



Certificate Course on Software Contracts

MODULE- 1

INTRODUCTION

Today the technology has replaced all the traditional methods of work, wherever you go whatever you do, you are surrounded by technology. Take a look around you, what do you see? Gadgets, mobile phones, even the source on which you are reading this course is a part of technology! It is evident that the future is all about gadgets and software's and one can progress only when he adapts himself with the changing needs of the society.

We are in an era of smart contracts which has replaced the traditional method of entering in contracts and agreements, now we can enter into any contract just by clicking on "I Agree" and "I Accept" icons indicating our consent. It is important to know that the method of entering into contracts may have changed, but the principles remain the same, traditional ones. It is important to know the basics of contracts first.

WHAT IS CONTRACT?

"A contract is an agreement creating and defining obligation between two or more persons by which rights are acquired by one or more to acts or forbearance on the part of others".- **Salmond.**

In India the law of contracts is governed by the Indian Contract Act, 1872. The Act is based on principles of English Common law, which can be brought into use in cases where Indian contract laws are silent about any issue or doesn't provide adequate clarity in a situation.

The term "**Contract**" is defined under section 2(h) of the act as," *an agreement enforceable by law is a contract*". Thus;

CONTRACT= AGREEMENT + ENFORCEABILITY

Section 10 of the act lists down the essentials of a valid contract, as "Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject. Every person is competent to contract who is of the age of majority according to the law to which he is

subject and who is of sound mind and is not disqualified from contracting by any law to which he is subject."

It can be determined from Section 10 of the Indian Contract Act, 1872 that the main elements constituting a valid contract are:

1. Offer and Acceptance:

The first step before creating any contract is that there must be a lawful offer, by one party to the other with a view of obtaining the assent to do or abstain from doing something. When the person to whom such offer is made accepts it. It becomes a promise. The word offer and acceptance are defined under section 2(a) and 2(b) of the Act.

2. Intention to create a legal relationship:

There must be a clear intention among the parties to create legal obligation for a contract. Agreements of a social or domestic nature do not contemplate a legal relationship, and as such, they do not give rise to a contract.

The case which gave birth to the purpose of creating a legal relation is *Balfour v. Balfour*, 1919. The defendant's husband who was employed in Ceylon (now Sri Lanka), went for a vacation with his wife (plaintiff) to London, where the wife fell sick and was unable to return to Ceylon with her husband. Subsequently, the husband promised the wife a maintenance of 30 pounds every month, till the time he returns. However, the relationship later sours and the husband failed to stand by his promise. The wife sued the husband for restitution. The Court held that there was no valid contract between husband and wife as there was no intention to create a legal obligation by the defendant. Hence, the husband was not obligated to pay for the wife's maintenance.

3. Lawful Consideration:

There must be a valid consideration. An agreement without consideration is void. A consideration is considered to be lawful unless, "It is forbidden by law; or is of such nature that, if permitted it would defeat the provisions of any law or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy." Section 2 (d) of the act defines the term consideration.

In the case of *Currie v. Misa*, 1874 it was held that "*A valuable Consideration in the sense of law may consist either in some Rights, Interest, Profit or Benefit accruing to one party or some forbearance detriment, loss or responsibility given, suffered or undertaken by the other*".

4. Competent Parties:

Section 11 of the Act states the criteria of parties competent to contract. The parties to the contract must be a **major**, that means they must have attained the age of majority as mentioned under the Indian Majority Act, 1875.i.e; 18 years..In ***Mohiri Bibi v. Dharmodas Ghose, 1903*** the court held that the contract entered into by a minor is *void ab initio*.

Such person must be of **sound mind** and is **not otherwise disqualified under any law**. The contract act states that a person is said to be of sound mind for the purpose of making a contract, if at the time when he makes it he is capable of understanding it and forming a rational judgment as to its effect upon his interests.

5. Free Consent:

Section 14 of the Act defines the term “free consent”. Parties must enter into a contract with free consent, means that the consent should be out of their own willingness without any undue influence, coercion, fraud, misrepresentation or mistake. The presence of any of these elements in the formation of a contract implies the absence of free consent and such contract is rendered voidable at the option of the party who had not freely consented.

