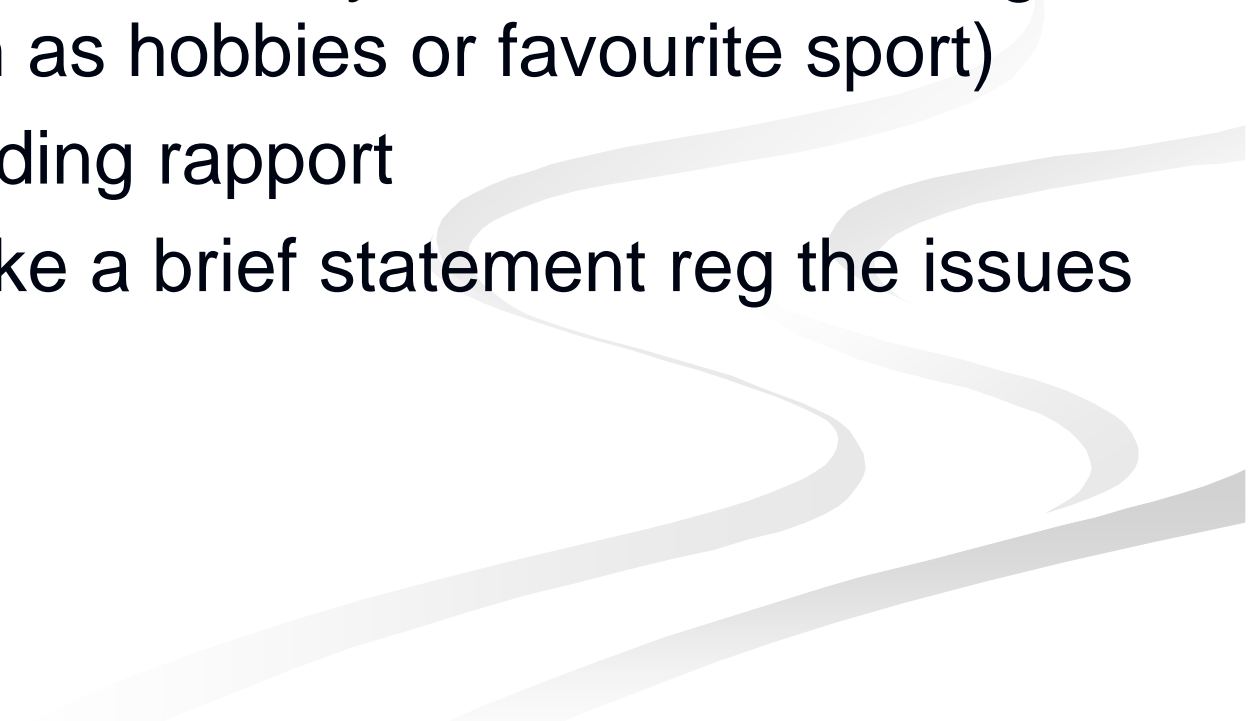
- Decide team composition and roles
 - Be clear about negotional limit
 - For major negotiation have a rehearsal.
 - Consultant should be present during rehearsal
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Negotiating positions- Identifying ZOPA



