



IKIGAI LAW

# Reimagining Contracts

## Drafting Contracts to Delight

By Darpan Singhi and Anirudh Rastogi

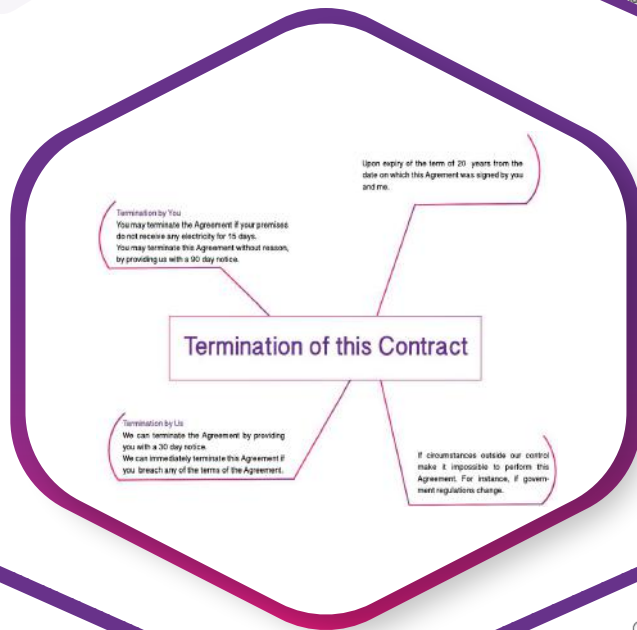


# Preface

One of the first mandates I handled at Ikigai Law was to draft an employment agreement. The agreement was standard, and my final draft was 15 pages long – only 13 pages too long in the client’s eyes. The client’s issues with the agreement were that it was: (i) too long; (ii) had too much content; (iii) would scare unsuspecting employees; and (iv) as a sum of the first three points, he would not be able to convince his employees to sign the agreement.

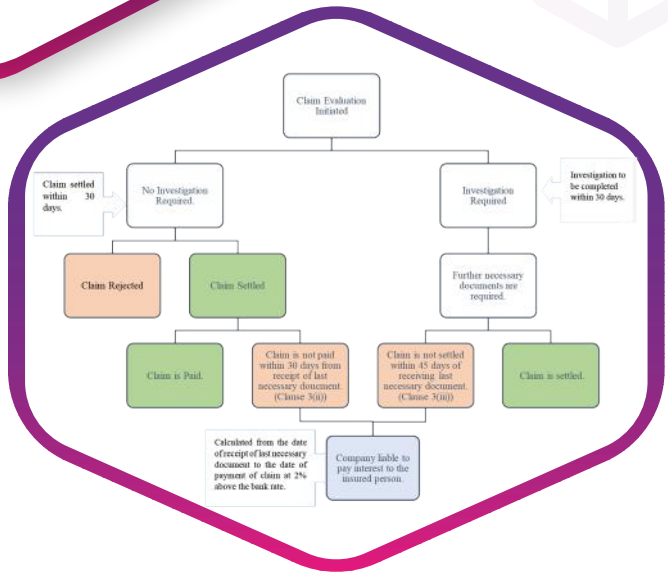
The mandate, in my mind, was to prepare a standard employment agreement. The client’s expectation was that he would get an agreement that was easy to execute. The simple employment agreement, which takes only a few hours to draft from scratch, took me a few days and multiple phone calls. Each call meant more words were shaved off the agreement, making me progressively uncomfortable, as I found it difficult to defend the legal writing style. This drove me up the metaphorical wall and left lasting questions in my mind, “Why do we, as lawyers, write the way we do? How do we deliver documents that our clients can not only understand, but also engage with? A document that is, if even possible, a delight to read?”

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Darpan Singhi



### Key Terms of your Power Purchase Agreement

- ₹ 20K**  
What is the one time installation cost?
- ₹ 1.5**  
Price per unit of electricity - for the first year
- 20 Years**  
How long will this Agreement be binding?