6. Lawful Object:

For a contract to be valid there must be a lawful object. A contract is said to have unlawful object “if it is forbidden by law; is of such a nature that if permitted it would defeat the provisions of any law, or is fraudulent or implies or involves injury to the person or property of another; or the court regard it as immoral or opposed to public policy. A contract without a lawful object is considered to be void.

7. Not expressly declared to be void:

Such agreement must not be one of those which are expressly declared to be void. A void contract is an agreement that is effectively illegitimate and unenforceable from the moment it is created.

Example: agreement in restraint of marriage, agreement in restraint of trade, agreements restraining judicial proceedings, agreement without consideration etc.

SOFTWARE CONTRACTS

Software contracts, electronic contracts or Technology Contracts are contracts between a software developer or a vendor and user of the software. The Indian Contract Act does not expressly mention about software contracts or technology contracts. However, it can be inferred from Section 10 of the Act which mentions, “***All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.*** Nothing herein contained shall affect any law in force in 1 [India] and not hereby expressly repealed, by which any contract is required to be made in writing¹ or in the presence of witnesses, or any law relating to the registration of documents. Thus, till the time a software contract or technology contract possess the requisites elements of a valid contract as mentioned under **Section 10** it will be considered as a valid contract and have a legal backing same like traditional contracts.

There are several kinds of software contracts comprising from Software Development Agreement, Software License agreement, software maintenance and support agreement, open source agreement, e- commerce agreement etc. The present course aims at describing in detail the first contract to be entered, before making of any software is Software Development Agreements.

Difference between Traditional contract and Technology contract

Sl. No.	<i>Traditional Contracts</i>	<i>Technology Contracts</i>
1	Parties meet face to face	Online procedure
2	Done on the papers.	Environment friendly, digitalize mode
3	Time consuming procedure	Time efficient execution
4	Registration is required	Registration is not necessary

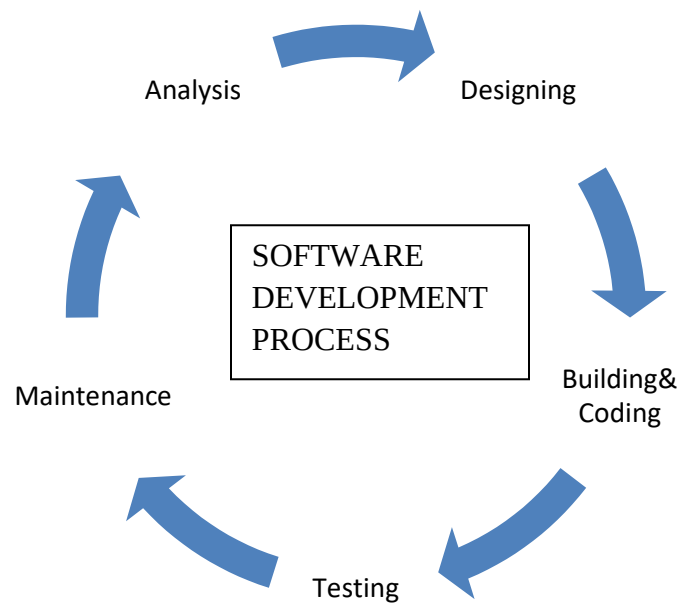
5	Parties meet and signature is done	Online agreement, digital signature.
6	Operational costs are involved which increases the cost in the implementation of the agreement.	Low transaction cost
7	Easier to execute	Complicated procedure
8	Chances of tampering	Technology eliminates any kind of tampering
9	Chances of human error	The technology contract software meets all compliance standards and contract law
10	Take a lot of time to search for one single thing.	Easier to monitor, track and find data

SOFTWARE DEVELOPMENT CONTRACT

A Software Development Contract is an agreement entered into between a software developer and a person or legal entity, where such person or legal entity mentions their features and concepts about a software. On the basis of which the Software developer creates a software as demanded based on the time limit specified by the person/ legal entity.

