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INSTITUTE FOR SUPPLY MANAGEMENT

ISM-INDIA

CONTRACT MANAGEMENT

(Pre-award and Post Award Contract Management)

Krishan K. Batra

President & CEO

ISM-INDIA

LEARNING OBJECTIVES

- ❖ Role of Procurement in Contract Writing
- ❖ Checklist for T&C
- ❖ What is Contract & its Formation?
- ❖ Types of Contracts & their usage.
- ❖ Understanding various Terms & Conditions
- ❖ Learn INCOTERMS 2010
- ❖ Remedies for poor performance/ non-compliance
- ❖ Dispute/Conflict Resolution (ADR)
- ❖ Applicable Contract Law and Acts
- ❖ Understanding the concept of Arbitration
- ❖ Overview of SLA &KPI



Key Objective: Mitigate Risks and Ensure Cost Effective & Efficient Contract Performance.

Role of Procurement in Contract Writing



- ❖ My experience indicates that many of problems in Contract Management can be attributed to contract formation stage.
- ❖ Start at RFX Stage (Writing Specs, Quality Requirements, Logistics, Payment Provisions, Commercial T&C etc.)
- ❖ There is really no Boilerplate that can serve all transactions.
- ❖ Templates can save time but can be risky if not properly utilized.
- ❖ Use a Checklist to ensure all key issues are covered

Checklist for Recommended Minimum T&C



- ❖ Scope & Description
- ❖ Duration of the Contract
- ❖ Price (What is included, Tax etc.)
- ❖ Delivery (When, Where, Who pays etc.)
- ❖ Inspection (Where, When, Acceptance)
- ❖ Warranty (When Commenced, How Long)
- ❖ Payment (When Due, Prompt Payment Terms)
- ❖ Damages & Liabilities (Indemnification, Insurance)
- ❖ Disputes (How to resolve, Mediation, Arbitration)
- ❖ Termination (For Convenience, For default of Seller)
- ❖ Environmental Compliance
- ❖ Intellectual Property (Patents, Copyrights, Trade Secrets)

What is Contract?



- ❖ A legally binding agreement between two or more persons which the courts will enforce
- ❖ Generates rights and obligations that may be enforced by courts
- ❖ Agreement arises as a result of offer and acceptance

INDIAN CONTRACT ACT 1872



- ❖ The Indian Contract Act, 1872 defines the term “Contract” under its section 2 (h) as “An agreement enforceable by law”. In other words, we can say that a contract is anything that is an agreement and enforceable by the law of the land.
- ❖ Act lays down the principles of **Formation, Performance and Enforceability of the Contracts.**



Elements of Contracting



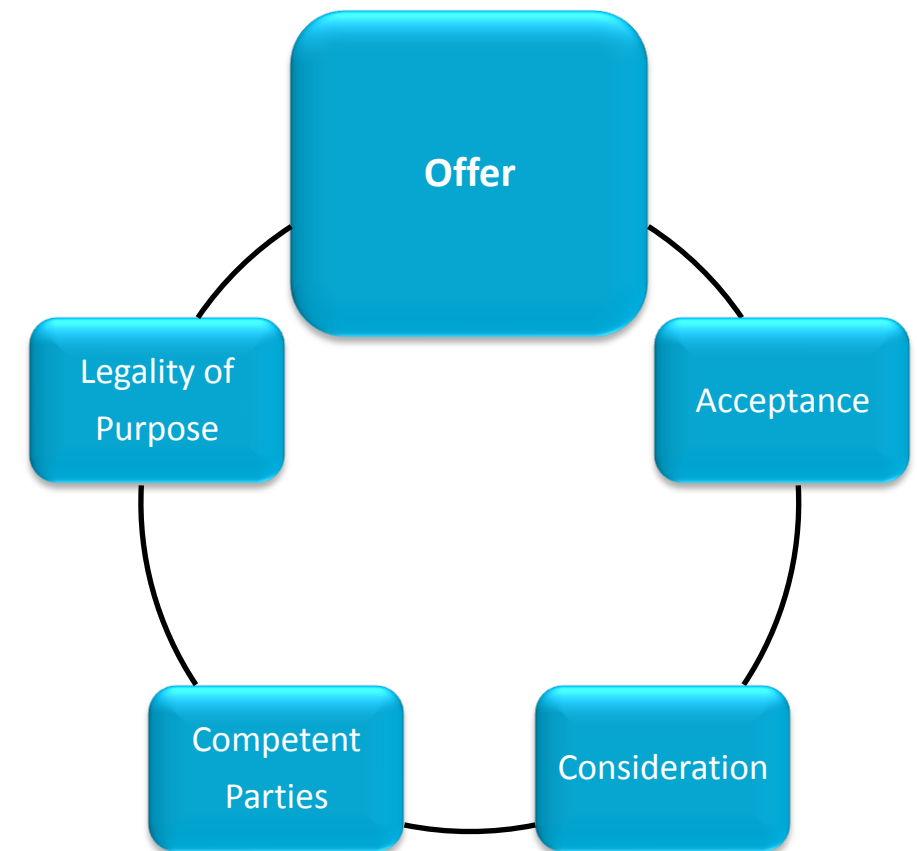
- ❖ Offer
- ❖ Acceptance
- ❖ Consideration
- ❖ Competent Parties
- ❖ Legality of Purpose

Elements of a Contract: Offer



An *offer* is a proposal to make a contract; a binding expression of interest and willingness to create a contractual relationship usually including certain terms.

- ❖ Intentional invitation to "come do business with us on these terms."
- ❖ A promise made to another party that if the terms proposed are satisfactory, there will be a contract.
- ❖ A legal commitment to the other party to form a contract if that person/organization agrees.