# I. Introduction

Legal writing has long been critiqued for being exclusionary. The core of such criticism stems from the use of precedents in legal drafting. Often contracts incorporate phrases such as “null and void,” and “free and clear title” almost automatically. Are these phrases really needed? Arguably no. Redundant phraseology is quickly characterized as “term of art”, but

Terms such as “null and void” are redundant. Legal tautology has ancient roots. English lawyers have had to select between languages through the course of legal history – first between Celts and Anglo-Saxons, English and Latin, and then English and French. Very often the clients and counter parties would speak only one of the two languages, and lawyers would write phrases to cover two languages. An example of this is “null and void”, where “null” can be traced to the French word, “nulle” and void to the plain English word, “avoid”. “Free and clear” can be traced back to the Old English word “freo” and Old French “cler”. The doubling has now devolved into drafting tradition.

phrases such as “free and clear title” are not the same as “represents and warrants”. The former is a product of habit while the latter is a term of art. If we learn to make this distinction, we can simplify the language of contracts. This begs the question, is there a need to deviate from precedent and to do things differently? We believe there is. A contract first communicates intent, and when signed, binds and protects the parties. Therefore, communication, comprehensibility, and simplicity should be the end goal of contract drafting. Good contracts speak directly to end users and not their lawyers. Perfection is when these documents delight their end users, and spark joy.

As business communication has transitioned from letters to e-mails to WhatsApp and Slack, and from formal writing to PowerPoint presentations, we argue that legal writing for business should also evolve and take to new formats.

Employment Contract

The Company hereby appoints the Employee as an "Associate" in the Company with effect from 11/1/20. The Employee's principal place of employment shall be New Delhi.

Company Letter

Dear Anmol,  
  
Greetings from Jared Dunn & Co. We are pleased to inform you that your candidature has been confirmed and we are offering you the position of "Associate" at our New Delhi office.

Email

Hi Anmol,  
  
How are you?  
Congratulations. We are pleased to offer you a position as an "Associate" with our New Delhi team.

WhatsApp

Hey Anmol, congrats. Happy to offer you the Associate position for Delhi. Will share more info over call.

## II. The argument for change.

In order to drive change and break from established precedents, we must answer two questions:

(a) Is there a concentrated body of thought that supports the idea of user-friendly contracts?

(b) Does the market for legal advice truly desire or care about such contracts, and are they willing to pay a premium for it?

We address these issues below:

### a. A concentrated body of thought

Professor David Mellinkoff once equated legal writing with cockroaches and rats – when it goes extinct, nobody will weep for it.<sup>1</sup> There is much criticism of legal writing, and there exists a consistent body of legal thought that seeks to reimagine the role of lawyers and how their writing may be guided.

The Scandinavian Proactive Law Movement is an example. The emphasis of this movement is that lawyers join forces with other professions: business continuity persons, risk analysts, human resources personnel, product developers and researchers, so that the documents produced by lawyers can speak to diverse professionals.<sup>2</sup> This helps make law more accessible and empowering for persons who will eventually be affected by legal drafts.<sup>3</sup> Proactive lawyering, as advocated by the movement, requires lawyers to predict realistic future business problems. Through inter-professional collaborations, we design better documents for businesspersons. Lawyers must think about their value addition to business projects. The evolving roles of lawyers as designers is as follows<sup>4</sup> –

<sup>1</sup> David Mellinkoff, “Legal Writing: Sense & Nonsense”, 1982.

<sup>2</sup> Helena Haapio, “Introduction to Proactive Law”, Scandinavian Studies in Law, Vol. 49: 21-34, 1999.

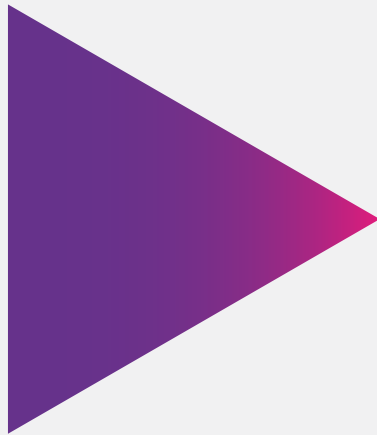
<sup>3</sup> Helena Haapio, “Introduction to Proactive Law”, Scandinavian Studies in Law, Vol. 49: 21-34, 1999.

<sup>4</sup> Helena Haapio, “Introduction to Proactive Law”, Scandinavian Studies in Law, Vol. 49: 21-34, 1999.

