

Chapter three

Practice of

contracting

Part I

INTRODUCTION TO CONTRACTING



Background of contract

- ❑ It is an agreement between two or more persons as between themselves to create, vary or extinguish obligations of a proprietary nature (art. 1675 of CVC 1960)
- ❑ **Generally, a contract is an agreement or willful promise enforceable at law.**
- ❑ However, not all agreements or promises are contracts. Some may lack enforceability at law.
- ❑ A **construction contract** is a product of an agreement between the **employer** & the **contractor** but it not exist between them only & it is enforceable at law.
- ❑ "Enforceable at law" means that if the agreement reached between the **employer** & the **contractor** breached(deviations occur from the promises) the aggrieved party, either the employer or the contractor, may bring a legal action against the other to demand the

BASICS OF CONTRACT

- Contract law in construction works define the relationship of the parties involved with regard to their obligations, responsibilities and privileges in the work and are part of the existing law.
- **The Form of Agreement**, in the construction contract, clearly presents the Agreement reached between the **employer & the contractor.**

CONTRACT

- 👉 In principle, contracting with **oneself** is impossible.
- 👉 The construction contract, in principle, is only binding between the **employer & the contractor**.
- 👉 This concept is related to the doctrine of the **privity** of contract.
- 👉 **Privity of contract** means that the contract is binding only the parties who have made it. This is true.



□ The purposes of a contract are to:

- bind the parties agree to procure services or works or goods.
- clearly show the Rights, Obligations and remedial rights of performances from the contracting parties.
- clearly show the Terms and Conditions of contracts the parties agree with.
- clearly show handling provisions for price, completion time, requirement variations adjustment systems, Changes in cost and legislations and dispute resolution mechanisms.



- ✓ to protect parties against defaulting by their contracting party, if so provide adequate compensation:
- ✓ It is one way of managing risk!
- ✓ Most (common contracts) are meant to share risks among parties



○ Types of contracts

- Bilateral or unilateral
- Executory or executed

○ Bilateral or unilateral

- Bilateral: obligations on both parties: . For example in a construction contract between employer and contractor, the contractor is obliged to execute the works while the employer is obliged to pay for the works.
- Unilateral: a promise made by one party in return for the performance of an act by the other party
- For example, a public announcement to reward somebody who finds a lost object would be come a binding contract the moment the finder delivers the item lost. The finder is not obliged to find the lost object, but if he finds the promiser is obliged



- as a construction example, a contractor calls block producers to supply 5000 blocks of a certain standard. The supplier is not obliged, but if he supplies the blocks according to the specifications provided the contractor has to pay.
- Executory or executed
 - Executory: a contract that has not been fully performed
 - Executed: a contract that has already been performed,

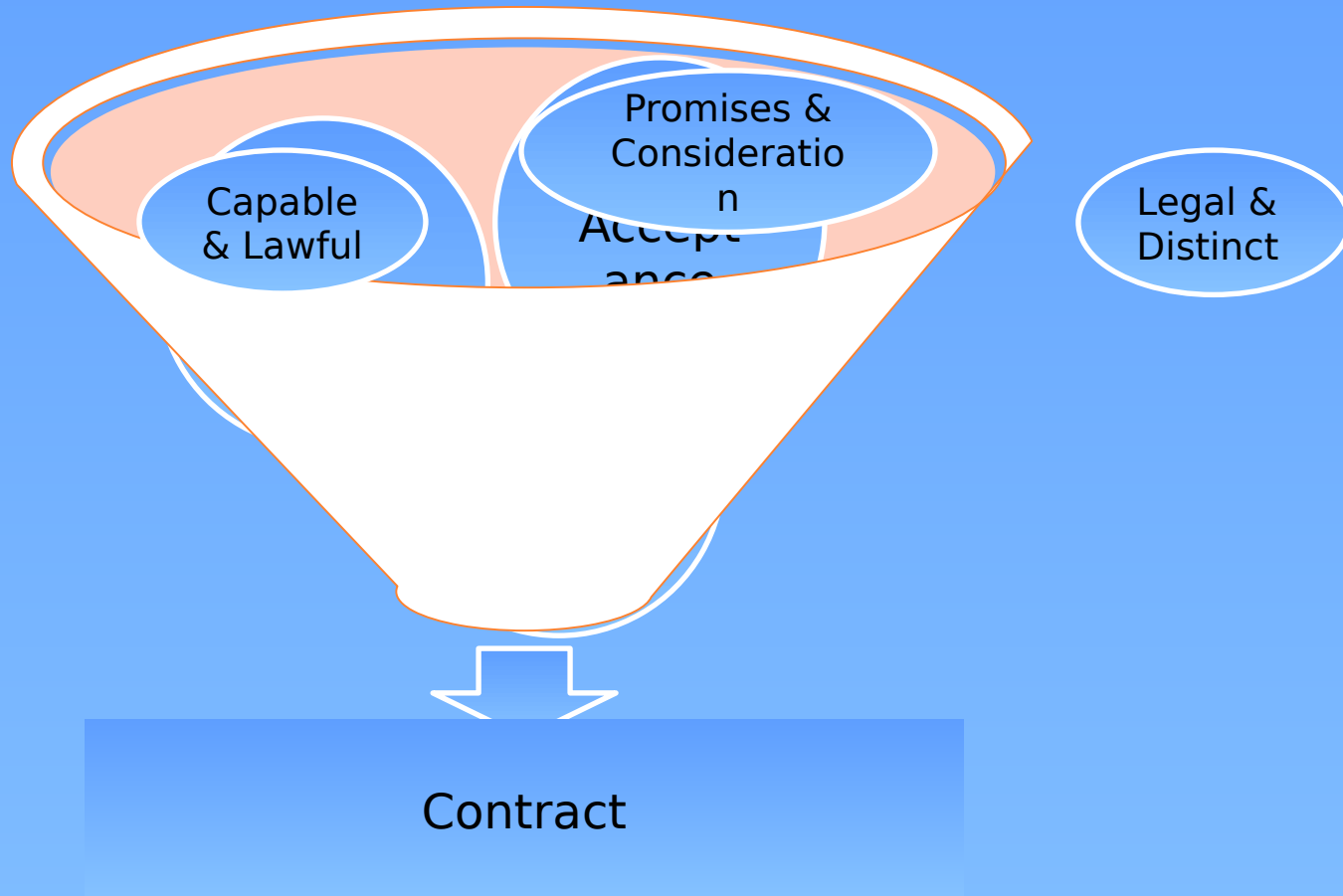
BASICS OF CONTRACT

□ There are basic contents of contract which contracting parties are expected to understand. These are:

- *Formation of Contract;*
- *Terms of Contract;*
- *Privity of Contract;*
- *Discharge of Contract; and*
- *Invalidation of Contract.*

Formation of Construction Contracts

- Six Requirements for Construction Contracts (Art. 1678 of Civil Code)



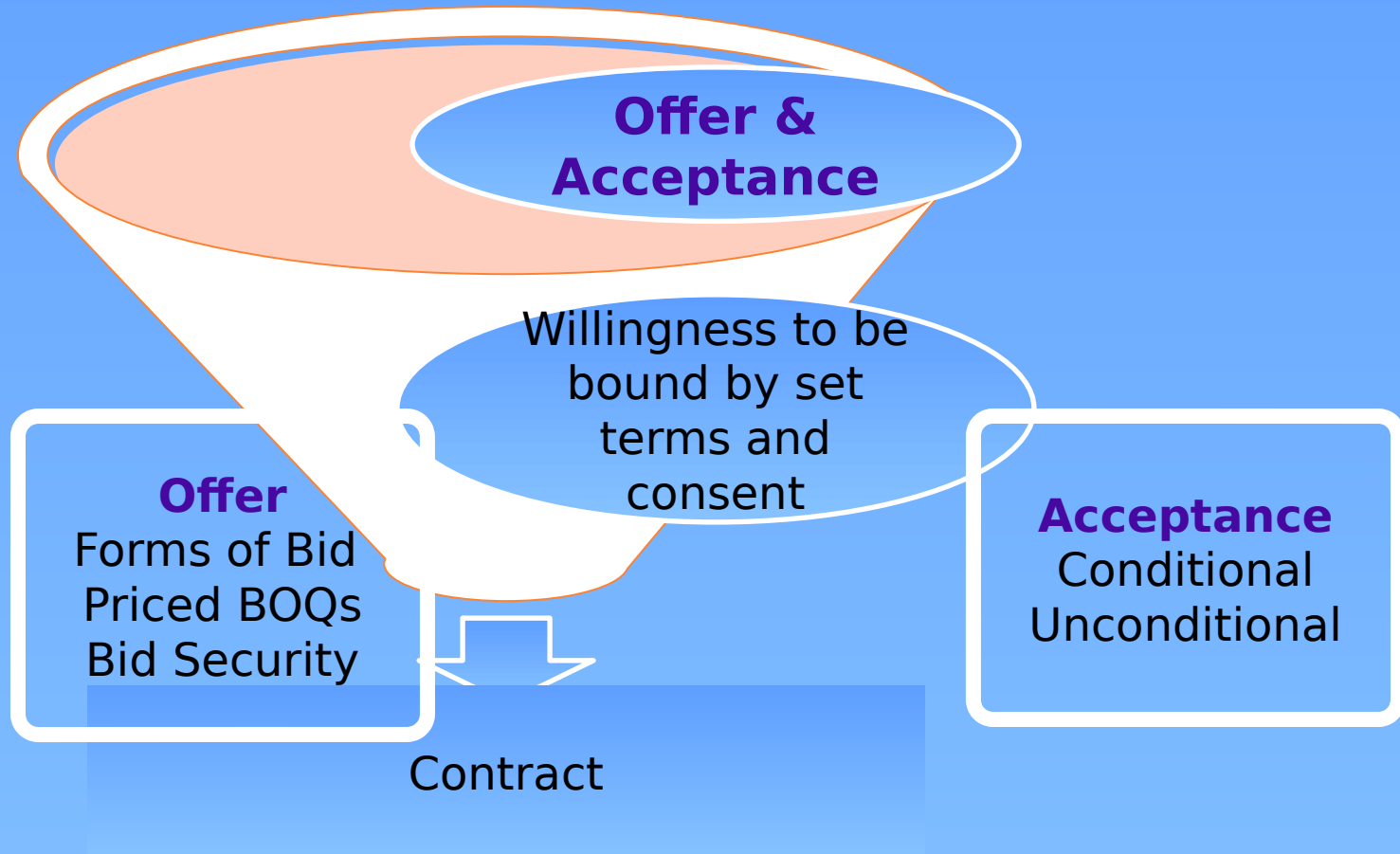
FORMATION OF CONTRACT

- Article 1678 of the Civil Code provides requirements that should be fulfilled to conclude a contract validly:
 - The parties involved must have capacity to contract. (capacity)
 - There must be an agreement, i.e. consent reached at by a process of offer and acceptance. (Consent)
 - The agreement must have sufficiently defined, lawful and possible object. (object or obligations to be performed)
 - For certain types of contracts, the contract must be concluded in special form such as writing. (form)



Construction Contracts

- Six Requirements for Construction Contracts



CONSENT

- Consent is a declared will of the individual to enter in to contract.
- It is the willingness of the parties to enter in to a legally binding relation.
- The contract must be made **voluntarily**
- It must not be entered into under duress
- Both parties must agree to what is in the contract
- Consent of the intended contracting parties decomposes in to :-
 - Offer; and
 - Acceptance;

Declare that you have read
all the incorporated
documents and are willingly
bound by the terms!



