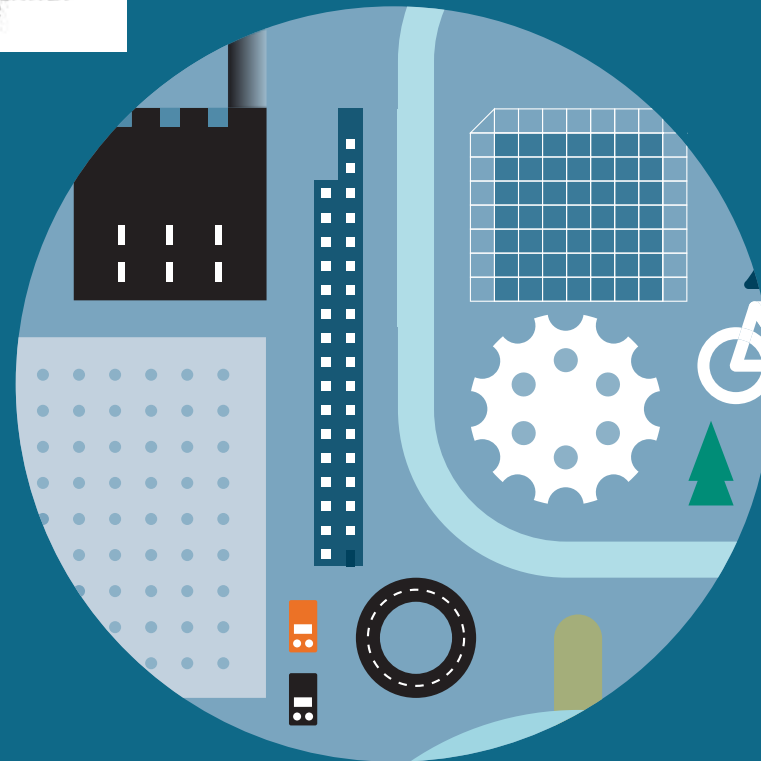


Geschäftschancen in Indien - Indian law



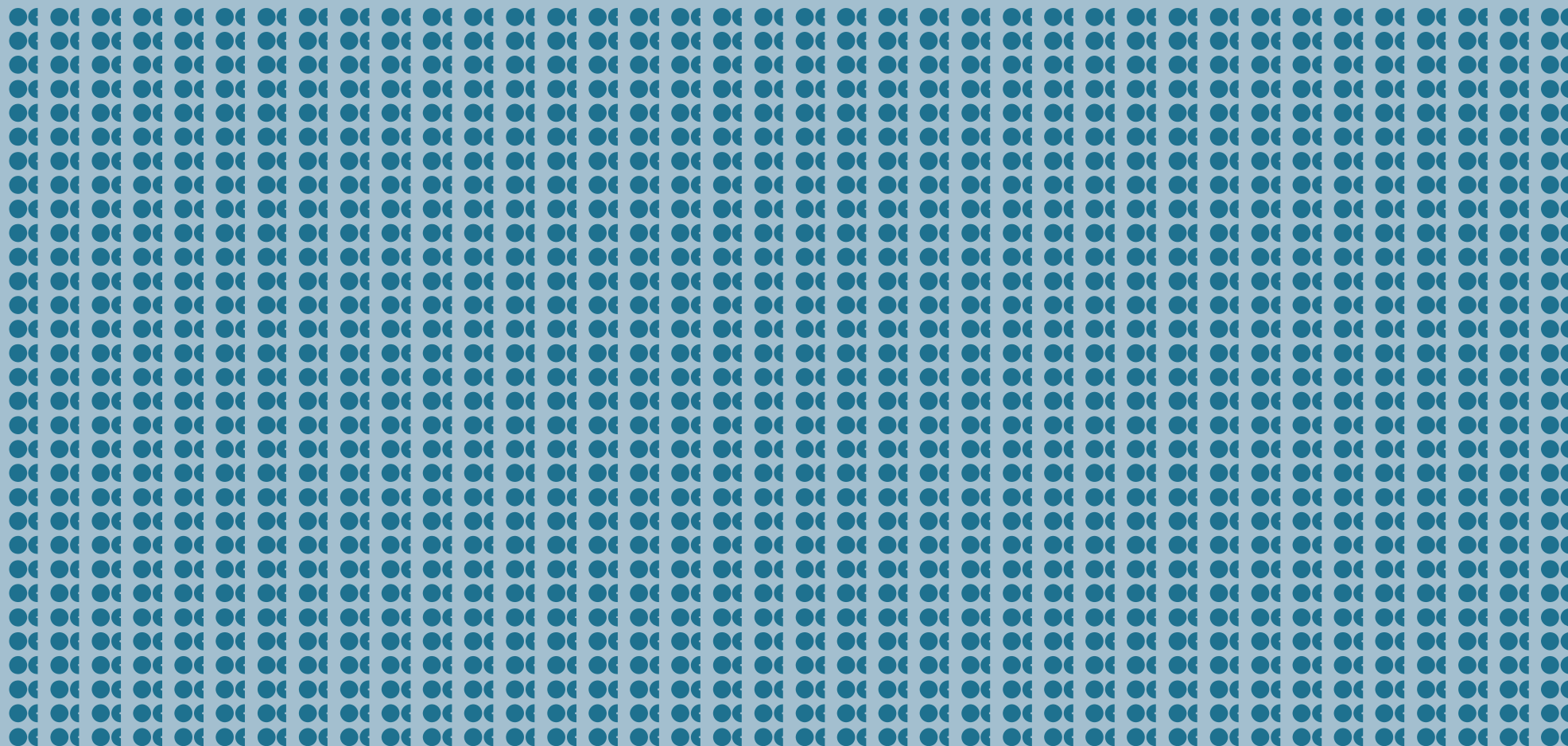
RA Ulrich Bäumer, LL.M.
Berlin
08. Mai 2018