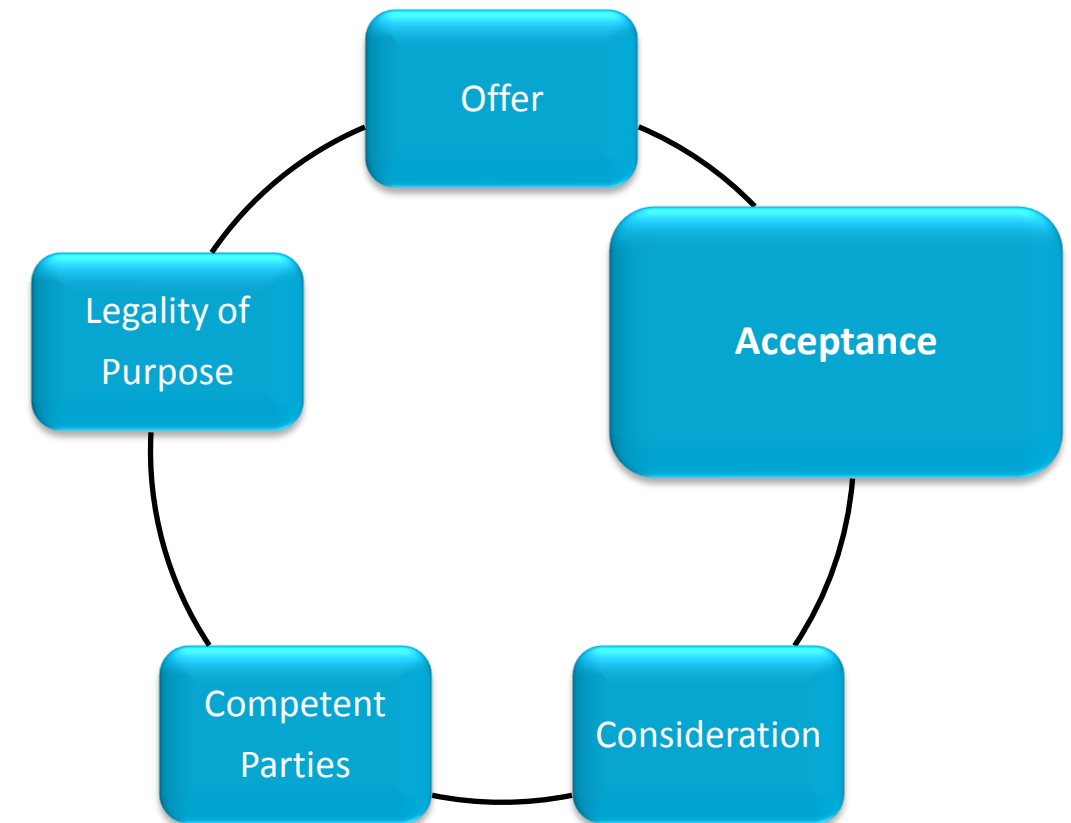


Elements of a Contract: Acceptance



An **acceptance** of an offer is the indication of an offeree to be bound by the terms of an offer; may be by communication or behavior. (*ISM Glossary, 2014*)

- A contract must result from the mutual agreement of the parties to the contract.
- Mutual assent is often reflected in an offer made by one party (the offeror) and the unconditional acceptance of that offer by another party (the offeree).
- Preliminary discussions and correspondence about price, quality, quantity and so forth do not constitute a contract, nor do price quotations or advertisements..

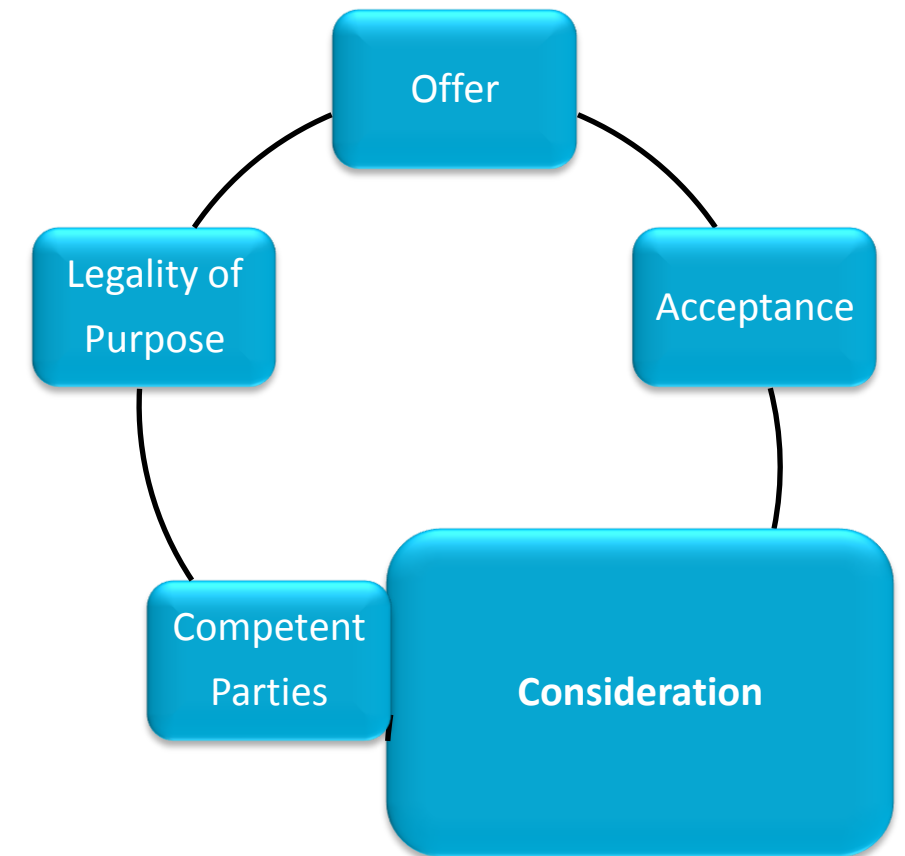




Elements of a Contract: Consideration

Consideration refers to a legal requirement for creation of a valid contract involving an exchange of value for value.

- The value may take the form of money, goods, an act or service, an exclusive dealing, promise or the giving up of an existing right.