For a better understanding, it would be beneficial to first learn about Software Development Process. A software development process is a process of dividing software development work into distinct phases to improve design, product management, and project management. A software development process is also known as Software Development Life Cycle (SDLC)

A software development process can be divided into the following stages:



1. Requirement analysis:

Requirement analysis is the first and most important and fundamental stage in software development process, wherein, the software requirements are analyzed, both by the customer and a software analyst. A software requirement analysis aims to determine the type, need, field,

requirements and expectations of the customer from a software. Such analysis are later on drafted in a document known as a “Software requirement specification document” (SRSD), which aims at providing details about the functional areas of a software and determine how the software connects with the hardware.

2. Designing:

The next step involves designing the product keeping in mind the requirement specification document. Usually more than one design approach for the software is proposed and documented in a DDS - Design Document Specification.

The DDS is then reviewed by the customer and based on various parameters as risk assessment, product robustness, design modularity, budget and time constraints, the best design approach is selected for the product.

3. Building & Coding:

In this stage the product is built, as per the requirement specification document and design document specification. A programming code is generated as per the document design specification during this stage.

4. Testing:

Once the coding process is complete, the software is tested where product defects are reported, tracked, fixed and retested, until the product reaches the quality standards defined in the software requirement specification document.

5. Maintenance:

This stage involves maintaining the software once it is completed and is ready to launch or already launched. This involves re-application of all the above steps in an existing software and adding new features or functions, in order to fix errors or improvise the software.

KINDS OF SOFTWARE DEVELOPMENT CONTRACT

Software Development Contracts are of three types:

1. Time and Material Contracts:

Time and material contracts is classic form of contracts. In this the client pays for the number of hours the software developer has worked towards the development of the said software. This type of contracts are beneficial for software development projects which are dynamic in nature and require agile execution.

- **Pros:**

T&M contracts are the easiest way to get started they give you a lot of flexibility, within the same budget.

This type of contracts allows supervision on the development progress of a software , which helps in eliminating errors before the final product.

- **Cons:**

This approach requires the constant involvement of the client, requiring more time and effort from both ends.

It is difficult to predict the final budget since the budget fixed initially will keep on fluctuating depending on the client's changing requirements during the development process.

2. Milestone:

Under this model the client makes payment to the software developer once he/she (the developer) has achieved a certain “milestone”, that is a pre-determined work, within given amount of time. The payment is made on evaluating the time and effort spent on achieving that milestone.

- **Pros:**

Errors can be eliminated at prior stage before releasing the final software;

The client can keep a track of software development process and can also make alterations or modifications in the software development plan.

- **Cons:**

No fixed price payment, as every milestone requires varying amount of time and efforts,

No fixed deadline for completion of the software development.

3. Fixed Bid:

Under this model the total price to be paid by client to the software developer , time required in development process, scope of software development are all fixed. This type of contracts are beneficial for longer period of engagements. However, for additional features apart from the one decided under the requirement specification agreement an additional contract will be made for such features and additional costs are charged.

- **Pros:**

The budget remains fixed.

Strict deadlines are enforced and the development process doesn't keep on fluctuating.

There is no need to supervise the project since everything is pre decided and both the parties know what to expect.

- **Cons:**

A separate contract will be required to make every time while altering the software requirements.

Requirement and errors cannot be foreseen in such projects as a result the final product may not produce desired results.

IMPORTANT CLAUSES

A well-drafted software development agreement must contain the following clauses:

1. Software design and development process:

The contract must mention the type of software design and model selected for software development process. It should clearly specify the time limit or deadline for completion of the software, provision for extent of flexibility of time limit and consequences of delay or missed deadlines should be addressed.

2. Product Specification:

This clause should mention clearly and in-detailed description of the software, requirements, functional areas, needs, technical solutions and technical specifications. The in-depth specification about the software design, coding, programming methodology shall be dealt under this clause.

3. Project Documentation:

This clause should talk about the level of responsibility and liability of both the parties. Which party should be responsible for documentation, what are the remedies available in certain consequences.

4. Standard of work:

A software development agreement should mention about the expected standard of work. A minimum standard mark which a software developer has to achieve to provide clients desired results. The provision shall mention the quality and type of work being expected by the client and the employment of experienced and professional people required for proper performance of the project.

5. Program of Work:

This provision shall deal with the mutually decided times limits fixed for the completion of various development stages and the final date by which the software should be completed.