# Duties of proactive lawyers

Fighter (preventive lawyer)

Lawyer as a designer



Lawyer as a problem solver

A business partner, legal architect, trusted counsellor, mentor, and coach, who, as a member of a team:

- helps clients achieve objectives and succeed;
- helps managers run their business more efficiently, with improved outcomes and fewer problems;
- introduces solutions and options through brief and clear advice;
- helps put in place systems, tools, and training that maximize opportunities and minimize cost and risk;
- helps clients learn their legal ABCs;
- stimulates and supports clients' legal self-care.

In addition to legal theory, there has also been a consistent shift in simplifying legal texts and de-jargonizing the law for a while. For instance, in 1993, the then U.S. President Bill Clinton signed an executive order<sup>5</sup> directing regulatory agencies in the U.S. to use plain and simple English. The order directs agencies to adopt various techniques, including using headings to ease the reading of regulations. Similar sentiments are also found in U.S. contract law. The N.Y. General Obligations Law § 5-702 requires the use of plain language on consumer transactions. The law provides that transactions must be written clearly and coherently using common words with every day meaning<sup>6</sup>. In the EU, Regulation 12(1) of the EU-GDPR requires controllers to take measures to provide data processing information in a concise and easily accessible form, using language that can be easily understood by children.<sup>7</sup> Plain English drafting is rapidly becoming the norm for drafting consumer agreements. Hopefully, it is only a matter of time that consumer protection legislation across the board starts requiring simple, easy to understand drafts. This ask is not without mainstream empirical evidence that the market desires such change.

<sup>5</sup> Executive Order 12866, Federal Register Vol. 58, No. 190, 4th October 1993.

<sup>6</sup> 2010 New York Code GOB – Creation, Definition and Enforcement of Contractual Obligations, § 5-702 (1).

<sup>7</sup> Article 12 and Recital 58, GDPR; Similarly, Australia, New Zealand, and the United Kingdom have all advocated for and prescribed manuals for plain English drafting, see: Vidhi Centre for Legal Policy, “Manual on Plain Language Drafting”, March 2017.

## b. Market viability and desirability

Businesses are taking on the responsibility to draft plain English agreements because of legal requirements, and because it is good for business. Here are a few examples:

### i. GE Aviation

GE Aviation combined its three digital businesses into a single “Digital Solutions” unit in 2013. The new unit had an inspired sales force that found plenty of customers but could not close their deals. The reason was their two hundred and fifty-page contracts that took months to be negotiated and frustrated customers.<sup>8</sup> There was an increasing realization that speed to market was key for the business’ survival<sup>9</sup>, which was being thwarted by long contracts. Enter the GE Aviation general counsel, who asked his team to redo GE’s agreements in plain English. The litmus test for the unit’s legal counsels was, “Can high schoolers understand this contract without context?” If not, then the agreement was re-drafted until it became a yes<sup>10</sup>. This was done for every single contract across the board. Here’s an example of a clause before and after the simplification exercise:<sup>11</sup>

Clause before plain English drafting	Clause after plain English drafting
“Under no circumstances shall Company have any liability, whether in contract, tort (including negligence), strict liability, other legal theory, or breach of warranty for: (i) any lost profits; (ii) any loss or replacement of data files lost or damaged; (iii) consequential, special, punitive, incidental or indirect damages arising out of this agreement, the delivery, use, support, operation, or failure of	“Your and our total compensation obligation under this contract cannot exceed twenty-five percent of the amount FES has billed you in the last twelve months for the applicable service, and neither of us have any compensation, contribution or other obligation for consequential, punitive, incidental, indirect or exemplary losses (including, but not limited to,

<sup>8</sup> Kristin Kloberdanz, “Honey, I Shrunk the Contract: How Plain English Is Helping GE Keep its Business Humming”, GE Reports, March 2nd, 2017, <https://www.ge.com/reports/keep-simple-plain-english-helping-ge-keep-business-humming/#.WL6fBKCaAu4.linkedin>.

<sup>9</sup> Shawn Burton, “The Case for Plain-Language Contracts”, January-February 2018 Issue, <https://hbr.org/2018/01/the-case-for-plain-language-contracts>; Shawn Burton was the General Counsel to GE Digital Solutions and responsible for the implementation of plain English contracts.