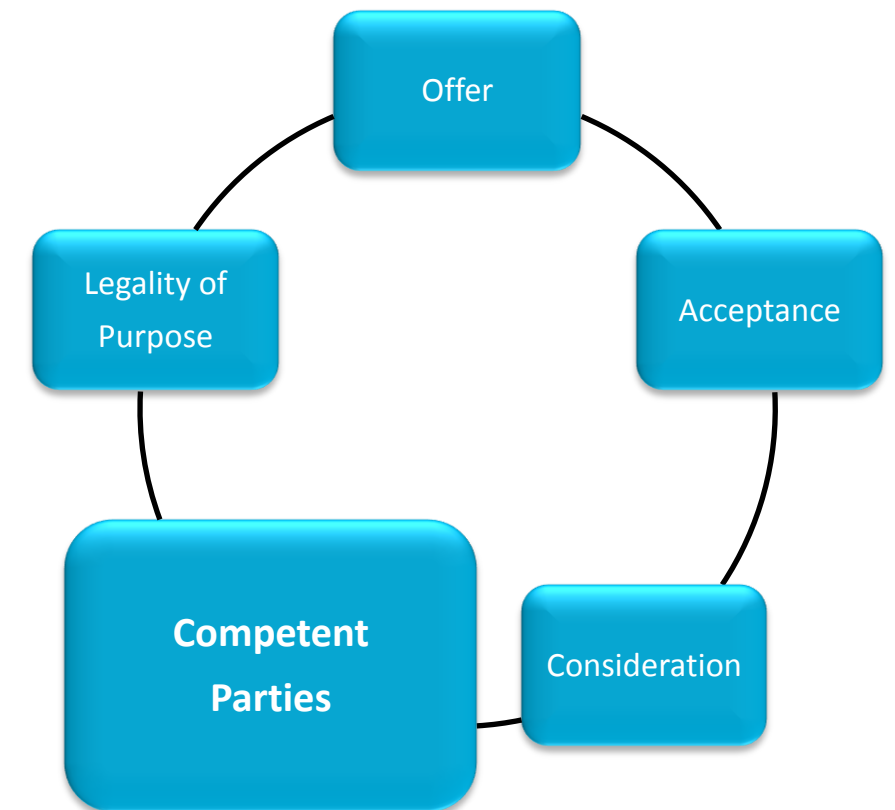




Elements of a Contract: Competent Parties

Competent parties must be capable of contracting. That is, they must not have been incapacitated at the time of agreement, as would be the case with a minor, someone with mental illness or someone who is intoxicated. If a party is acting as agent for another person or organization, that party must have legal authorization to do so.

- Age (18 years in most jurisdictions)
- Mental capacity (requisite understanding of the transaction);
- Authority (acting for oneself or on behalf of another).



Elements of a Contract: Legality of Purpose

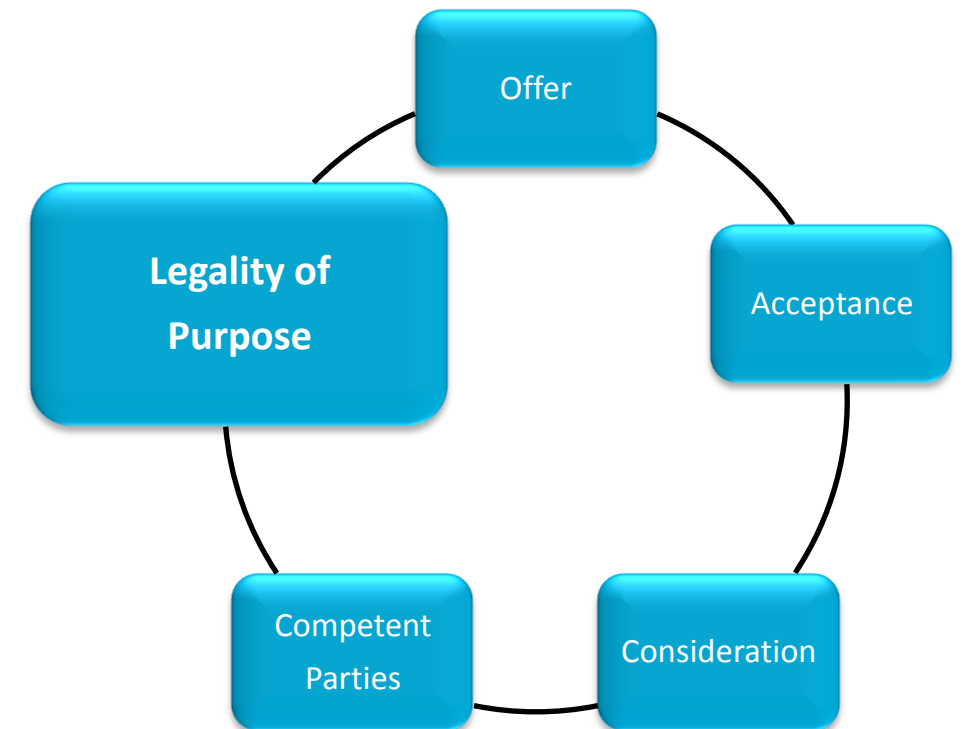


The *legality of purpose* requirement for creation of a valid contract that it be consistent with federal, state or provincial constitutions and not in violation of legal statutes or public policy.

Both the subject of a contract and the consideration offered must be legal.

Contracts that do not meet these requirements are not enforceable.

- What are some examples of contracts that do not meet these requirements?



Confusion of Buying vs. Contracting



- ❖ We use sometimes “PO or Contract Order or Purchase Agreement or sometimes Contract”.
- ❖ When one party is prepared to pay another party based on conditions, the parties enter into a CONTRACT.
- ❖ Broadly there is no fundamental differences between Purchasing & Contracting.
- ❖ Important aspects such as price stability, terms of payments, suppliers’ vulnerability, delivery date etc. should be clarified.

PO Confirmations & Acknowledgements



- ❖ **PO confirmation of a verbal agreement**
Establishes a “writing” under the Statute of Frauds Avoids possible ambiguity in the contract
- ❖ **Unilateral contract**
Involves an offer that is accepted through performance
- ❖ **Bilateral contract**
Involves two promises, an offer and an acceptance e.g., a purchase order followed by a formal acceptance



Offer + Acceptance = Agreement

- ❖ The second element required to create a valid contract is an offer, and an acceptance of the offer.
- ❖ An offer is a proposal. When accepted it creates a legally binding agreement—a contract.
- ❖ An offer needs to be distinguished from an ‘invitation to treat’.

Rules with respect to offer



- ❖ An offer is not required to be in any particular form.
- ❖ The person who makes the offer is called the offeror; the person to whom the offer is made is the offeree.
- ❖ An offer can be made to one or more persons, even the whole world.
- ❖ All terms of an offer must be communicated to the offeree.