OFFER AND ACCEPTANCE

- An offer is an expression that one party is willing to be bound by specific terms which are set out in the contract.
- An offer must be communicated to the beneficiary.
- **Acceptance** refers to agreement to the terms of the offer. The acceptance must be in exact conformity with the terms of the offer.
- If the offeree changes any terms of the offer or adds new terms, there is no acceptance.
- **Time of offer:** Offer can be made with time limit or without time limit. An offer may be made as to terminate on specified date.
- Please, see Article 1678 (a) and Article 1679- Article 1710 of the Civil Code)

OFFER AND ACCEPTANCE

- A contract is complete when an offer by one party is accepted without condition by the other party
- Termination of offer:
 - Through refusal (rejection) or counter offers but not just a request for further information
 - Death of offeror or offeree
 - None acceptance within the offer time or after reasonable length of time
 - Failure of a condition subject to which the offer was made



CAPACITY AND LAW FULL

- The parties must have legal & mental ability
- No agreement is deemed an enforceable contract if any of the parties is incapable of contracting
- A person said to have contractual capacity if he or she is mentally able to understand the nature and consequences of making a contract
- Capacity means competence to enter in to a legally binding agreement.



CAPACITY

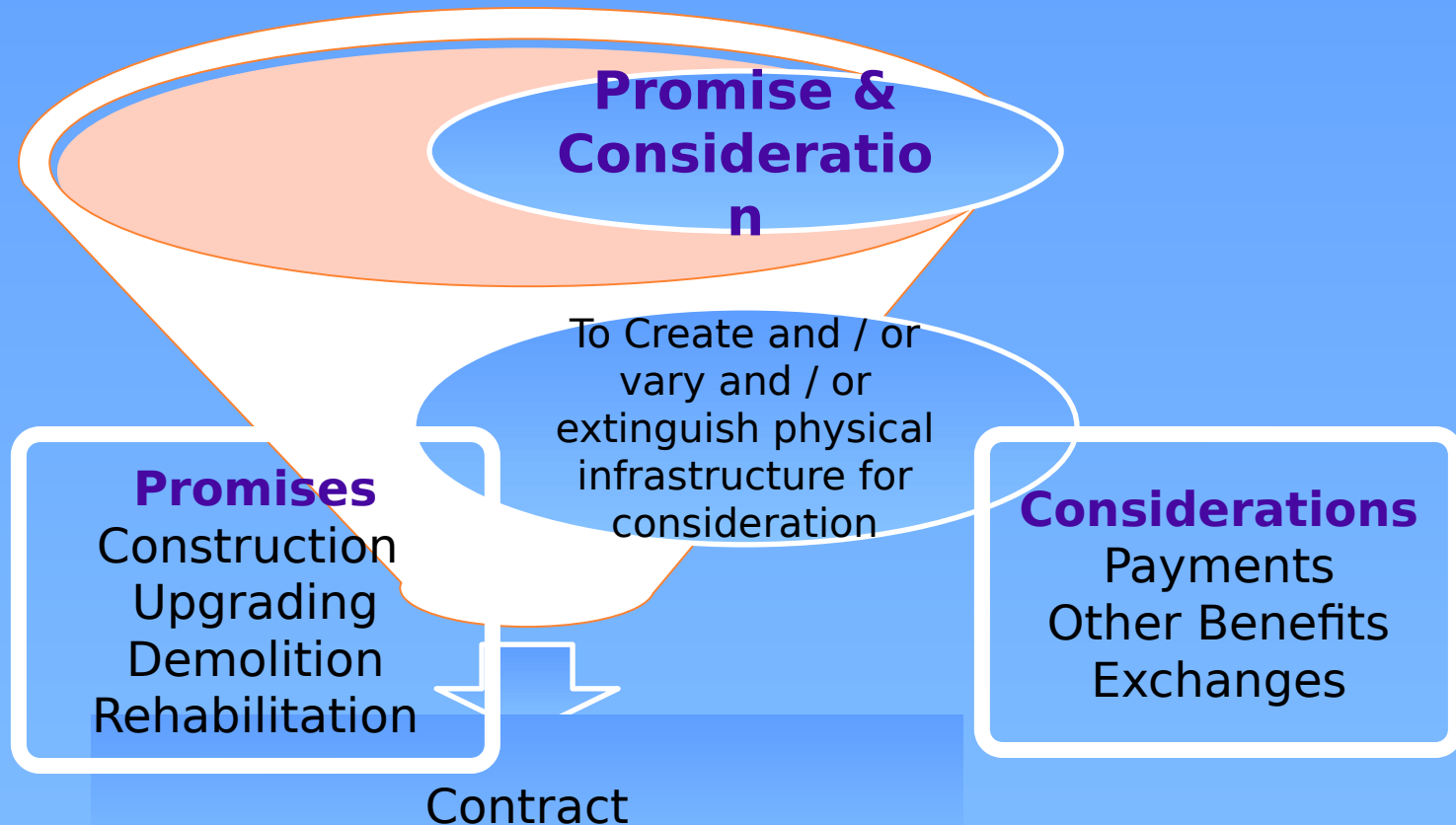
- Exceptions:

- Bankruptcy
- **Minor** (under age of 18)
- **Considered mentally incompetent or ill**
- **Under the influence of alcohol and other drugs**
- **Inexperience in business (if the other party tried to exploit the inexperience)**
- Please, see more Article 1678(a) of the Civil Code.