Agenda



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- I. Basics Contract Law in India
 - II. Liability in breaches of contract
 - III. Liability in breaches of contract
 - IV. Cultural Issues in contract negotiations

I. Basics



I. Basics

About India

- Size: slightly more than 1/3 the size of the US; approximately the size of the EU
- Population: approx. 1 billion (65 years and over: 5 %)
- Religion: 80 % Hindu; 14 % Muslim; 2.4 % Christian; 2 % Sikh; 0.7 % Buddhist
- Literacy rate: 52 %



I. Basics

Government

- Largest democracy in the world
- Republic of India (Independence: August, 15th, 1947)
- Capital: New Delhi
- 28 states and 7 union territories
- Legal system based on English Common Law (!)
- Bicameral Parliament
 - Rajya Sabha (council of states: 250 members)
 - Lok Sabha (people's assembly: 545 members)

I. Basics

- India is the largest democracy
- Common law state
- Doctrine of stare decisis (Precedents)
- Statutes in various areas
- Modelled on UK law
- Case laws

I. Basics

Business models (+) vision

- Captive BPO
- Joint Venture
- Third party outsourcing
- Build – Operate – Transfer
- M&A

I. Basics

Law – International dimensions:

- Compliance with multi-country laws
- Common law vs. Civil law
- Cross border enforceability issues
- Cross border corporate structure
- Intellectual property protection (International Standards – TRIPS in effect as of 01 January 2005)

I. Basics

- US
 - HIPAA / GILB
 - State Laws (changing frequently)
- Europe
 - EU Data Privacy Directive (for India: model EU contract)
- India
 - Draft new Section 43 A of the Information Technology (Amendment) Act 2008 (limited scope- not yet implemented)
 - Contractual obligation – vendors contractually obliged to comply with foreign laws on Data Privacy

I. Basics

Choices of law in India – Limits

- Causal connection necessary (National Thermal Power Corporation (NTPC) v The Singer Co. AIR 1993 SC 998)
- Enforcement of foreign judgment / award may be refused if contrary to public policy in India (as in Germany: Art 6 EGBGB - ordre public, e.g. punitive damages pursuant to a US judgement)
- Certain issues can not be governed by selected law: IP transfer, registration, protection in vendor territory, real estate, labor laws, bankruptcy, enforcement of foreign judgement / award (as in Germany, Art. 29, 29 a, 30 EGBGB)

I. Basics

- choice of law
 - choosing the law applicable to the contract

- forum selection clauses
 - choosing a particular forum for the resolution of a dispute

I. Basics

- Section 28 (1) (b) (i) of the **Arbitration and Conciliation Act, 1996**
- validity of the arbitration agreement
- whether a dispute lies within the scope of the arbitration agreement
- validity of the notice of arbitration
- constitution of the tribunal
- question whether the award lies within the jurisdiction of the arbitrator
- formal validity of the award

I. Basics

- Legal framework conditions in India:
 - Congestion of the courts due to increasing caseload
 - Long periods
 - Duration of proceedings up to 10-15 years
 - Timing at the discretion of the courts