Termination of an offer



❖ Offer will lapse if:

- acceptance is not made within the time stated, or
- where no time is stated, if the acceptance is not made within a reasonable time, or
- a counter-offer is made.

❖ Offer can be revoked at any time:

- before acceptance, and
- if communicated to the offeree.

❖ Offer will be terminated if rejected.

❖ Death of the offeree or offeror may terminate an offer.

❖ Offer can be terminated if a condition precedent is not met.

Rules of Acceptance



1. Acceptance must be communicated to offeror by an authorised person.
 - ❖ Exception: offeror waives the right to receive notification of acceptance.
 - ❖ Communication by post (postal rule): if it is agreed that post is the method of acceptance, and the letter is stamped and addressed correctly, acceptance occurs when posted.
2. Acceptance must comply with the conditions of the offer.
3. Acceptance must be in reliance of knowledge of an offer.
4. Acceptance must be unqualified.
5. Acceptance can only be made by the offeree.
6. Acceptance must take place within a prescribed time or within a reasonable time.

Consideration:

The Importance of the “Bargained Exchange.”



- ❖ Consideration must be mutual. Both parties must receive something of value.
- ❖ Involvement of money is not required.
- ❖ Contracts vs. Gifts



Consideration vs. Gifts



- ❖ In contract law consideration is concerned with the bargain of the contract. A contract is based on an exchange of promises. Each party to a contract must be both a promisor and a promisee. They must each receive a benefit and each suffer a detriment. This benefit or detriment is referred to as consideration.
- ❖ Consideration must be something of value in the eyes of the law - This excludes promises of love and affection, gaming and betting etc. A one sided promise which is not sued by consideration is a gift.
- ❖ The law does not enforce gifts unless they are made by deed.

RULES OF CONSIDERATION



1. Can be present or future, but not past.
2. Must be of some value, but need not be adequate.
3. Must be definite, not vague.
4. Must be capable of being performed.
5. Must not be illegal or unlawful.
6. Must be more than a person is already required to do, in terms of:
 - a) requirement by law
 - b) compliance with contract already existing.
7. Must move from the promisee.
8. Cannot be satisfied by part payment of a debt.
9. Essential in all simple contracts.



Writing The Contract

- ❖ **Basic Core Contract Boilerplate**
- ❖ **Statement of Work**
 - Services to be provided (What)
 - Manner of service Provision (How)
- ❖ **Performance Specifications**
 - Measures
 - Measurement Methodology
- ❖ **Method of Payment (How & When)**
- ❖ **Special Provisions**

Termination of the Contract



Contracts can be terminated (discharged) in four ways:

- ❖ By Performance.
- ❖ By Agreement of the Parties.
- ❖ By Operation of Law.
- ❖ By Nonperformance.

Contract Type and the Profit Factor...



❖ Fixed Price Arrangements

Generally Involve Profit Discussions

❖ Cost Reimbursable Arrangements

Generally Involve Fee Discussions

❖ Time & Material

Elements of both Fixed Price (Established Firm Labor Rate) & CR (only what is used)

Fixed Price Contract



❖ *Fixed-price*: a contract term which indicates that the price is set at a certain amount and is not subject to change (unless the purchaser requests a change in specifications, delivery or terms).

- Firm-fixed price
- Firm-fixed price with escalation
- Fixed-price with redetermination
- Fixed-price with incentives
- Fixed-price with level of effort

Types of Fixed Price Contracts



Fixed Price With Redetermination

- When there are many uncertain variables to contend with, the buyer and supplier may choose to revisit the price for the purpose of re-determining it at a later point in time.
- The supplier is protected against future uncertainties, but will have to engage in negotiation again.
- The buyer is protected against future uncertainties, but will have to engage in negotiation again.

Fixed Price With Incentives

- Offers incentives to the supplier to engage in cost reduction even after the contract is signed. Typically used in high-cost, long-term projects.
- The supplier receives savings when costs are successfully reduced.
- The buyer receives savings when costs are successfully reduced.

Fixed Price Level of Effort

- The price for a fixed unit of effort is agreed upon. Used when neither the work nor the results can be specifically defined before performance. Both parties agree on a specific level of effort, after which they will assess the results and decide if additional work is required. Examples include consulting and R&D.
- The supplier is guaranteed to be paid for the work it conducts.
- The buyer only pays for work conducted.

Cost-reimbursable



Pricing Arrangements or contract types that provide for payment of allowable, allocable and reasonable costs incurred in the performance of a contract, to the extent that such costs are prescribed or permitted by the contract. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed without the approval of the buyer.

- Cost plus fixed fee
- Cost plus percentage of cost
- Cost plus incentive fee
- Cost without fee
- Cost-sharing

Types of Cost Based Contracts



Cost Plus Fixed Fee

- This contract puts a ceiling on how much the supplier can spend, plus a negotiated fee.
- The supplier is ensured of covering its costs plus a fee as long as it stays within the predetermined ceiling amount. However, there is little incentive to reduce costs.
- The buyer is protected from the potential risk of the supplier incurring too much cost.

Cost Plus Percentage of Cost

- The buyer agrees to reimburse the supplier for the cost incurred plus a percentage markup for that cost.
- In essence, the supplier is rewarded for spending money.
- The buyer has little control over cost incurred by the supplier.

Cost Plus Incentive Fee

- The buyer agrees to pay the supplier for the target cost plus an additional fee as an incentive to contain costs.
- If the cost comes out above the target cost, the supplier loses that amount from the incentive fee.
- If the cost comes out below the target cost, the buyer and supplier share the savings at the agreed-on proportions (generally, 50/50)

Cost Without Fee

- Supplier receives payment for the costs it incurs but nothing else. This is often used in not-for-profit organizations such as universities.
- Supplier is allowed to cover the cost.
- The buyer receives services from the supplier without paying a profit margin.

Cost-Sharing

- Both the buyer and supplier agree to share costs.
- The supplier shares the costs and benefits of work being conducted.
- The buyer shares the costs and benefits of work being conducted.

Other Types of Contracts



- ❖ Indefinite Delivery/Indefinite Quantity
- ❖ Blanket Agreement (For repetitive orders)
- ❖ Letter Contract (Written Authorization)
- ❖ Dealer's Agreement
- ❖ Master Service Agreement
- ❖ Licensing Agreement
- ❖ Master Purchase Agreement (for MRO, IT services)
- ❖ Speciality Agreement (Trade Agreement, Construction etc.)