Construction Contracts

- Six Requirements for Construction Contracts



CONSIDERATION

- What one party gives to another
- There must be some sort of **exchange**
- Consideration involves a benefit moving from the offeree to the offeror in exchange for the promise
- If one party makes a promise and the other party offers nothing in return for that promise, the promise is unenforceable due to lack of consideration.
- Example: Mary buys a car from Tom for €14,000

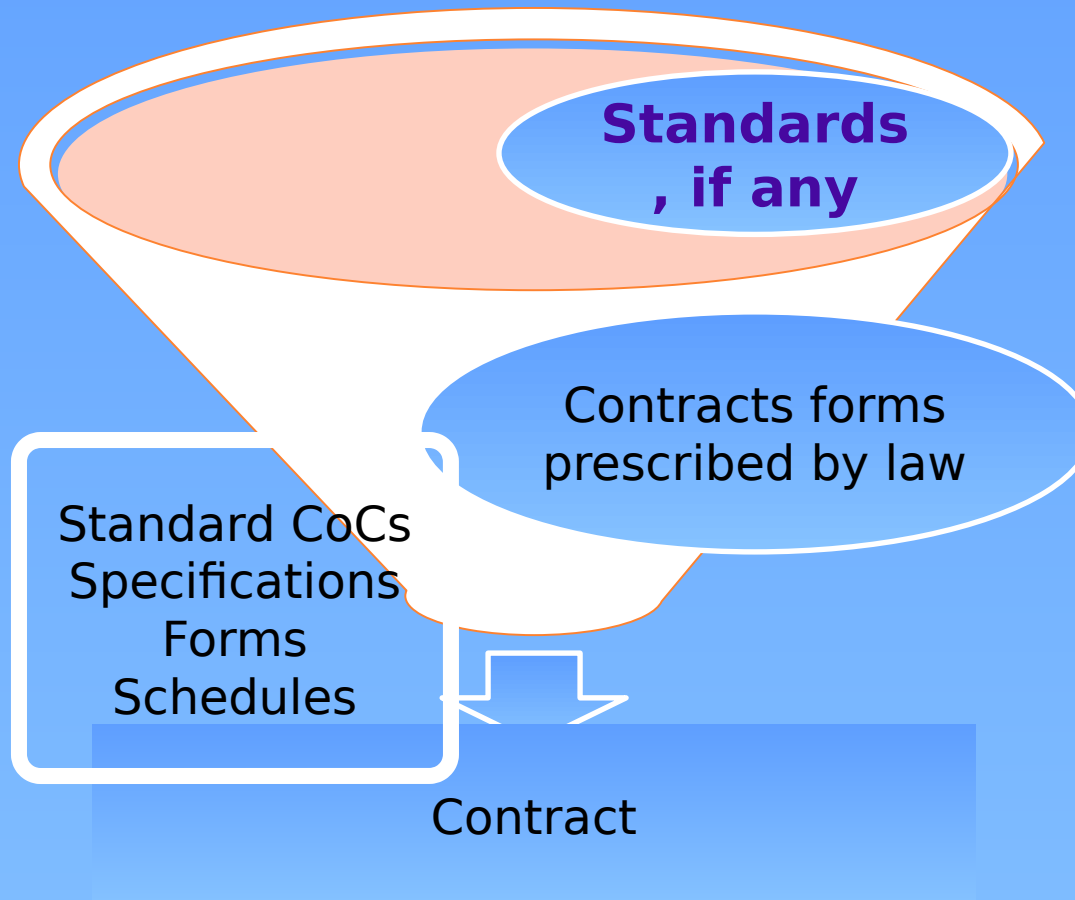


and Tom gets



Construction Contracts

- Six Requirements for Construction Contracts



FORM OF CONTRACT

- Written contract:

- According to the Civil Code of Ethiopia 1960, Art.1727
- *Any Contract required in writing shall be supported by a special document signed by all the parties bound by the contract*
- *It shall be of no effect unless it is attested by two witnesses* The witnesses must also be capable.