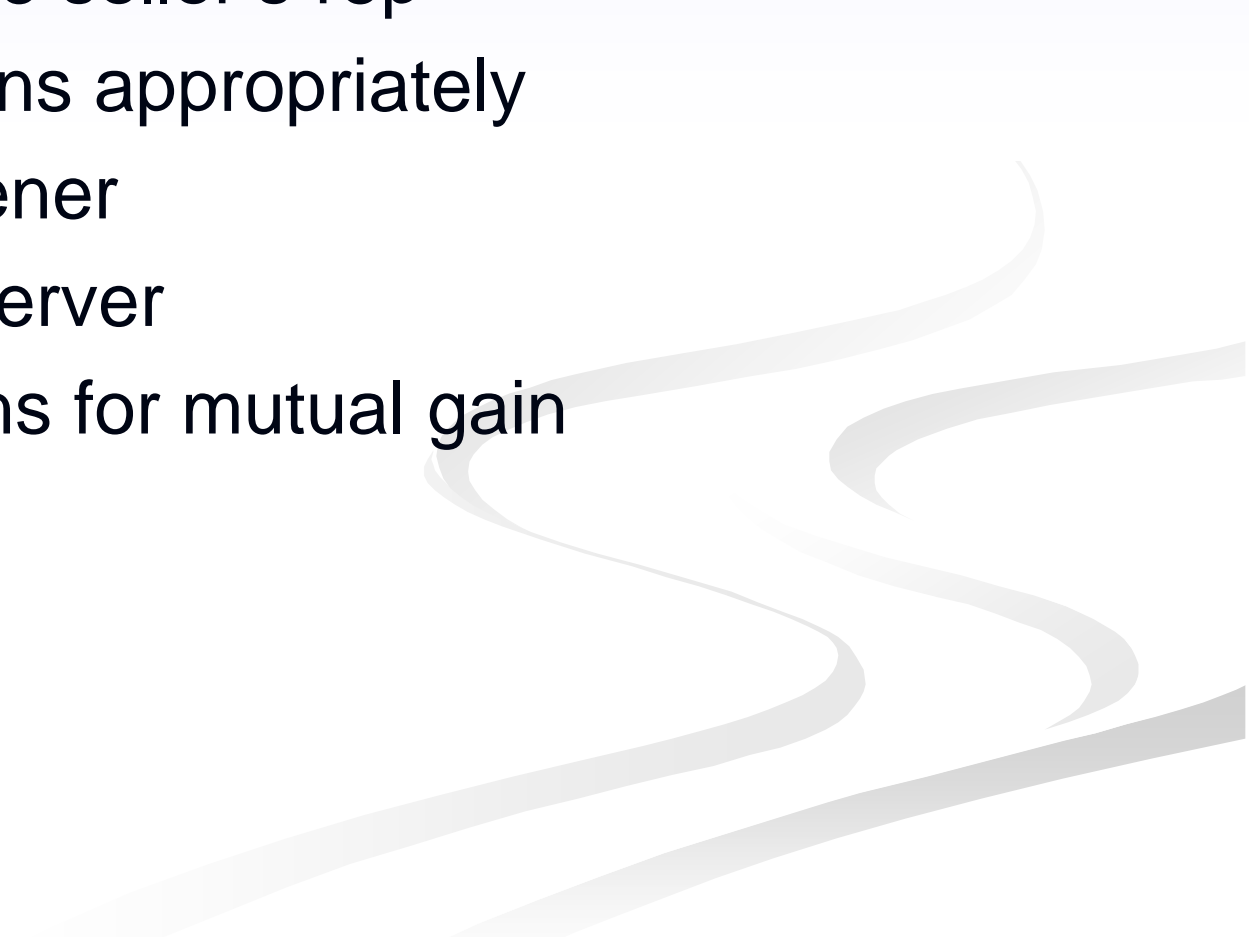
Negotiation

Opening phase

- It's good idea to engage in a little small talk
 - This will set a positive tone
 - You may also find that you have something in common (such as hobbies or favourite sport)
 - This helps building rapport
 - Both sides make a brief statement reg the issues involved
- 