Letters of Intent (LOI)

❖ Anticipates a future contract

❖ Typically used to

- Reserve a place in line for standard goods
- Establish a basis for volume discounts with a firm order
- Encourage a supplier to stock items for a buyer
- Provide the supplier with evidence to secure bonding





Why Have Conditions of Contract?

- ❖ Normally business are conducted on a goodwill basis.
- ❖ However disputes may arise then T&C agreed during contracting form the ground rules for resolving disputes
- ❖ Any default in absence of proper T&C could lead huge losses.
- ❖ Both parties are looking for some basic protection to cover unresolvable dispute or justifiable claim for damages.

Intellectual Property Rights



- ❖ **Patent** - a legal monopoly by the patent owner on rights to make, use and sell a patented item, and prevent others from doing so
- ❖ **Copyright** - grants the author of an original work the exclusive right to publish, reproduce, display, sell, perform, transmit or prepare derivative work from the original work
- ❖ **Trademark** - a registered name, symbol or design
 - Term is 10 years, with 10-year renewals, indefinitely
 - Between 5th and 6th year after initial registration, must file affidavit setting forth certain information to keep registration alive

Intellectual Property Rights



- ❖ **Licensing** – the granting by a patent or copyright owner of use and exploitation rights in return for consideration
- ❖ **Royalties** – payment for the use of patented or copyrighted materials based on a license granted by the property owner

Insurance and Indemnification



- ❖ Contracts should specify supplier insurance requirements
- ❖ Sub contractors should carry similar insurance
- ❖ Typical insurance coverage includes
 - Commercial general liability, broad form
 - Professional liability as appropriate
 - Vehicle
 - Employer's liability and workman's compensation
 - An additional insured clause on the insurance certificate

Independent Contractor Status



- ❖ In the eyes of a court, a contractor will be considered an employee and the buying organization will be the “prime contractor” if the buying organization
 - Controls, or has a right to control, the work
 - Furnishes tool, vehicles, etc. required for the job
 - Has a right to terminate services prior to end of contract
 - Has the contractor perform work that is part of the buying organization’s regular business
 - Pays contractor workers by a time frame (hour, week, etc.)

- ❖ Further, the contractor must hold itself out to the public as an independent contractor (letterhead, business registration, previous recognition as an independent contractor, etc.)

Consideration in Contracts



❖ Termination and exit clauses

- Termination for convenience requires agreement
- Expenses up to termination are reimbursable

❖ Customer confidentiality

- Confidentiality form (NDA) must be signed before disclosure
- Confidentiality clause in contract will not cover disclosure prior to the contract

❖ Force majeure

- Translated as a “superior or irresistible force”
- Major events that preclude performance
- Force majeure protection is not automatic.....must be written in the contract

Consideration in Contracts



❖ Restraint of trade

- Anti-trust law is intended to protect free enterprise
- Primary anti-trust laws in the U. S. are the Sherman Act, Clayton, Federal Trade Commission and Robinson-Patman Acts
- Many other countries also have anti-trust laws

❖ Security issues (US Homeland Security Presidential Directive HSPD-12)

- Objectives are to establish a process to enhance security, increase government efficiency, reduce identity fraud and support the fight against terrorism
- Establishes a mandatory, government-wide standard to verify identify and provide ID badging credentials to employees and contractors who routinely work in federally controlled facilities or have access to federal information systems

❖ Assignability provisions

- Contract terms may permit assignment of rights, benefits or obligations under a contract, or they may prohibit it

Considerations In Contracts



❖ Source code escrow accounts

Example is the purchase of proprietary software

- A 3rd party escrow agent stores source code and documentation with instructions to release it to the buyer under specified conditions

❖ Protests

Private sector

- An informal administrative matter unless formal steps are required

Public sector

- The process is much more formalized
- Involves a formal hearing and a decision regarding remedy
- Award may be held in abeyance until a ruling is finalized

Considerations In Contracts



❖ Claims

-Include any right to payment or other equitable remedy

❖ Limitation of liability

-Refers to supplier effort to avoid or reduce their liability potential under warranties

-Typical liability limitation methods include

- A merger clause: states that the writing is the “final written agreement” and
- that any other representations, promises, warranties or statements by the seller’s agent are of no effect
- Warranty term limitations

❖ Waiver of consequential damages

-Special damages unique to a specific situation

-May include lost profits, lost sales and injury to property or persons

Considerations In Contracts



❖ Collusive offers

Refers to agreement with a fraudulent, deceitful intent

❖ Suspension – two situations

- Allows a buyer to temporarily stop all or part of the work, with an assumption work will re-start later
- Also applies to suspending a supplier for non-compliance, with expectation of corrected performance within a specified time

❖ Reservation of rights

- A concept under which a buyer can reserve certain rights which, without the reservation, would be lost
- Example: buyer wants to accept defective goods with a right to reject later

❖ Estoppel

- A legal concept that a party can be held liable for damages if he/she makes a promise to another who, because of reliance on the promise, is damaged when the promise is not kept

Considerations In Contracts



❖ Social responsibility issues

- ❖ Consider language dealing with child labor, worker safety, nondiscrimination, ethical practice and environmental responsibility

❖ Liquidated damages

- ❖ Refers to a pre-agreed amount to be paid as damages by the breaching party

❖ Warranties

- ❖ A legally enforceable promise as to quality or performance of goods and services made by a seller

❖ Implied warranties – no expression required

- ❖ Title, Merchantability, and Fitness for purpose

❖ Expressed warranties – must be expressed in some way

- ❖ Written or oral
- ❖ Specs, advertisements, photos, proposals, samples, etc.
- ❖ Must be referenced in the contract

❖ When a warranty period begins is negotiable

REMEDIES



❖ **Objective** is to provide buyer with goods that conform to the contract within a reasonable time after discovery and notification to the supplier

❖ **Types of remedies**

- Cure – refers to repairing defects, etc.
- Cover damages – refers to damages incurred when buying goods elsewhere, after a supplier breach
- Incidental damages – expense related to inspection, receipt, transportation and care of goods rightfully rejected
- General damages – damages that flow naturally from a breach