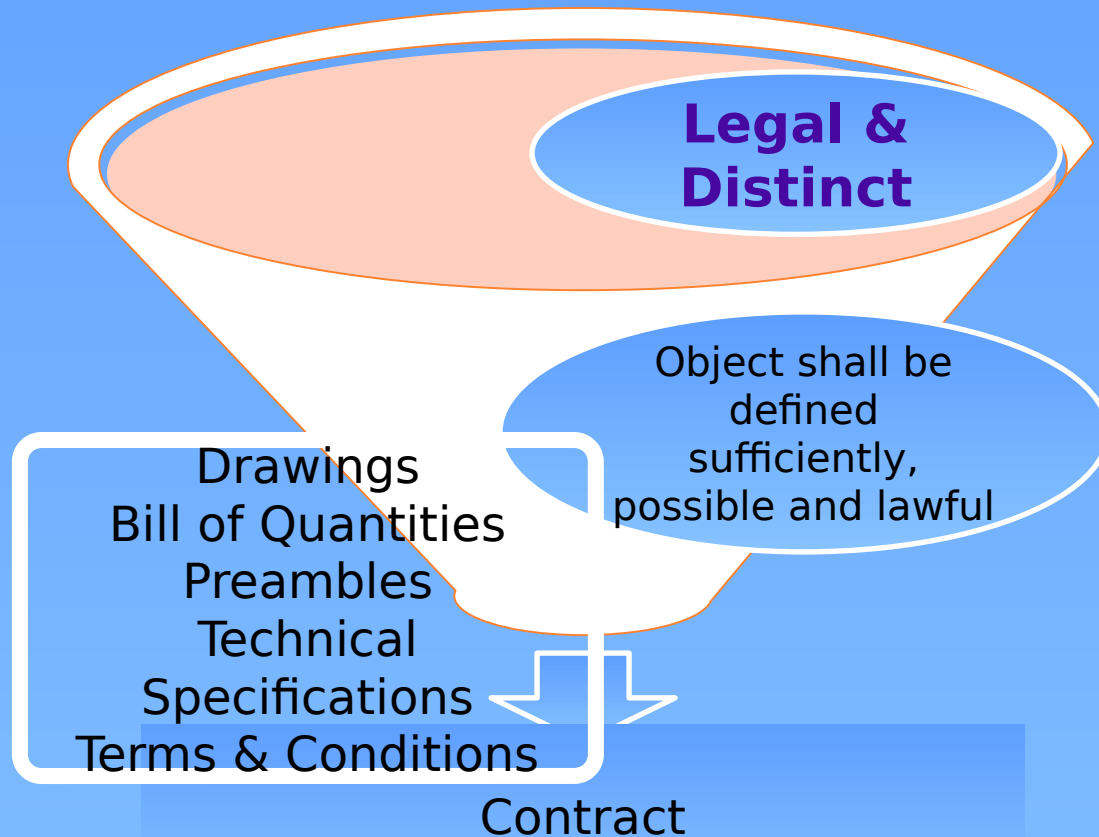


The law, for instance, requires writing for the following contracts.

- Contracts relating to immovable.
 - Contracts made with public administration
 - Contracts of guarantee
 - Contracts of insurance
 - Contracts of loan where the amount lent exceeds birr five hundred.
- ❖ The law requires the agreement between the parties and their irrevocable intention to be obligated, and that the instrument is signed by them.
- ❖ The signature of the parties needs to be handwritten. In other words, signature mechanical means or seals is not allowed.
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Construction Contracts

- Six Requirements for Construction Contracts



LEGALITY OF CONTRACT

- Legality of the object
 - Contract must be legally enforcement
 - Contracts can be illegal by statute or law
 - Examples of illegal contracts
 - Agreement to commit crimes or civil wrong
 - Agreement which may injure the state
 - Promotion of corruption
- The contract must not break any laws
- Agreements to commit a crime will not be upheld in court



II. TERMS OF CONTRACT

- The terms of contract are provisions or stipulations in a valid contract describing some aspects of the agreements between the parties to contract.
- The terms define the rights and obligations of the parties in accordance with their agreement. The terms can either be **express, implied or statutory**

Terms of Contract

- **Conditions** are terms which are fundamental to the contract and may lead to breach and/or damage
- **Warranties** are terms which are subsidiary to the contract. Can normally lead only to damages under tort (wrong doing).
- **Expressed terms** are terms clearly stated in the contract.



- **Implied terms** are not specifically written into the contract but are considered by the courts to be part of the contract
- Implied terms that are particularly important to construction contracts are:
 - the contractor will carry out the work in a workmanlike manner
 - the goods and materials will be of good quality
 - the materials and work will be reasonably fit for their purpose
- **Exclusion clauses:** These are clauses (terms) that seek to deny liability or limit liability
- For example, construction contracts usually exclude;
 - Liability for design faults by the contractor
 - Certain liabilities are excluded by the employer. The contractor is required to indemnify the employer and to ensure against claims arising due to such matters (Standard Conditions of Contract, MOWUD, 1994 and FIDIC Clause 21, 22, 23 and 24)

DISCHARGE OR TERMINATION OF CONTRACTS

○ by Performance

- A construction contract will be discharged by performance on the part of the contractor when
 - *all the works has been completed including maintenance during defects liability period,*
 - *the Engineer has issued all the required certificates and*
 - *on the part of the employer when he has paid all the payments due.*



PERFORMANCE

- Both parties carry out their side of the contract
- Example: a builder builds a house and the owner pays the builder



DISCHARGE OF CONTRACTS

- By Agreement

- ***Mutual agreement*** (agree to cancel the contract)

- Both parties agree to end the contract

- Example: the homeowner decides not to go ahead with the construction of the new house and the builder agrees to cancel the contract



DISCHARGE OF CONTRACTS

- **By Frustration :**

- Occurs when the contract was executable at time of agreement but subsequent events, over which the **contracting parties have no control**, make it impossible to fulfill the contract obligations. The Ethiopian civil code deals with frustration under force majeure.[Art.1792]
- Force majeure (war, earth quake, natural hazard)



DISCHARGE OF CONTRACTS

○ Breach

- failure to carry fundamental obligations under the contract
 - Leads to compensation and/or termination
- One party to the contract breaks an essential condition of the contract
- Example: the builder stops construction before the house is completed



INVALIDATION OF CONTRACTS

- Invalidated contract is a contract which is not binding. The two main factors that can invalidate a contract are *mistake* and *misrepresentation*.
 - **Mistake:** the term 'mistake' is used to describe the situation in which an 'offer' made by one party and its 'acceptance' by the other do not actually corresponds.



INVALIDATION OF CONTRACTS

□ **Misrepresentation (False statement):**

Misrepresentation may be described as the making of an untrue statement relating to fact which induces another party to enter into contract.

- When misrepresentation occurs, the injured party can either state or reject the contract. He or she can also bring an action for either rescission and restitution or damages.