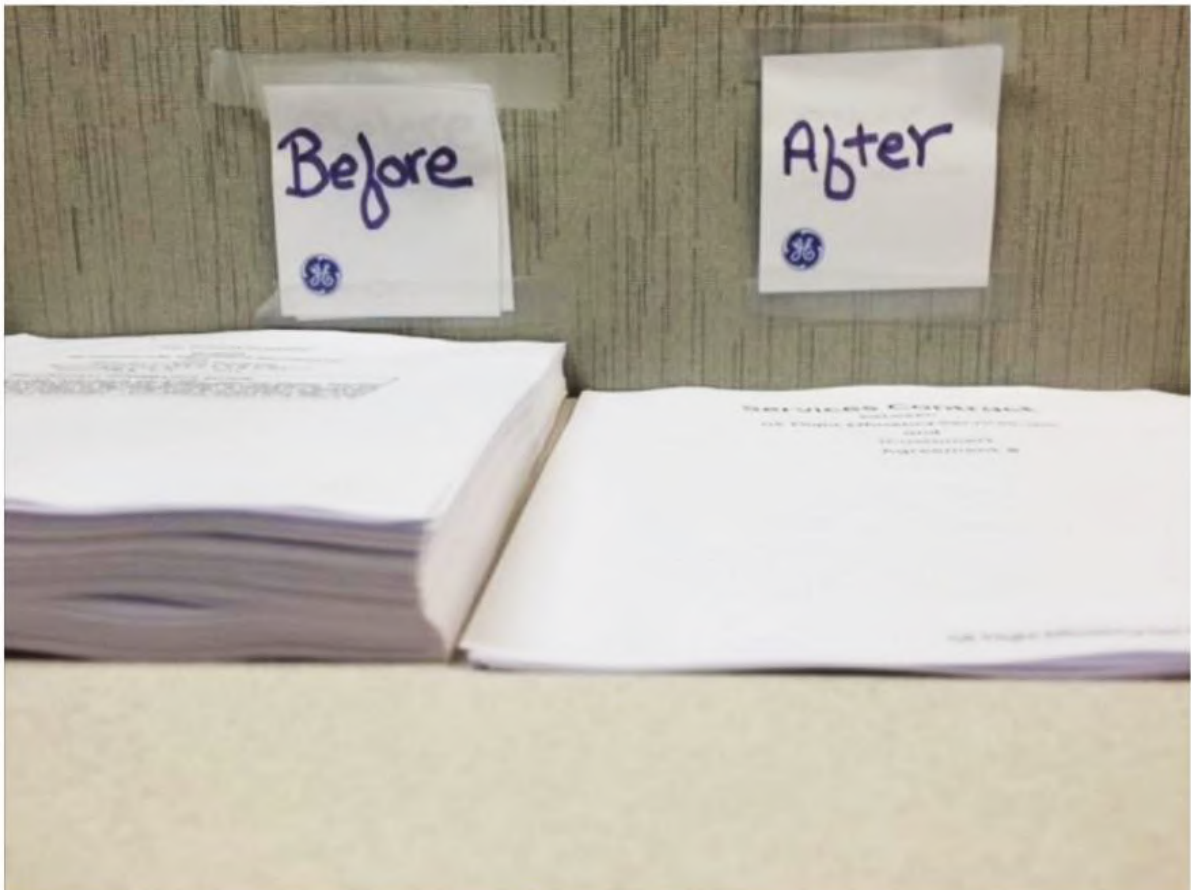
<sup>10</sup> Shawn Burton, “The Case for Plain-Language Contracts”, January-February 2018 Issue, <https://hbr.org/2018/01/the-case-for-plain-language-contracts>.

<sup>11</sup> Shawn Burton, “The Case for Plain-Language Contracts”, January-February 2018 Issue, <https://hbr.org/2018/01/the-case-for-plain-language-contracts>.

the system; or (iv) consequential, special, punitive, incidental or indirect damages arising out of the inaccuracy or loss of any data generated by the system; even if company has been advised of the possibility of such damages, provided that the foregoing disclaimer under sub-section (iii) above does not apply to the extent such damages are based upon the use of the system and are arising out of Austin's willful misconduct or gross negligence that results in a breach of section 6 hereto."

profit or revenue loss, capital costs, replacement costs and increased operating costs)."

The overall impact the re-written agreements in plain English looks dramatic:<sup>12</sup>



<sup>12</sup> Kristin Kloberdanz, "Honey, I Shrunk the Contract: How Plain English Is Helping GE Keep its Business Humming", GE Reports, March 2nd, 2017, <https://www.ge.com/reports/keep-simple-plain-english-helping-ge-keep-business-humming/#.WL6fBKCaAu4.linkedin>.