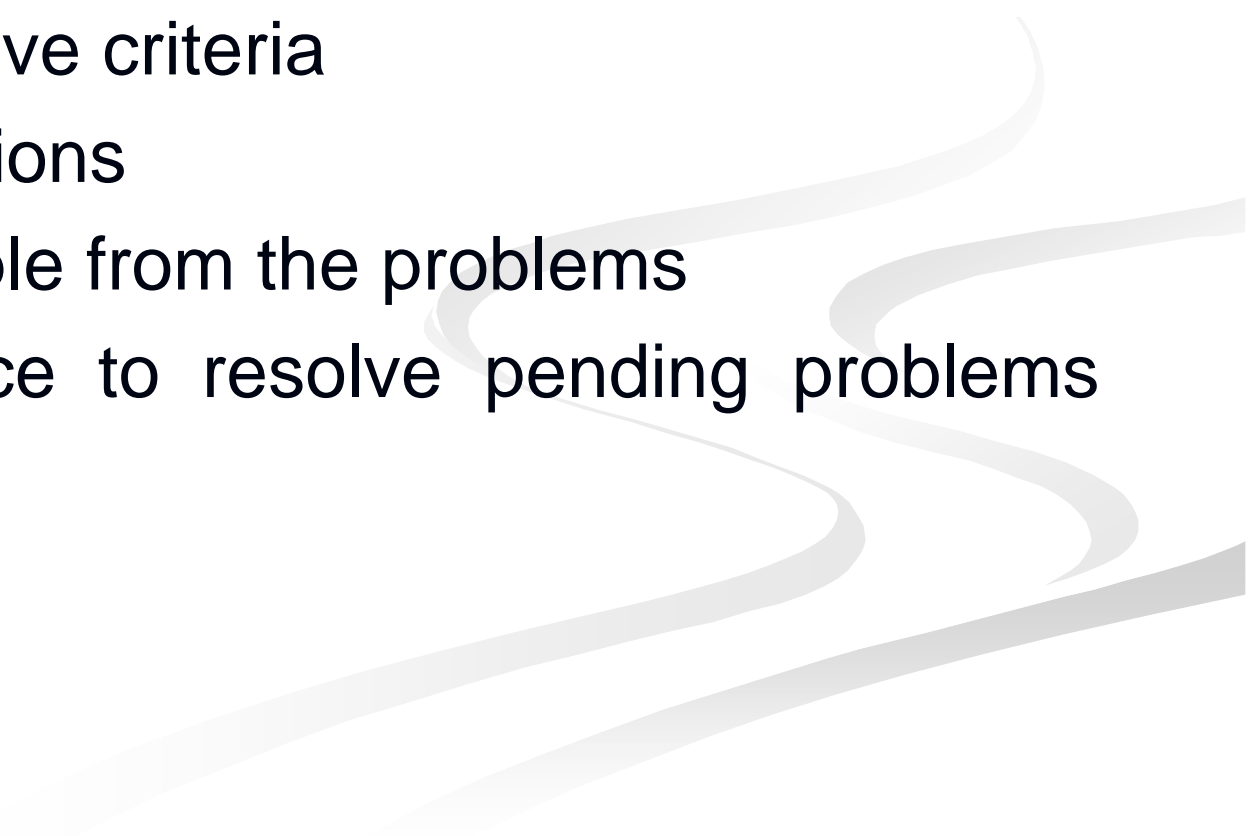
Negotiation-Conferring

Narrowing the differences

- Give **respect** to seller's rep
 - Frame questions appropriately
 - Be a good listener
 - Be a keen observer
 - Develop options for mutual gain
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Negotiation-Conferring

Narrowing the differences

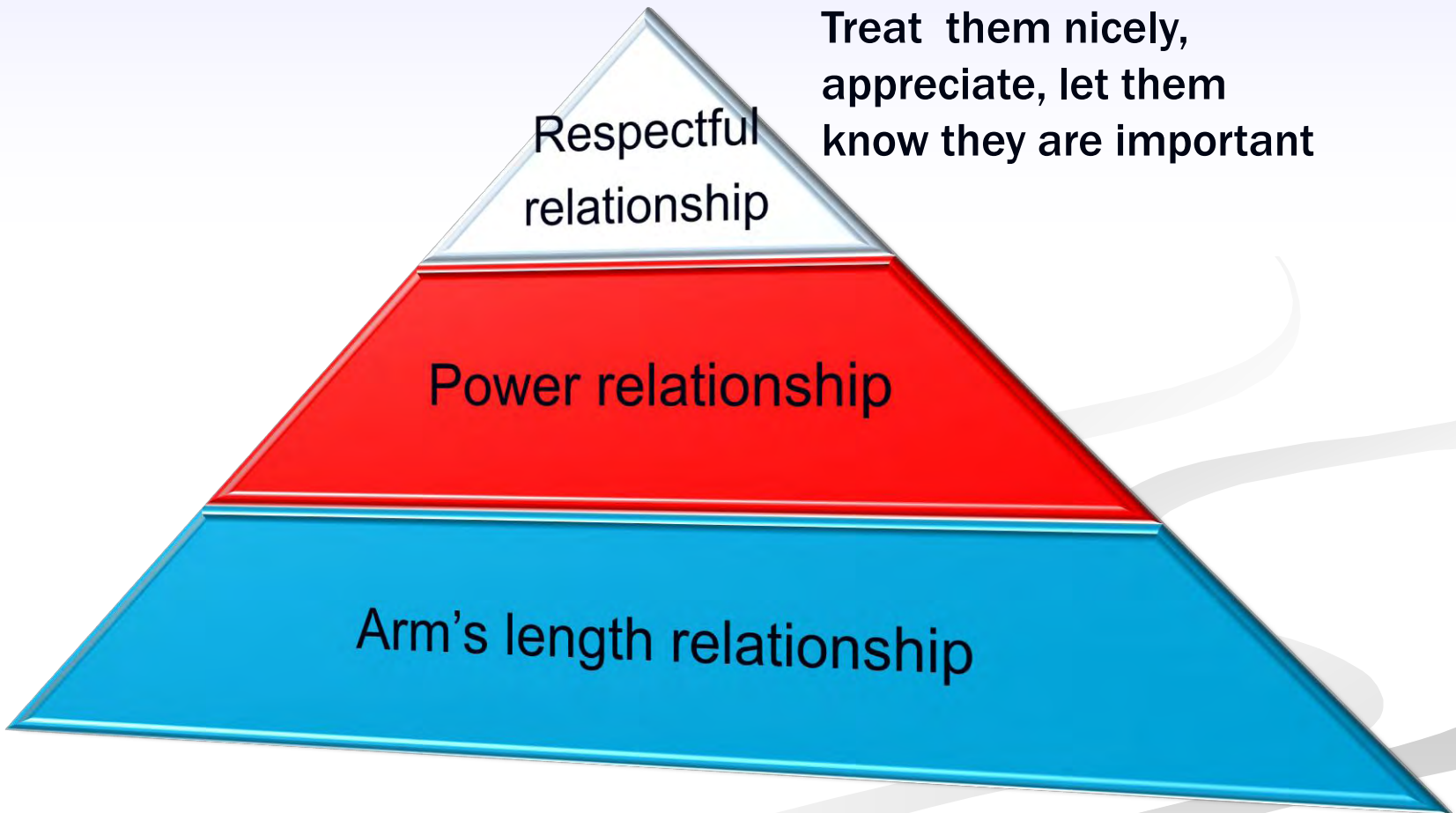
- Use positive statements
 - Focus on interests not on positions
 - Employ objective criteria
 - Provide diversions
 - Separate people from the problems
 - Give assurance to resolve pending problems
- 