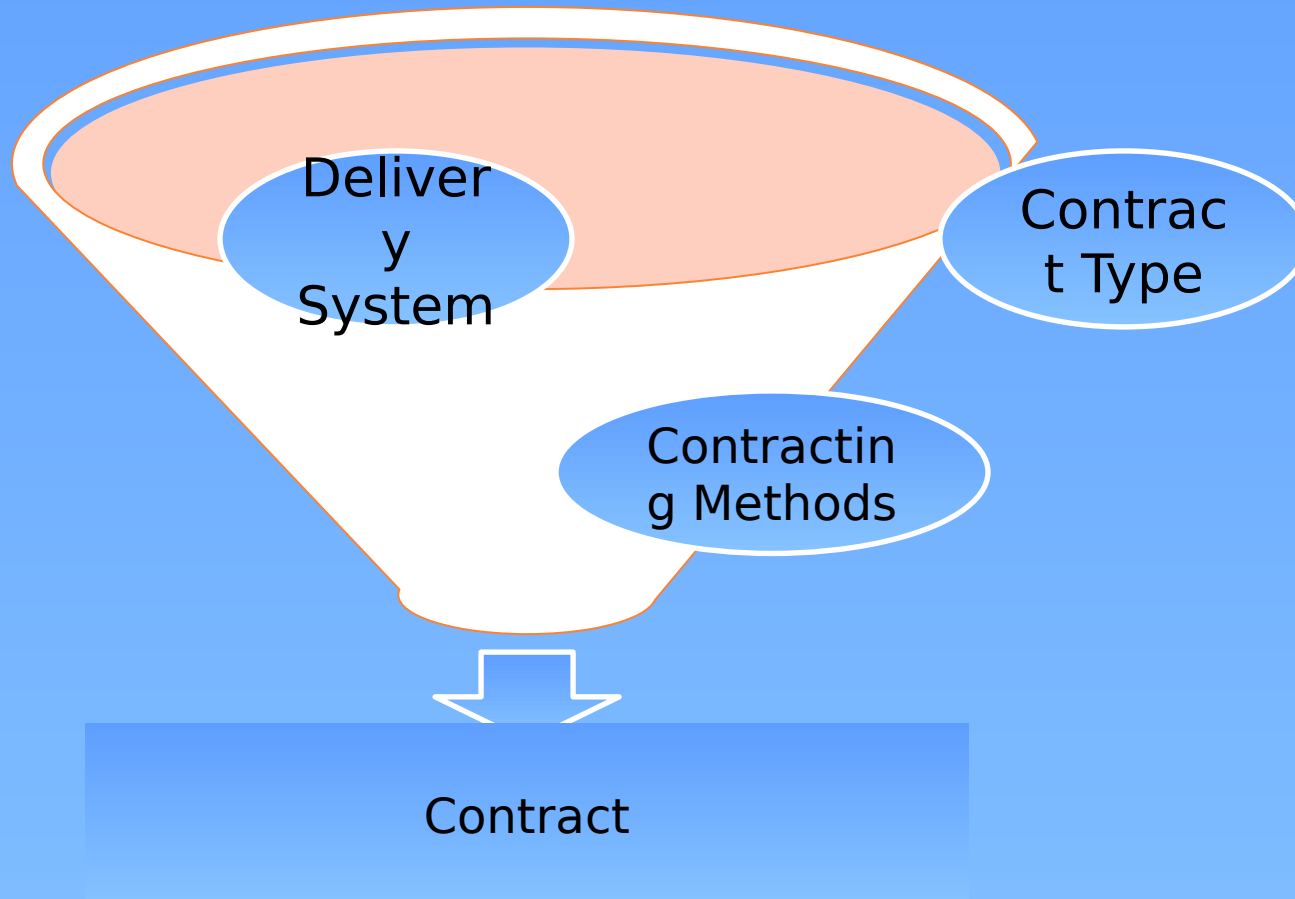
- Fraud (Deception) Cheat!!