The simplification was not a futile effort. The sales team was able to go out and do their job – selling products and ensuring the company’s profits are maintained. The success of plain English drafting was impactful enough for other GE verticals to consider using plain English for all their contracts.<sup>13</sup>

## ii. Shell

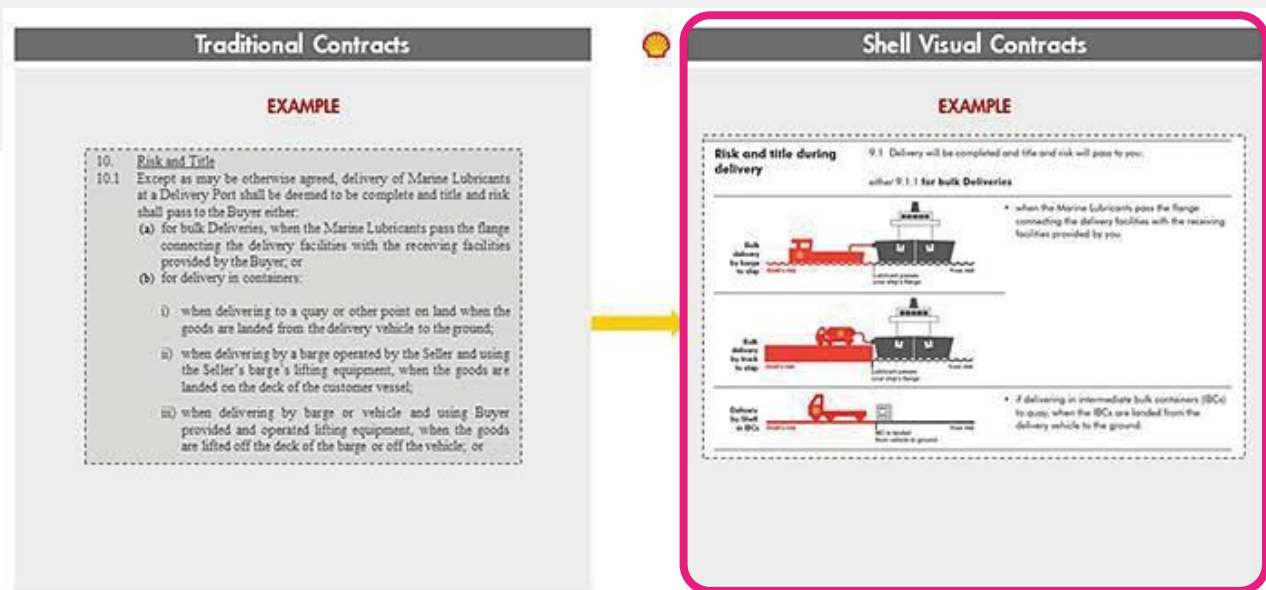
G.E. Aviation is not the only megacorporation that has taken to novel contracts to streamline businesses. Shell, the Dutch multinational company, noted in 2017 that it needed to streamline its marine and aviation business processes to increase profits. The group’s legal department felt that the thousands of contracts signed by the company needed to be optimized.<sup>14</sup>

Shell’s marine division redrafted its contracts using plain English, cutting down the word count by almost 40%. Shell went a step forward and moved to visual contracts. Once finalized, the contracts served as a catalyst for the company. They helped avoid prolonged negotiations and increased comprehensibility allowed the counterparties to build a relationship of trust with Shell.<sup>15</sup> Here is an example of a clause before and after the simplification exercise:

<sup>13</sup> Kristin Kloberdanz, “Honey, I Shrunk the Contract: How Plain English Is Helping GE Keep its Business Humming”, GE Reports, March 2nd, 2017, <https://www.ge.com/reports/keep-simple-plain-english-helping-ge-keep-business-humming/#.WL6fBKCaAu4.linkedin>.

<sup>14</sup> Bruce Love, “Can contracts use pictures instead of words?”, Financial Times, October 23rd, 2019 <https://www.ft.com/content/032ddcb0-e6b1-11e9-b8e0-026e07cbe5b4>.

<sup>15</sup> Bruce Love, “Can contracts use pictures instead of words?”, Financial Times, October 23rd, 2019 <https://www.ft.com/content/032ddcb0-e6b1-11e9-b8e0-026e07cbe5b4>.