6. Acceptance Testing:

This provision should talk about acceptance procedures and criteria. It should describe in detail the methods to be adopted for acceptance test and time of performance acceptance test. If the software or any of its components fails the acceptance tests, provisions must be laid down for conducting “repeat tests”. If the software still fails to pass the repeat tests, the contract should clearly mention the client’s right in that case, such as rejecting the software, or accepting the software at a reduced price.

7. Approval and final delivery of deliverables:

The time period within which the product should be approved by the client after conducting the acceptance test must be specified in the contract. In case of disapproval of the product proper consequences must be mentioned regarding that. Usually, the contracts provide for extension of the approval period till the time all the requirements have been covered by the software developer.

8. Alterations:

The alteration clause should talk about the events in which client demands for additional requirements or changes in the software specification. The deadlines within which such work should be done and how the cost should be calculated for variations in plan. Whether a separate contract should be made for alterations or additional requirement. It should also talk about dispute mechanism in case of disputes arising out of such alteration or additions.

9. Intellectual Property Ownership:

This is the most important clause in a software Development agreement, as the issue arises who should have the IP Rights over the produced software, whether the Software Developer or the Client who employed the developer. The document should specify the transfer or assignment of the intellectual property rights from developer to client. It should also talk about the kind of intellectual property rights subsist in the software, third party software licenses, owner of such license and open source license if any used in a software.

10. Warranties and Indemnity:

This clause should provide provisions related to warranty period within which if any error occurs in a software, such errors must be rectified by the software developer within a given time and without any additional costs. In Indemnity clause the client should be indemnified by the software developer in case the software infringes the intellectual property rights of the third party.

11. Responsibilities of both the parties:

A separate clause discussing the responsibilities of the client and the software developer should be made specifically mentioning each parties duties and obligations. Some of duties on part of software developer includes, timely delivery of the deliverables, doing work as per clients requirement, maintaining client confidentiality etc. and duties on the part of client includes timely payments, clearly defining the software requirements in SRSD and any other obligations as the parties mutually decide.

12. Fees:

This clause should talk about the payment methodology, whether the payment will be based on time and material basis that is on number of hours worked by the software developer , or on the basis of Fixed bid, the final amount to be paid on completion of the software. The mode of payment , whether payment is to be made in advance or not.etc. It should also mention the rights the software developer will have in case of delay in payments.

13. Force Majeure:

This clause talks about the extraordinary events which may occur in future or which could not have been foreseen by either of the parties at the time of making of the contract such as wars, earthquakes, floods, fire etc. In such circumstances both the parties are freed from their liability or obligation. Most force majeure clauses only suspend the liability for the duration of force majeure and does not excuse a party's non-performance entirely.

14. Dispute Resolution:

In case of disputes whether the dispute should be resolved by the Arbitrator or the Court should be decided. The name of the Court having jurisdiction, governing law, name of the arbitrator or mediator in case of ADR , before whom the dispute will be redressed should be mentioned.

SAMPLE SOFTWARE DEVELOPMENT AGREEMENT

This Agreement is made and entered into this _____ day of _____ 20____

BETWEEN

M/s. A.B.C and Co. Ltd., a Public Company limited by registered under the Companies Act 1956, and having its registered office at _____ (hereinafter referred to as the 'Customer') of the one part.

AND

M/s. XYZ and Co. Ltd., a Public Company limited by shares registered under the Companies Act 1956, and having its registered office at _____ (hereinafter referred to as the 'Contractor') of the one part.

WHEREAS the contractor has agreed to write certain Computer program for the customer and to provide other services hereinafter mentioned upon the terms and conditions hereinafter mentioned.

NOW IT IS AGREED BETWEEN THE PARTIES AS FOLLOWS:

1. The Contractor agrees to design and write the¹ software in the programming language as per specifications given in the Schedule hereunder written and to deliver and install the software on the computer hardware equipment of the Customer and which is installed at the office viz. _____ (hereinafter referred to as the Computer Equipment. The Contractor shall also supply the Documentation along with the software and to render such of the services as hereinafter mentioned.
2. The Contractor admits that it has received all information about the specifications above referred to and the said Computer Equipment and the Contractor will not be entitled to raising any objection on the ground of misinterpretations of the equipment or any part thereof.