- Duress □ Pressure



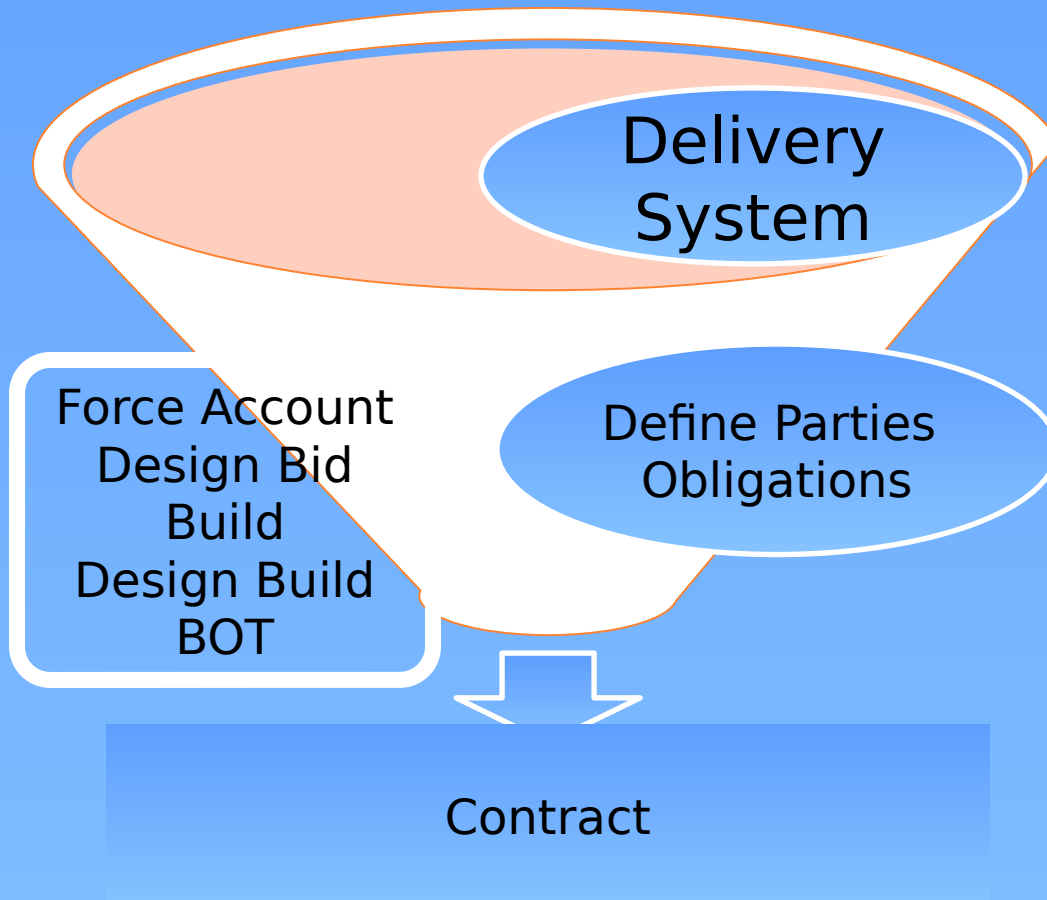
Construction Contracts

- Three Bases for Construction Contracts



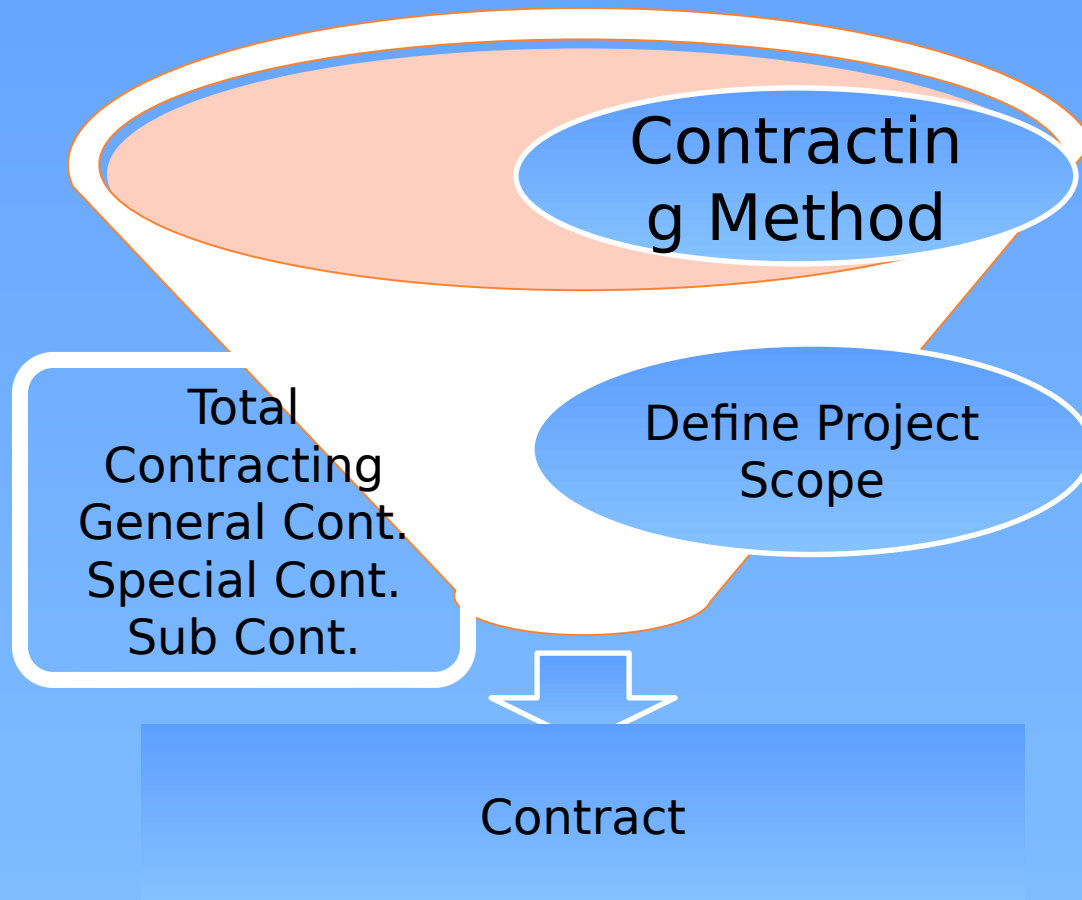
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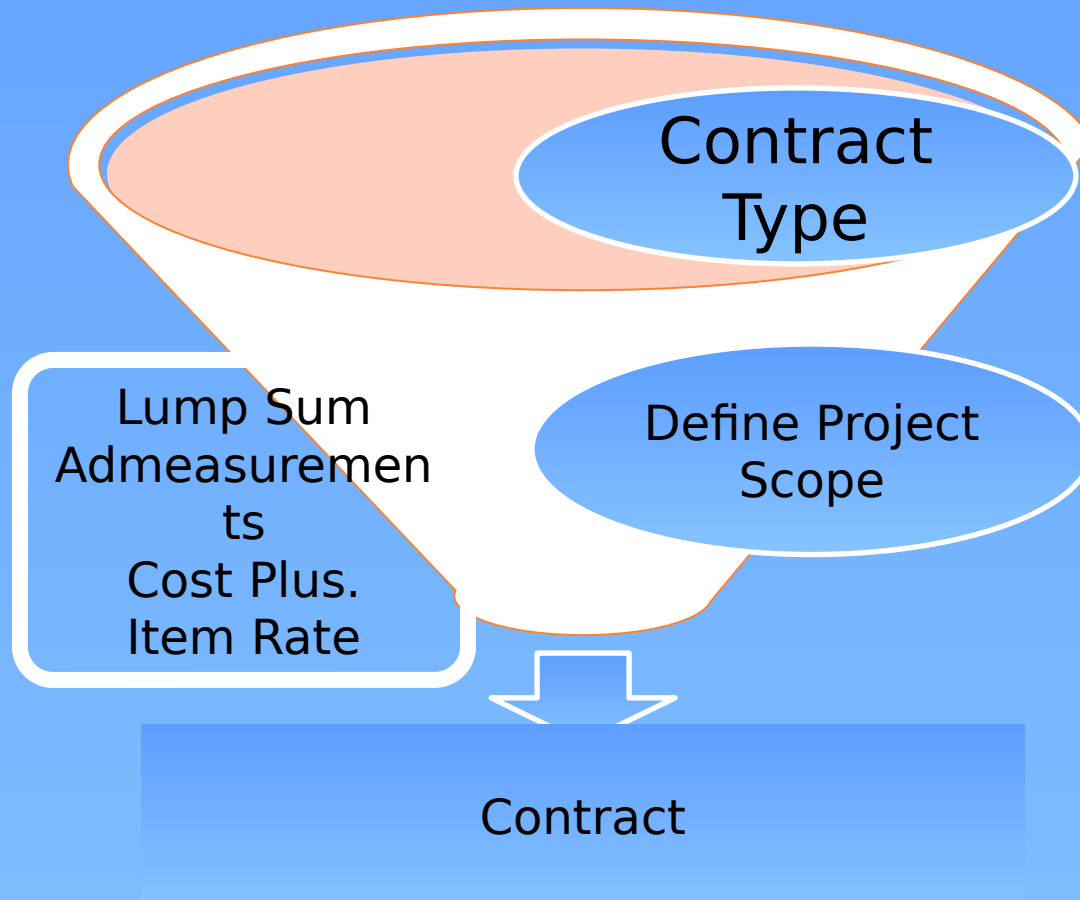
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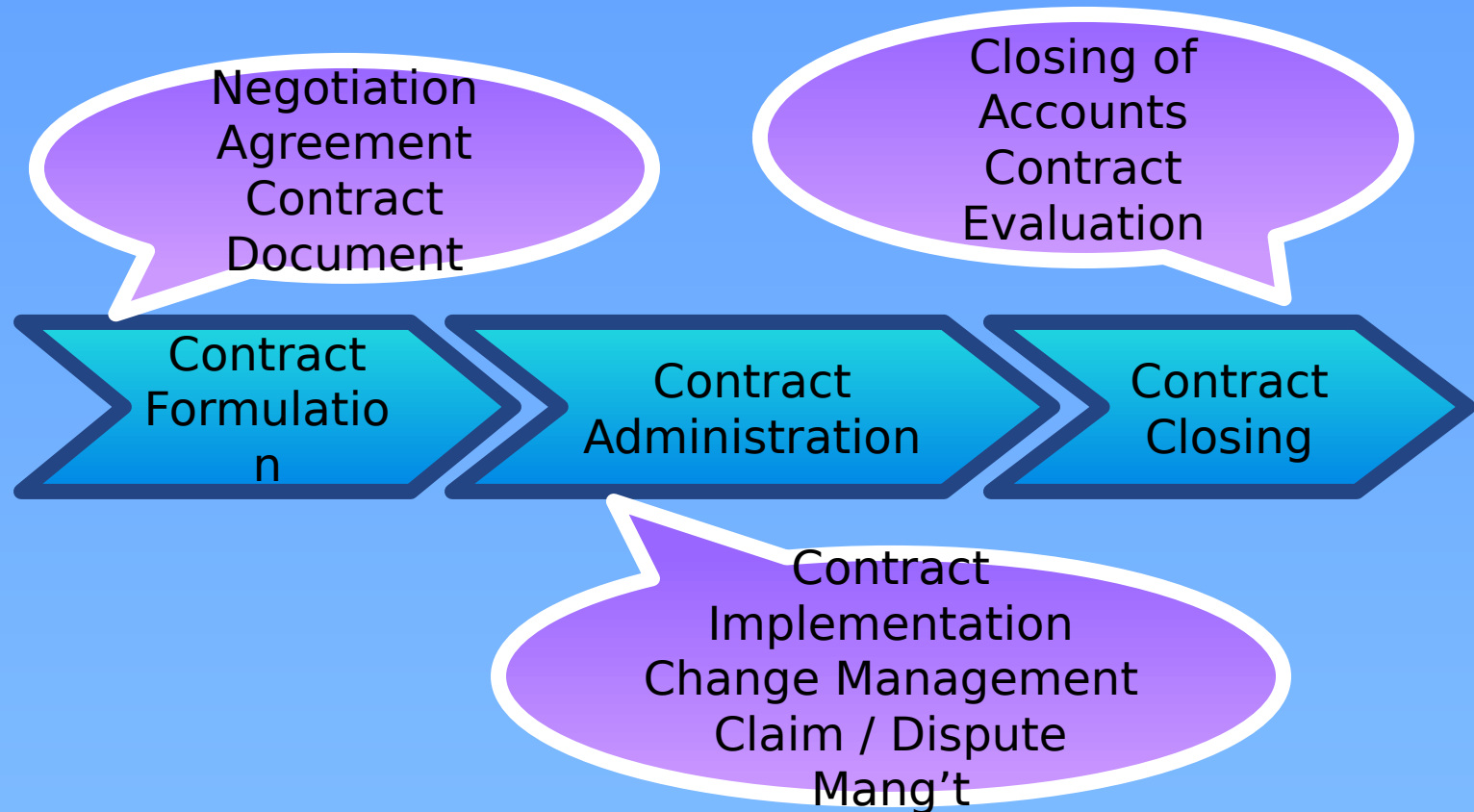
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Construction Contracts

Three Contract Management Process



Contract Document Contents

1. Signed & Sealed Form of Contract Agreement with appendix if necessary
2. Letter of acceptance
3. Signed & Sealed Minutes of Contract Negotiations, if any and are not incorporated elsewhere
4. Signed & Sealed Form of Tender with appendix, if necessary
5. General & Particular Conditions of Contract
6. Scope of Requirements including
 - Terms of References, if any
 - Technical Specifications and Methods of Measurement
 - Price BOQs, Drawings and their Preambles if necessary
7. Necessary Contractual Forms, Formats & Schedules

A close-up photograph of a pair of light-skinned hands, palms up, holding a small, rectangular piece of white paper with deckled edges. The paper is held between the fingers and thumbs of both hands. On the paper, the words "Thank You" are written in a black, elegant cursive script. The background is a solid, dark color, making the hands and the paper stand out.

Thank You