Negotiation- Closing

Reaching an agreement

- Be considerate of sellers
 - Make every effort to clinch a satisfactory deal
 - Draft a statement detailing the agreements reached; seek comments (and signature)
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Treat the other party with respect



Respectful
relationship

Treat them nicely,
appreciate, let them
know they are important

Power relationship

Arm's length relationship

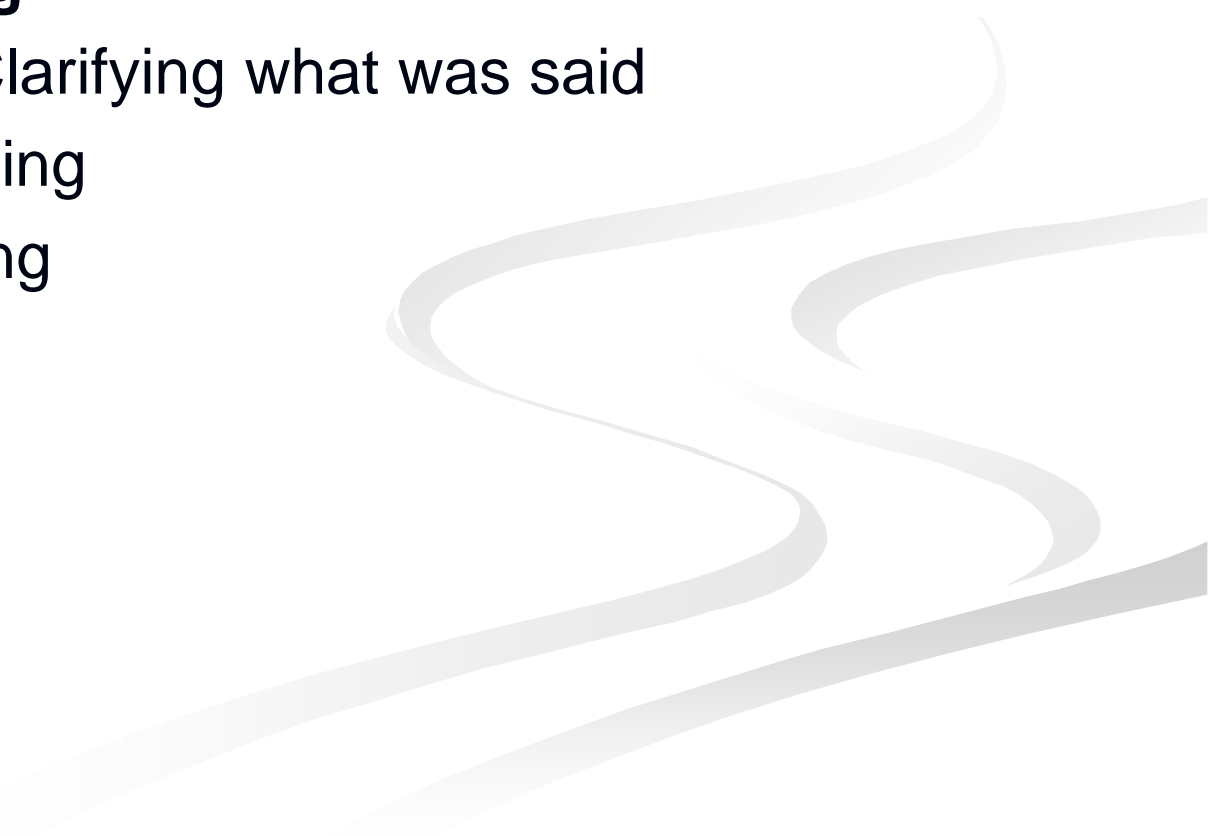
All-important law in human conduct

**Always make the other person
feel important.**

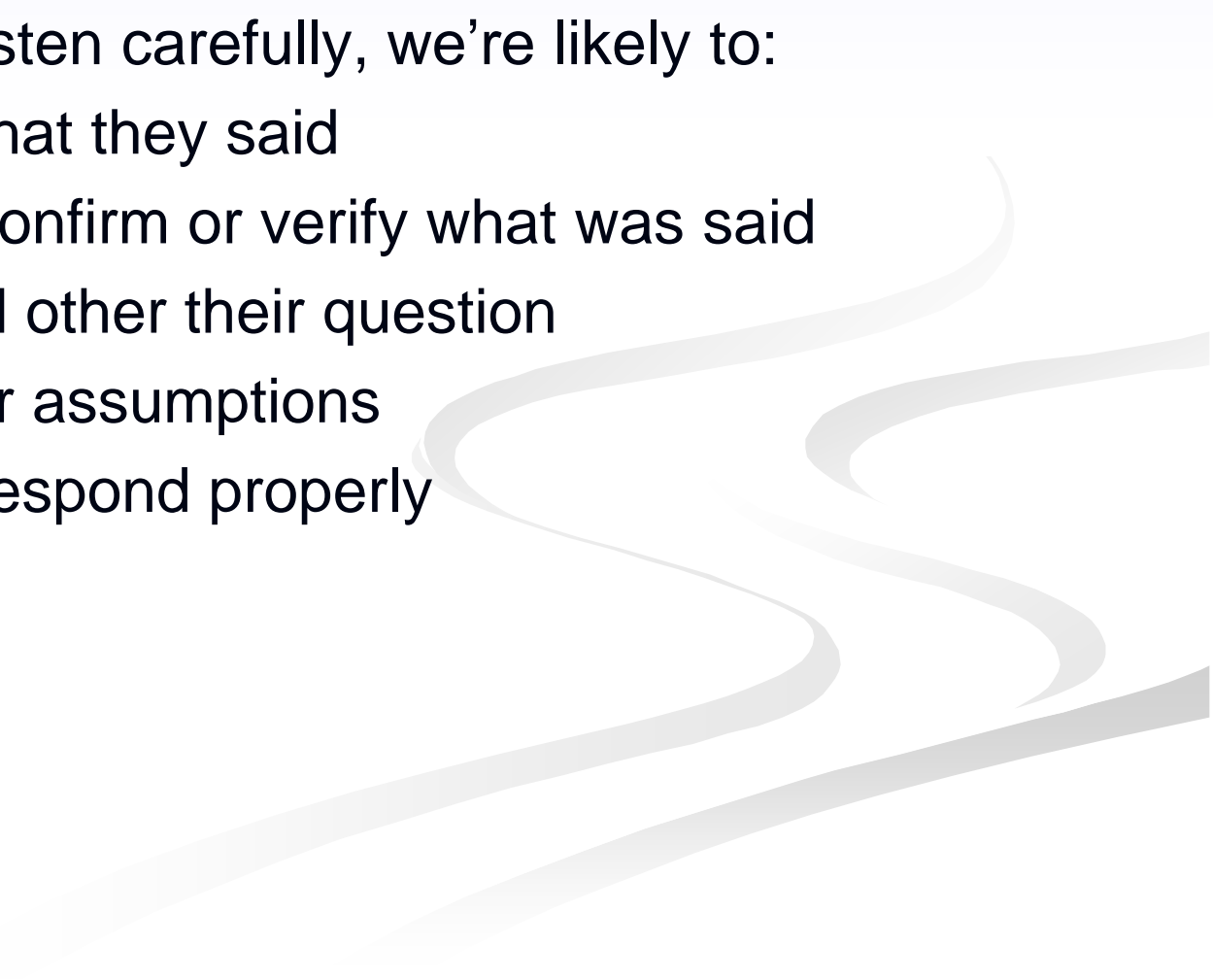
Dale Carnegie

The third phase

Conferring

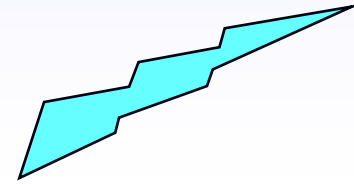
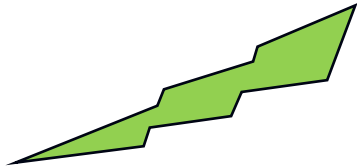
- The emphasis here is two-way communication
 - As you communicate, use these basic skills:
 - **Active listening**
 - Summarizing/ Clarifying what was said
 - Tactful questioning
 - Careful observing
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Active listening

- The **biggest source of mistake** in negotiations is failing to listen
 - When we don't listen carefully, we're likely to:
 - Misinterpret what they said
 - Be unable to confirm or verify what was said
 - Misunderstand other their question
 - Make improper assumptions
 - Be unable to respond properly
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You learn when you listen