¹ Software means computer programme in object form only as described, including any copies but excluding source code material and preparation design material.

3. The Contractor agrees and undertakes to carry out the project that is the² Deliverables to be supplied and all services to be provided by the Contractor under this Agreement with reasonable care and skill with the help of qualified and experienced personnel.
4. Similarly the Customer will provide the Contractor with accurate and complete information as will be necessary concerning the customers operation and shall answer to queries, decisions and approvals reasonably necessary for the Contractor to undertake the Project.
5. The Customer shall provide the Contractor and its personnel free access to and the use of the said computer equipment, offer full help of the Customer's employees and shall provide electric power, lights, heating and air conditioning facility at the site of the Computer Equipment and all other necessary facilities reasonably required for the working of the Project.
6. The Customer guarantees that the computer equipment and all the software and other the deliverable, used in the said computer equipment is the property of the Customer and the Contractor is permitted to use the same.
7. Each party hereto will appoint its qualified representatives who will hold meetings between them from time to time to provide progress reports and to discuss the same and other issues.
8. The bespoke³ software will be written with the use of the said Computer equipment which will be maintained by the Customer and at its own costs but solely for the purpose of the Project.
9. The Customer will keep the said computer equipment validly insured against all risks of loss or damage from any cause whatsoever for the full replacement value thereof and will pay the premium thereof from time to time regularly. The Customer shall not agree to sell, or mortgage the said computer equipment during the substances of the agreement.
10. The Contractor will be responsible for providing and installing the software on the said computer equipment at the said site thereof. The software so installed will consist of one copy of each class of software in machine relatable object code on the storage media specified in the specification and the Contractor will deliver the documentation in accordance with the project specification. If the Customer desires the Contractor to provide or procure the provision of software maintenance the same will be done under a separate agreement to be entered into between the parties hereto.

² Deliverables means the software and documentation.

³ Bespoke software as distinguished from package software means a service and more akin to consultancy

11. At any time prior to the acceptance date hereinafter mentioned, the Contractor may in writing recommend and the Customer may in writing from time to time request change to any part of the Project. The Contractor shall investigate such change, with the consent of the Customer and if recommended it will be effected accordingly provided that the costs incurred due to such change will be payable by the Customer.
12. After the software is installed on the Computer equipment the Customer will submit to the Contractor by the date specified in the Project plan, for approval of the Contractor a test specification setting out the criteria and the procedures for the acceptance of the software which is suitable to demonstrate that the software complies with and performs in accordance with the specifications unless they are not in accordance with the specifications , The Customer will undertake the acceptance test at the site where the Computer Equipment is installed. The Customer will undertake the acceptance test in accordance with the acceptance specifications during the testing period using test data and expected results prepared by the Customer and accepted by the Contractor. The testing will commence within eight days after installation of the software.
13. If any part of the Software fails to pass the acceptance test, the Contractor will be allowed to rectify such part of software until the same complies with the tests.
14. If the software or any part thereof fails to pass the acceptance test two times, then the Customer may give notice to the Contractor giving him option either to provide at no extra charge such additional service and replacement items as will enable the software or the part thereof to pass the acceptance test within a period of _____ days after service of the notice , or to accept the software or part with an abatement of the contract price as reasonably suffered by the Customer after taking into account the circumstances.
15. If even after the procedure stated above the software fails to pass the acceptance test or if the amount of abatement of price is not agreed upon, then the customer will be entitled to reject the software and terminate this agreement giving written notice to the Contractor on that behalf.
16. However, the Customer shall be deemed to have accepted the software if the Customer signs an acceptance certificate after successful completion of all stages of the acceptance tests or if the of _____ days that the software has materially failed to pass the or of the software or a substantial part thereof is first put into operational use .