IBM<sup>16</sup>, AirBnb<sup>17</sup> and Lemonade<sup>18</sup> have all developed plain English contracts for various business undertakings. It is becoming apparent that companies are seeking newer and efficient ways of building customer trust as well as reducing acquisition time, and that reducing contractual complexities is a certain way to do this.

### c. On what format works best

The use of plain English is not the only way to simplify a contract. It may not suffice for persons who cannot read and write or remain wary of signing word-heavy contracts.<sup>19</sup> Empirical and quantitative research shows that pure text agreements, irrespective of layout, are not the most effective format for contracts<sup>20</sup>.

<sup>16</sup> Sue Reisinger, “How IBM Shrunk a Complex Contract Down to 2 Pages”, IACCM.

<sup>17</sup> “Nick Brodribb, head of legal at Qantas Airways Ltd., had this to say about the contract: “Australian lawyers have for a long time been dealing with redundant language in U.S. legal contracts. The drive towards plain English we have seen from GE, along with companies like Airbnb, gives us great hope for the future. Plain English should save time on the front end of a transaction, which allows the business to get into the project quickly, to manage it more easily and potentially to resolve disputes sooner.” Kristin Klobberdanz, “Honey, I Shrunk the Contract: How Plain English Is Helping GE Keep its Business Humming”, GE Reports, March 2nd, 2017, <https://www.ge.com/reports/keep-simple-plain-english-helping-ge-keep-business-humming/#.WL6fBKCaAu4.linkedin>.

<sup>18</sup> <https://www.lemonade.com/policy-two>; See, Laure Latham, “Time to Kill your Legalese Darlings”, The Attic, 18th April 2019, <https://theattic.london/2019/04/18/kill-legalese-darlings/>.

<sup>19</sup> Stefania Passera, “Flowcharts, Swimlanes, and Timelines: Alternatives to Prose in Communicating Legal–Bureaucratic Instructions to Civil Servant”, *Journal of Business and Technical Communication*, Vol 32 (2): 229-272, December 26, 2017.

<sup>20</sup> Stefania Passera, “Beyond the wall of Contract Text: Visualizing contracts to foster understanding and collaboration within and across organizations”, *Doctoral Dissertations 134/2017*, Aalto University; Stefania Passera, “Flowcharts, Swimlanes, and Timelines: Alternatives to Prose in Communicating Legal–Bureaucratic Instructions to Civil Servant”, *Journal of Business and Technical Communication*, Vol 32 (2): 229-272, December 26, 2017.

Documents that regulate behavior – like contracts and statutes, often overlook supporting user tasks through design. Diagrams and visual aids are particularly useful for aided-drafting since they clearly identify the flow of parties’ rights and obligations.

A 2017 study conducted with a sample group of businesspersons, students, lawyers, and engineers found that the focus group (including lawyers) provided with visual aids performed better at comprehension and recollection of contractual terms.<sup>21</sup> Visually enhanced contracts, aided with simple language, require lower mental effort, but yield superior comprehension performance from the readers.<sup>22</sup> Here are a few examples of formats that we, Ikigai Law, have adopted in the past:

i. FAQs

We were engaged by a student co-living service provider to draft licensing agreements to be executed with college students. The challenge: How do you make college students and hostel managers understand a license agreement? We prepared the agreement in an FAQ format. Here is an excerpt:

Clause title	Clause	In short
1. Duration of the License	Licensee will have the right to use the Premises from the Effective Date to 5th October 2020 (“Term”). The Agreement shall automatically stand terminated upon the expiry of the Term.	How long can you stay with us? Ans: Until Monday, 5th October 2020.
2. Your responsibilities	So long as you are present and/or reside on the Premises, you have the following responsibilities –	What are your mandatory obligations under the Agreement? Ans: Please see the column on the immediate left. If you fail to meet these

<sup>21</sup> In a series of exercises conducted by Passera, she noted that persons using visual aids were far more accurate when using diagrams than when not using diagrams. The test and the statistics took into account the answering accuracy and speed of the participants and factored for any calculations that may be needed for any commercial components of the contract. See, Stefania Passera, “Beyond the wall of Contract Text: Visualizing contracts to foster understanding and collaboration within and across organizations”, Doctoral Dissertations 134/2017, Aalto University