**Everyone you will
ever meet**



**Knows something
that you don't**

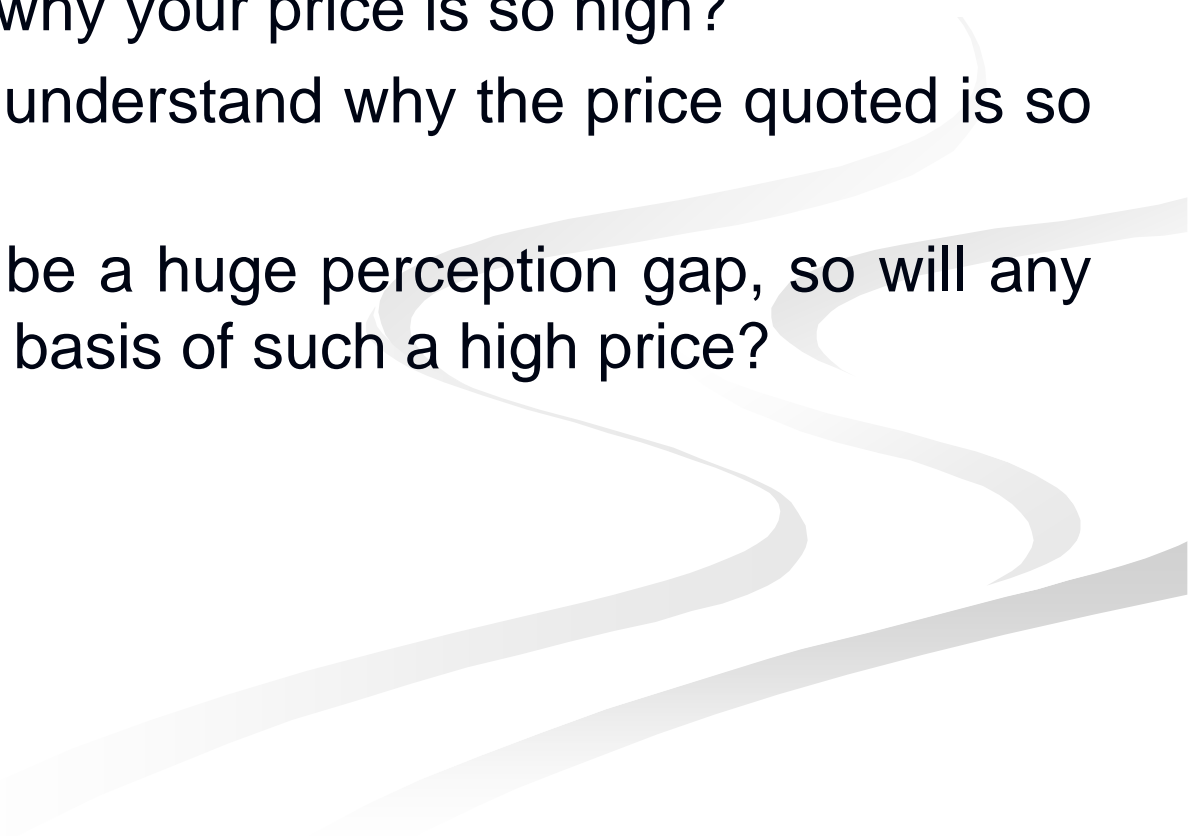
- **Everybody is an expert on something.**

•

Framing

- If you communicate a message in different ways, people receive it in different ways. This effect is called framing (eg two astrologers)
- A advertises that my milk is **97%** fat-free; 'B' advertises that my milk has 1% fat ; Who sells more?
 - It is A who sells more


Framing questions

- The following four questions aimed to get the same information, but framed differently:
 - Why have you quoted such a high price?
 - Will you explain why your price is so high?
 - Will you help us understand why the price quoted is so high?
 - There seems to be a huge perception gap, so will any of you tell us the basis of such a high price?
- 

How e-contracts touch our daily life?

- E-contracts have become so common in our day-to day life that most of the time we do not even recognize that we have entered into one.
- Right from buying vegetables to hiring a cab to buying an airline ticket online, many requirements of our daily life are met by e-contracts

Why do we go in for e-contracts?

- E-contracts have the advantages:
 - In terms of **speed**,
 - In terms of **efficiency**,
 - In terms of **economy** and
 - In terms of **ease of operation**
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What is e-contract?


- E-contract is a contract concluded electronically. It has similar features like a traditional contract wherein goods and services are exchanged for an agreed amount of consideration.
- The only two extra requirements for e-contract are that the contract here takes place through a digital mode of communication and the I T Act (Besides Ind Cont Act etc,) becomes applicable
- Usually, E-contract is not paper-based, but in the electronic form.

Differ between traditional and e-contract?

Traditional Contract	e-Contract
Indian Contract Act, 1872	Indian Contract Act, 1872 ; IT Act, 2000
Written/ Oral	On line/ Comp generated
Hand-written signature	Digital signatre

- S-10 of **IT Act** gives legislative authority to e-contract. **Digital signature** is required to make the e-contract valid in the eyes law.