CASE 1



- ❖ **Sale of car components built on specifications**
- ❖ **An earthquake destroys the facilities and the stored components**
- ❖ **Non-delivery causes stop of car production:**
 - buyer loses increase of sales because important car event is missed;
 - buyer loses extraordinary profit due to extremely profitable contract;
 - buyer incurred expenses to charter ships that were not used due to non-delivery
- ❖ **Supply contract is in force for 5 more years**
- ❖ **What can the buyer do?**

CASE 2



- ❖ **Sale of car components built on specifications**
- ❖ **A fire destroys the facilities and the stored components**
- ❖ **The fire alarm had not been installed due to illness of the person in charge of security in the seller's company**
- ❖ **Consequences as above.**
- ❖ **What can the buyer do?**

Seller has to reimburse loss of increased profit, incurred expenses. Buyer may terminate contract

Case 3: SUPPLIER FAILURE



- ❖ Sale of car components built on specifications
- ❖ The aluminium supplier fails to deliver aluminium on time for the production of the components
- ❖ The aluminium supplier is a recognised supplier on the market, but due to extraordinary weather conditions it cannot ship on time
- ❖ Consequences as above.
- ❖ What can the buyer do?

Seller has to reimburse loss of increased profit, incurred expenses. Buyer may terminate contract

INCOTERMS 2010



- ❖ **Incoterms are used for international transportation. They determine**
 - Who will pay the freight
 - Who will be liable for customs duties
 - Who will bear risk of loss
- ❖ **The are categorized into four groups**
- ❖ **There are 11 Incoterms that define where responsibilities are transferred from seller to buyer**

Incoterms: A Common Language



- ❖ Imagine bringing a group of international business people discussing Shipping for trade.
- ❖ To simplify the process one needs common language to cover Liabilities, Risks & Responsibilities.
- ❖ So in 1936, the International Chamber of Commerce created Incoterms to explicitly define the buyer's and seller's shipping responsibilities.
- ❖ Incoterms are made part of sales agreements and contracts and provide guidance to importers/exporters, lawyers, insurance companies, and transport companies.
- ❖ Recently ICC has launched INCOTERMS 2020
- ❖ It provides rules for any mode of transport. Each rule is represented by a three-letter code.

What do Incoterms cover?



Incoterms cover various practical elements of a sale contract i.e. Primary Obligations & Responsibilities of the seller and the buyer;

- ❖ Time of delivery and the Transfer of risk.
- ❖ Insurance,
- ❖ Export and Import Clearance and
- ❖ Division of other costs pertaining to the delivery of goods.

While a full set of terms are provided under each Incoterms rule, the parties to a sale contract do not have to adopt those terms in their entirety. Parties may incorporate specific provisions from the relevant Incoterms, although care is needed to avoid uncertainty.

What is the ICC?



- The International Chamber of Commerce is the largest business organization in the world
- Created to promote global trade and investment
- Keeps The United Nations & The World Trade Organization in touch with views of international business

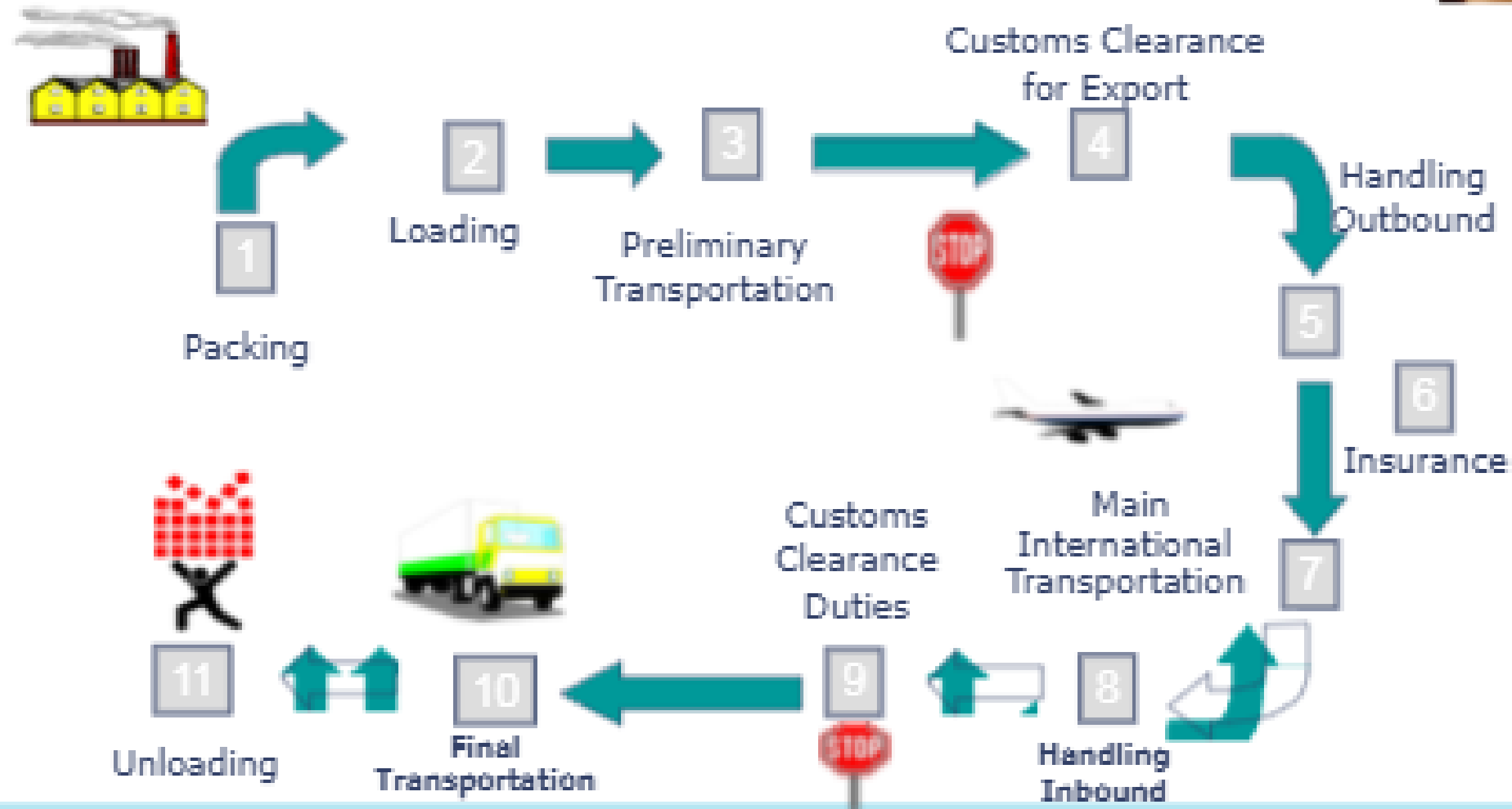


What are Incoterms?