17. The contractor price for the Project payable by the Customer to the Contractor and the mode of payment thereof will be stated in the schedule hereto. The said price will not include the charges for the additional services rendered by the Contractor and which are not provided in this agreement as well as the charges for the computer facilities provided, including storage media, data preparation, photocopying documentation, printing and other material provided by the Contractor itself or through a third party.
18. If any installment of the contract price or any other amount payable by the customer of the Contractor is not paid on the due date the same will carry interest at the rate of _____ p.c. p.a. from the date till payment. This is without prejudice to the other rights of the Contractor under this agreement or in law.
19. Until the acceptance of the software program by the customer as foresaid and the payment of the contract price agreed to be paid by the Customer to the Contractor the copyright in the Computer program , documentation and other material developed by the Contractor under this agreement will belong to the Contractor. On the acceptance of the program by the customer and payment of the Contract price by the Customer to the Contractor the copyright in the said program and the documentation and all other rights will vest in and belong to the Customer.
20. The Contractor warrants that it has ability to perform its obligations under this agreement, that the design of the software will be suitable to fulfill the specifications and that the installation of the software will be free from defects in workmanship.
21. The Contractor further warrants and agrees that it will be responsible to rectify within a reasonable time any defect which under proper use, care and maintenance appears in the software, provided the defect is properly reported to the Contractor in writing within _____ weeks of the acceptance of the software without any additional charge provided the defect is not found cured due to any negligence on the part of the Customer or any modifications made by the Customer or any other person without the Consent of the Contractor.
22. The Contractor agrees to identify and keep indemnified by the Customer against any loss or damages suffered or incurred by the Customer on account or breach of any copyright or rights related to any patent trade mark or design of any other person committed by a contractor in supplying the software program under this agreement.
23. The customer ensures the Contractor that any specifications, decision or instruction given by it to the Contractor do not infringe an intellectual property or other rights of any other

person and the Customer agrees to identify the Contractor against any loss or damage suffered by the Contractor on account of such breach.

24. All information, knowledge, whether Commercial, financial, technical or otherwise received by one party from another party here in connection with the project, and this agreement will be kept confidential including the employees or agent to the party and the auditors, professional advisors, and others having legal rights or duty to have access to or knowledge of the confidential information in connection with the business of the party.
25. The purpose of this agreement shall be carried within a period of _____ months from the date hereof failing which the agreement shall stand terminated on the expiration of the said period unless the parties agree to extend the term in writing in which case the clause will apply to the extended period.
26. On the termination of the agreement by efflux or otherwise as aforesaid, the Contractor will be paid all moneys due to the Contractor after taking into account the amounts previously paid together with the total value of the project completed upto the date of termination, and the cost of materials and good ordered for the Project for which the Contractor has paid or is legally bound to pay, If the Contractor is paid till the termination any amount in excess of what is due to it as aforesaid, the excess will be refundable by the Contractor to the Customer.
27. Termination of the agreement will not prejudice the rights of any party accrued to it till the date of termination.
28. Any notice required by the party to be given hereto of any under this agreement shall be given in writing and shall serve either through post registered A.D. or by Fax or by personal delivery at the address of the party hereinabove mentioned.
29. This agreement is sole repository of the agreements and the understandings arrived at between the parties and it supersedes all previous correspondence, representations, communications and memorandum of understanding.
30. Any dispute or difference arising out of or in respect of this agreement or any provision thereof will be referred to arbitration of one or two arbitrators conversant with the subject matter of this Agreement and the arbitration will be governed by the Arbitration and conciliation Act, 1996.

31. This agreement will be governed by the Indian law and any competent Indian Court alone will have jurisdiction to entertain any legal action taken by one party against the other.

THE SCHEDULE ABOVE REFERRED TO CONSISTING OF

- (1) Specifications
- (2) Documentation
- (3) Computer Equipment
- (4) Installation Date
- (5) Project plan or program
- (6) Contract price and mode of payment
- (7) Project plan, Training plan and personnel

IN WITNESS WHEREOF the parties have put their seal here under the day and year first hereinabove written.

Common seal of the ABC and Co.)
the within named customer)
is affixed as per the Resolution of)
the Board of Directors in the)
presence of)

Common seal of the XYZ and Co.)
the within named 'Customer' is)
affixed as per the Resolution of)
the Board of Directors in the)
presence of)

With this we have come to an end of this course, we hope you enjoyed learning and found the materials useful. In order to receive your certificate kindly follow the examination procedure as mentioned in the mail. In case of any doubt mail us at ledroitonline@gmail.com