Formation of e-contract

- Offer
 - Acceptance
 - Intention to create legal relationship
 - Lawful consideration
 - Competency of parties
 - Free consent of parties
 - Lawful object
 - Certainty and possibility of performance
 - Legal formalities
- 
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What is cryptography?

- Cryptography is the practice and study of techniques for **securing** communication and data in the presence of adversaries
- It involves creating codes that allows information to be kept secret. The pre-fix “**crypto**” means **secret, hidden** or vault and the suffix “graphy” stands for writing.
- It helps us in achieving the four objectives, namely confidentiality, integrity, authentication and non-repudiation

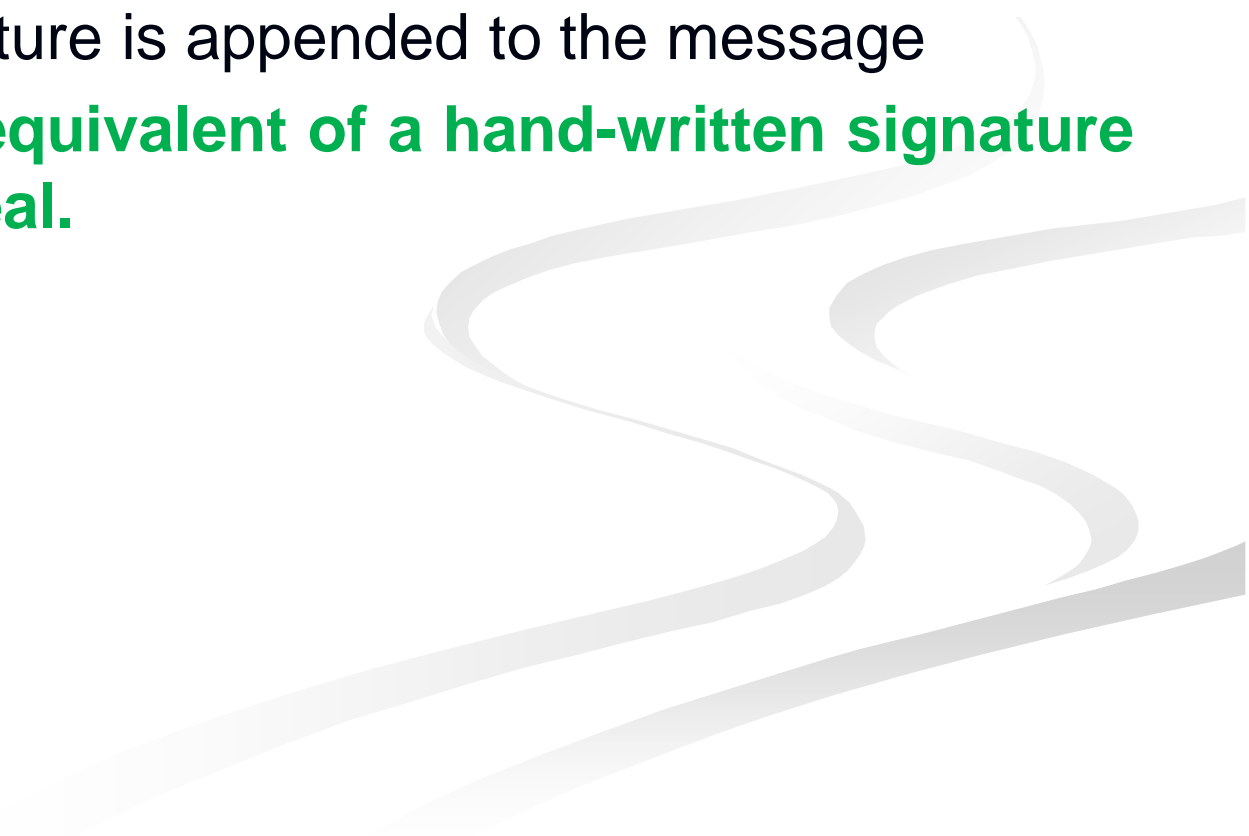
Caesar's Cipher

- Each letter in a message was substituted by another that is 3 letters away, ie A becomes D, T becomes W, C becomes F, K becomes N etc
- ATTACK AT DAWN becomes:
- **DWWDFN DW GDZQ**

Asymmetric key cryptography

- Uses a pair of keys – **Private key and Public key**
- Message encrypted with one key can **only** be decrypted with the other Key in the key pair
- Keys are mathematically related, yet it is computationally **infeasible to deduce** one of the keys from the other, ie one may not be able to derive the private key from the public key and other way around
- Key pair is issued to an individual and is used to **uniquely identify** that individual through the public key of that key pair