“Incoterms are a collection of internationally recognised standardised trade terms published by the ICC and widely used in domestic and international sales.”

The Steps of Global Logistics



What do Incoterms not cover?



- ❖ Incoterms do not constitute a complete contract of sale.
- ❖ A number of important (and in some cases fundamental) issues are intentionally left out of Incoterms and should therefore be set out in the sale contract.
- ❖ These include: Transfer of title to the goods;
- ❖ Pricing of the goods;
- ❖ Detailed Payment Obligations and Terms;
- ❖ Vessel Requirements;
- ❖ Force majeure; Termination; Insolvency; Compliance and Trade Restrictions; and
- ❖ Applicable Law and Jurisdiction.

GROUPING OF OBLIGATIONS



The Seller Must	The Buyer Must
Provision of Goods as per contract	Payment of the Price
Licenses, authorizations & Formalities	Licenses, Authorizations & Formalities
Contract of Carriage & Insurance	Contract of Carriage
Delivery	Taking Delivery
Transfer of Risks	Transfer of Risks
Division of Costs	Division of Costs
NOTICE TO Buyer	Notice to Seller
Proof of Delivery, Transport Document or Electronic Message	Proof of Delivery, Transport Document or Electronic Message
Checking –Packaging-Marking	Inspection of Goods



INCOTERMS 2020 RULES

Group E: Goods at the buyer's disposal in the Seller's premises.
Ex Works (Low commitment)

Group F: Main carriage paid by the Buyer
FCA, FOB, FAS (moderate commitment)

Group C: Main carriage paid by the Seller
CFR, CPT, CIP, CIP (High commitment)

Group D: Seller's responsible up to agreed delivery address
DPU, DAP, DDP (Very High commitment)

The Categories



Incoterms	Code	
Ex works	EXW	E Terms
Free carrier	FCA	F Terms
Free alongside ship	FAS	
Free on board	FOB	
Cost & freight	CFR	C Terms
Cost, insurance & freight	CIF	
Carriage paid to	CPT	
Carriage and insurance paid to	CIP	
Delivered at Place	DAP	D Terms
Delivered at Terminal/	DAT	
Delivered at Place Unloaded	DPU	
Delivered duty paid	DDP	

OBLIGATIONS & CHARGES



	EXW	FCA	FAS	FOB	CFR	CIF	CPT	CIP	DAP	DPU	DDP
Obligations & Charges:											
Export Packaging	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller
Loading Charges	Buyer	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller
Delivery to Port/Place	Buyer	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller
Export Duty, Taxes & Customs Clearance	Buyer	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller
Origin Terminal Charges	Buyer	Buyer	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller
Loading on Carriage	Buyer	Buyer	Buyer	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller
Carriage Charges	Buyer	Buyer	Buyer	Buyer	Seller	Seller	Seller	Seller	Seller	Seller	Seller
Insurance	Negotiable	Negotiable	Negotiable	Negotiable	Negotiable	*Seller	Negotiable	**Seller	Negotiable	Negotiable	Negotiable
Destination Terminal Charges	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Seller	Seller	Seller	Seller	Seller
Delivery to Destination	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Seller	Seller	Seller
Unloading at Destination	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Seller	Buyer
Import Duty, Taxes & Customs Clearance	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Seller

RISKS COVERED



- ❖ Insurance clause “C” provides **LIMITED COVER** for loss or damage to goods due to **SPECIFIED PERILS ONLY**.

- ❖ This include:
 - Fire or explosion
 - Sinking or grounding of vessel
 - Overturning of vehicle
 - Vessel collision with any external object
 - Discharge of cargo at a port of distress
 - Jettison

- ❖ No cover is provided for accidental damage or physical loss of goods in transit. A claim would only be met if the loss can be shown to have arisen directly as a result of one of the perils, specified above.

Risks Not Covered in “C” Clause



- ❖ War, Strikes & Riots
- ❖ Wilful misconduct of the insured
- ❖ Natural loss in weight or volume and wear and tear and ordinary leakage
- ❖ Insufficient packing or stowage where the assured stow the goods
- ❖ Inherent vice (a hidden defect which causes or contributes to its own deterioration)
- ❖ Loss due to delay
- ❖ Unseaworthiness or unfitness of the container.

DURATION: Cover ceases on completion of unloading from the carrying conveyance at the specified warehouse or other nominated destination.

CARGO INSURANCE



Separate circumstances for cargo loss or damage	ICC A conditions	ICC B conditions	ICC C conditions
Sailing on shoal, stuck , sinking, overturning of the ship or any similar event	YES	YES	YES
Overturning or rollover of the land transport vehicles	YES	YES	YES
Collision of ships or other means of transport	YES	YES	YES
Collision with any other objects except for the means of transport (with the exception of water transport)	YES	YES	YES
Forced unloading at airports	YES	YES	YES
Fire or explosion	YES	YES	YES
Earthquake, volcano eruption or lightning strike	YES	YES	NO
Malicious acts of the third persons	YES	NO*	NO*
Thefts and pilferage	YES	NO	NO
General accidents	YES	YES	YES
Forced throwing overboard	YES	YES	YES
Washing off from the deck	YES	YES	NO
Risks of war, riots, and strikes	NO*	NO*	NO*
Piracy	YES	NO	NO
Water penetration into the ship, place of storage, container, or any other transportation unit	YES	YES	NO
Loss at loading/unloading (only in cases of full loss)	YES**	YES	NO
Any other risks of physical cargo loss or damage not defined above	YES	NO	NO

(*) – Can be agreed additionally;

Supplier Exit Strategies



❖ Internal Considerations

- Stakeholders
- Timing
- Assets
- Documentation

❖ External Consideration

- Contractual
- Customer Requirements
- Supplier Certification Status
- Asset

❖ Associated risks

- Legal Requirements
- Financial Requirements

❖ Community Concerns



Conflict / Dispute Resolution



- ❖ Understanding Buyer-Supplier Conflict
- ❖ Determine level of engagement (Arm's Length vs Alliance)
- ❖ Levels of Organizational Conflict
- ❖ Termination Options
 - For Cause : Provision in a purchase order or contract that allows for unilateral ending of the contract, either in whole or in part, due to some behavior of the other party. Often results in a cancellation as the implication is that of a breach.
 - For Convenience: Provision in a purchase order or contract that allows for unilateral ending of the contract, either in whole or in part, without fault of the other party. Not provided for by the law itself, termination for convenience requires a specific contract provision.