<sup>22</sup> Stefania Passera, “Beyond the wall of Contract Text: Visualizing contracts to foster understanding and collaboration within and across organizations”, Doctoral Dissertations 134/2017, Aalto University

	<ul style="list-style-type: none"> <li>• You shall always pay the Hostel Fees and all other costs payable by you on time, as provided in this Agreement.</li> <li>• You shall always maintain Premises in a neat and clean manner.</li> <li>• [...]</li> </ul>	obligations, we have the right to terminate this Agreement (see clause [] (When can we terminate the Agreement?)).
3. Governing Law	This Agreement shall be governed by the laws of India. The competent courts of New Delhi shall have jurisdiction over all disputes arising between us.	Where can we file cases in the event of a legal dispute? Ans: Courts of New Delhi

## ii. One-line explainer

We were engaged by a new ride-sharing startup to draft their terms of use and privacy policy. We added a one-line explainer with an image to each provision to make these documents accessible to users, in line with forthcoming privacy law requirements. An excerpt follows.



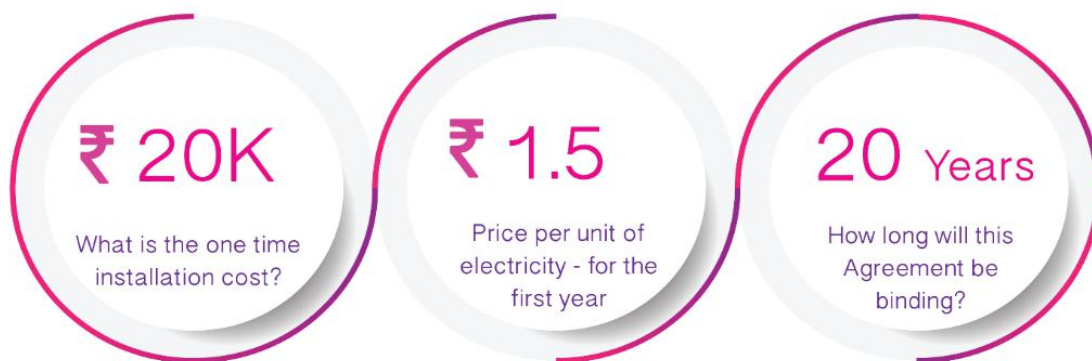
*If you forget anything in the cab, we will try to recover it, but cannot guarantee it. We, or the drivers, cannot take responsibility.*

Please be responsible and do not forget any luggage/goods in the cab. If you forget any luggage in the cab, please inform us immediately through the App and we will make all reasonable efforts to recover the lost item. However, we make no warranties for recovery of any forgotten luggage. You will reimburse us for all additional costs incurred by us in shipping the luggage to you. Neither we nor the Driver will be responsible for any loss or damages that you, your luggage or possessions may suffer.