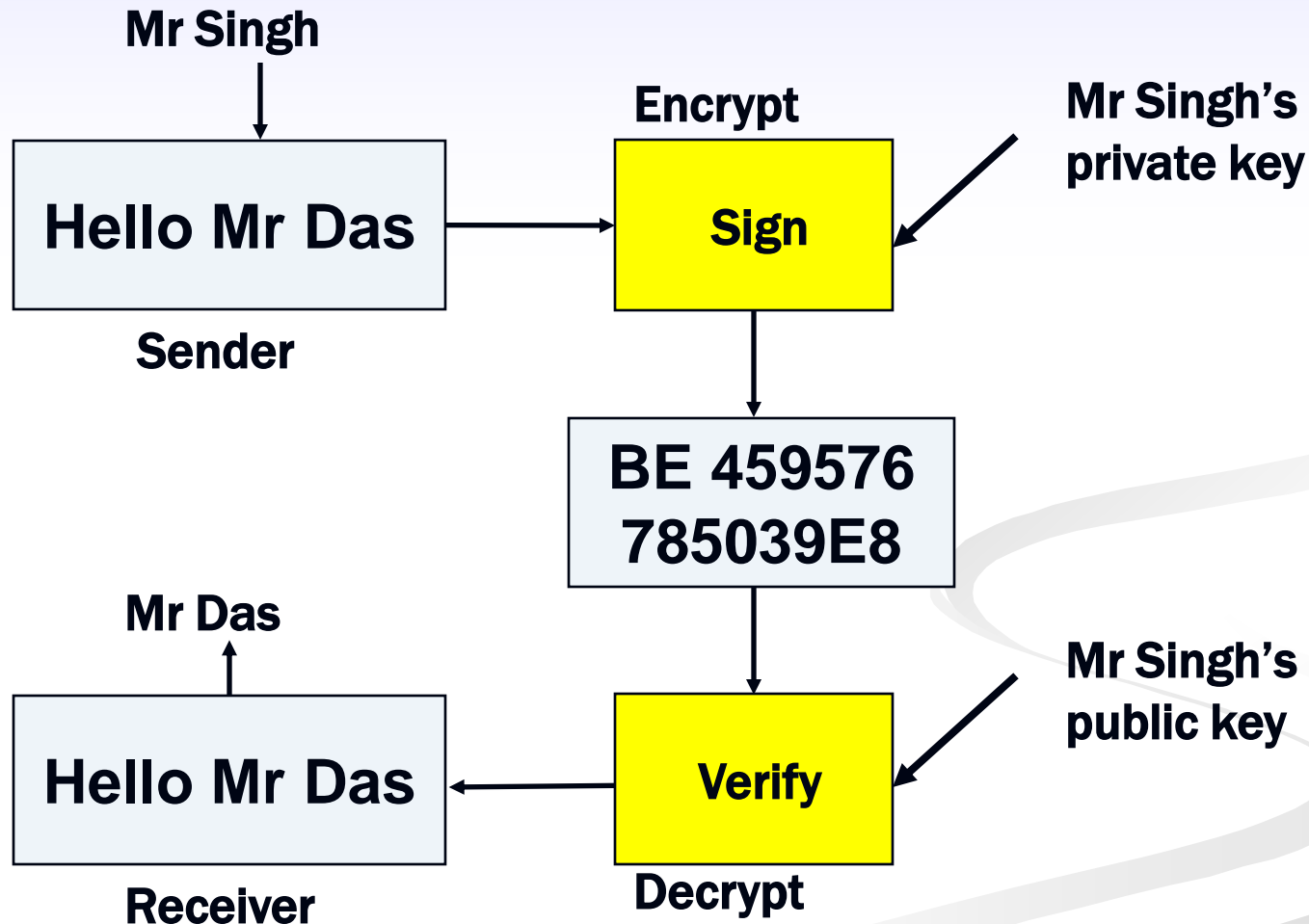
What is Digital signature

- Digital signature for a message means encryption of the message digest using the **private key** of the signer.
 - The private key is **unique** to the person or entity and remains with the person or entity.
 - This digital signature is appended to the message
 - **It is the digital equivalent of a hand-written signature or a stamped seal.**
- 

Digital signature Certificate

- Digital certificate is your internet passport
- Digital certificate come with 1 or 2 yrs validity
- Can be procured easily
- List of licensed Certifying Authority (CAs) include
 - TCS
 - N CODE (GNFC)
 - SAFESCRYPT
 - MTNL
 - NIC

How does Digital signature work?



How do digital signature work?

- Mr Singh signs using his private key. Mr Das receives the message along with a copy Singh's public key.
- IF Mr Singh's public key can't decrypt the signature, it means the signature isn't Singh's or has been changed after it was signed. This checks the authenticity of message
- To protect the integrity of the signature, PKI requires that the keys be created, conducted and saved in a secure manner and often requires services of a reliable Certificate Authority

**Thank you so much
for
active participation**

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