Methods of Dispute Resolution



- ❖ Negotiation
- ❖ Mediation/Conciliation (Conciliator plays active role in proposing solution while Mediator helps parties to find solution. Mediation is chargeable service)
- ❖ Arbitration
- ❖ Litigation

Arbitration INTRODUCTION



- ❖ Arbitration is the mechanism to settle disputes between parties to a contract, determined in a quasi-judicial manner
- ❖ The Arbitration and Conciliation Act 1996 provides legal frame work for settlement of disputes by mutual settlement out side the court.
- ❖ Central Government may make rules for carrying out the provisions of this act subjected to the approval of the Parliament.
- ❖ Arbitration is an arrangement agreed upon by the parties concerned to refer the disputes to a third party for settlement.

Arbitration Award



- ❖ The arbitral award is issued under the signature of all or majority of arbitrators on the basis of the decision or stating it as mutually agreed upon by the parties.
- ❖ Signed copy shall be delivered to all parties.
- ❖ The award is binding on all the parties.
- ❖ Award is enforceable as if it were a decree of the Court.

Arbitration



- ❖ Needs to be consciously selected at the time of signing the contract.
- ❖ Agreeing on arbitration during a dispute is extremely difficult.



CONTRACT CHANGE IN RESPONSE TO DEFAULT



- ✓ **Contracts may not work as a result of the appropriateness of the technical and economic terms of the contract.**



Solutions to work out problems

Keep in mind that it may cost much less to find a way to work out the problem than to pursue legal remedies.

- ▶ Revise the terms
- ▶ Re-determine certain aspects of the contract
- ▶ Create an addendum
- ▶ New contract

WHAT IS A SERVICE LEVEL AGREEMENT?



A service level agreement (“SLA”) is a formal document describing the level of service a customer expects from a service provider.

EXAMPLES



“Vendor shall provide the services set forth in Addendum 1.”

WRONG!

“Vendor shall provide the services set forth in the Service Level Agreement, attached hereto and incorporated herein as Addendum 1. (“Services”)”

CORRECT!



PURPOSE OF AN SLA

- ❖ An SLA is intended to specify performance expectations, responsibilities and metrics.
- ❖ It ensures all parties have the same understanding of and improves each parties ability to reach intended goals.



KEY REQUIREMENTS

- ❖ Services and Objectives
- ❖ Performance Requirements and Responsibilities
- ❖ Performance Metrics and Measurement
- ❖ Accountability

KPI: KEY PERFORMANCE INDICATORS



- ❖ Key Performance Indicators, or KPIs, **help contract managers measure progress and achieve goals against contracts. ...**
- ❖ Contract KPIs can be grouped into several categories.
- ❖ Most useful tend to be Contract Value, Contract Incidents, Contract Monitoring, and Contract Renewal.

Contract Management - Introduction



- World Bank regards contract management as:
 - systematic and efficient ***planning, execution, monitoring, and evaluation*** of contracts
 - an approach to ***optimize performance***
 - an integral part ***managing risks***
 - a method ensure that ***both parties*** fulfill their contractual obligations
 - a process to deliver the ultimate goal of achieving ***Value for Money*** (VfM)
 - a key driver to achieving ***results on the ground***

Contract Management- Procurement Framework



- New Procurement Framework recognizes that effective contract management:
 - is part of the *Procurement Process*
 - needs planning thus should be considered at the *Project Procurement Strategy Document* stage
 - should be considered as part of the overall *Procurement Approach*
 - is applicable to goods, services, works and non-consulting services
 - is an essential part of a *Fit for Purpose Procurement Approach*
 - requires *Borrower capacity*

Contract Management- Procurement Framework



- New Procurement Framework recognizes that effective contract management:
 - is integral and linked to ***risk identification, mitigation and management*** across all aspects of the contract e.g. Environment, Social, Health and Safety
 - requires ***KPIs*** need to be built into contract
 - includes a broad range of aspects including contract variations (both commercial and technical)
 - achieves improved ***VfM*** and ***improved project outcomes***

Contract Management – Borrower's Role



- Contract management is the *responsibility of the Borrower*
- *Proportionality* is key
- Contract plans are developed during *contract creation*
- WB Guidance to Borrowers suggest that contract management priorities are:
 - tracking and monitoring cost, time, quality and deliverables
 - being clear on roles and responsibilities of both Borrower and supplier/contractor/consultant
 - managing relationships with the supplier/contractor/consultant and key stakeholders
 - managing payments in accordance with agreed terms
 - being proactive throughout the contract to anticipate problems and issues before they arise
 - managing problems and issues as they arise, quickly, effectively, fairly, and in a transparent manner

Contract Management – Bank’s Role



- ***Fiduciary role*** - ensure funds are used for the purpose intended
- Requiring Borrowers to apply Bank’s ***standard forms of contracts*** (international good practice) for ***international contracts***
- ***Prior review of major contracts***
- Post review, including contract execution of smaller contracts on sample basis
- ***Supervision***
- ***Prior review of material amendments*** to major contracts
- Requiring ***speedy resolution of disputes*** through alternative dispute resolution such as dispute experts/dispute boards and international commercial arbitration
- Exercising Bank’s audit and inspection right when needed
- End of project evaluation



Q&A

THANK YOU!



For More Information
contact me:

Krishan.batra@ism-india.org

Tel: **+91 9971171220**