iii. Graphic explainers

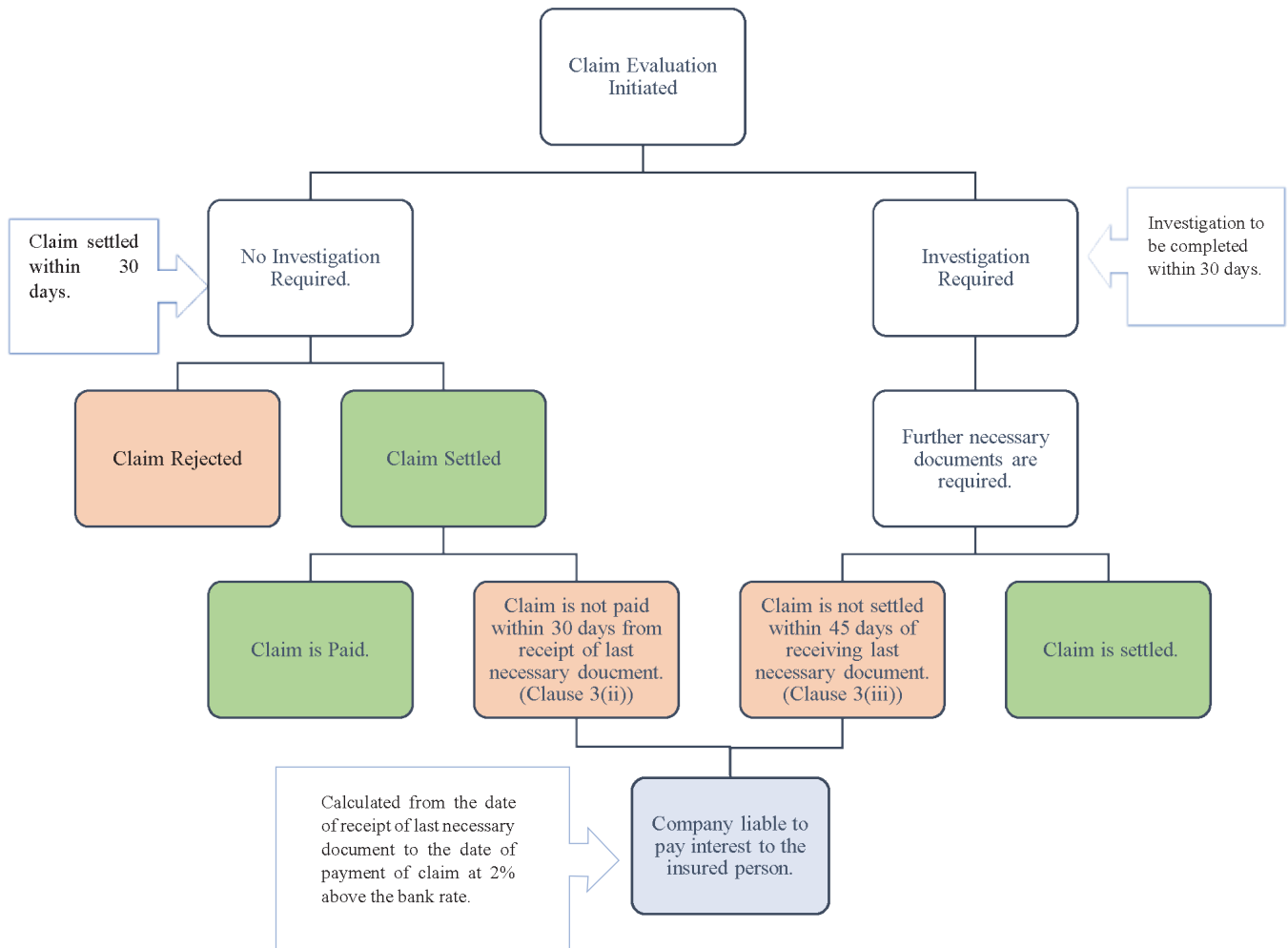
We were engaged by a solar power manufacturing company facing a tough time selling their roof-top solar plants due to their bulky contracts. We designed a graphic summary to be affixed to the agreement. Here are excerpts:

## Key Terms of your Power Purchase Agreement



#### iv. Flow-chart explainers

We redrafted the Indian insurance regulator's standard contractual clauses as part of a consultation exercise by the regulator to bring transparency and ease of use to insurance policies offered in India. Here are a few samples:



v. Comic book agreement

We drafted a comic book agreement for the purchase and storage of fresh apples from farmers and cultivators. Here is a tase of (no pun intended) what it looked like:



d. Key concerns

One must be careful to ensure that diagrams and visual aids do not contradict the contract’s actual text. Further, the contract should clearly state that, in the case of inconsistencies between the text and visuals, the text version would prevail — a solution commonly used in bilingual contracts.<sup>23</sup>

<sup>23</sup> Stefania Passera, “Flowcharts, Swimlanes, and Timelines: Alternatives to Prose in Communicating Legal–Bureaucratic Instructions to Civil Servant”, *Journal of Business and Technical Communication*, Vol 32 (2): 229-272, December 26, 2017.

### III. Conclusion

Contracts are binding if they satisfy the basic legal requirement of an offer, its acceptance, and lawful consideration. Beyond this, lawyers are free to devise formats that make contracts easier to read. And, they should. Contracts should not be documents for lawyers by lawyers. They should rather be designed with their end-user in mind. The end-user would typically like the contracts to be jargon-free, to-the-point, and simple to read. A good test for this contract can be framed as a question: “Can a thirteen-year-old understand this contract?” If not, we recommend taking another stab at it. If you want to raise the bar, ask, “Will this contract delight a thirteen-year-old?”

*Hope you enjoyed reading this, and if you want to learn more about our thinking and work in this area, [click here](#) to watch Anirudh’s TEDx talk on “Reimagining contracts to empower millions.”*