I. Basics

- Supreme Court in New Delhi
(Chief Justice and not more than 25 other judges)
- High Court (18 High Courts in India)
- District Courts (430 District Courts in India)
- Lok Adalat (Mediation)



I. Basics

- 11 Judges per 1 Million persons in India (OECD: 113 Judges)
- Therefore about 11.000 Judges in India (Germany: 35.000)
- Pending cases High Court: 3,62 Million (9/02)
- Pending cases District Court: 20,1 Million (2004)

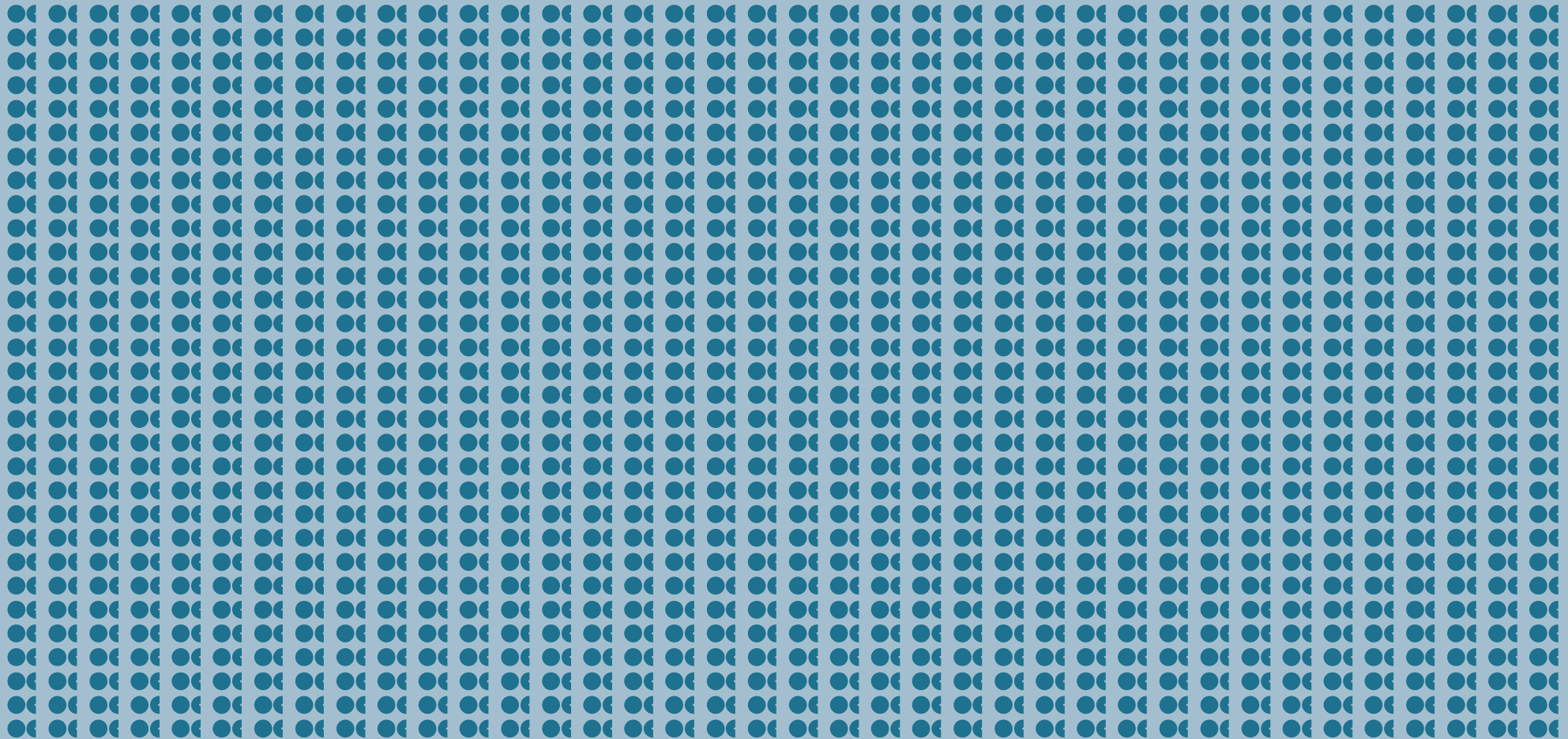
I. Basics

Lawyers

- legal training in India is not standardized
 - lack of minimum standard at universities
 - at the same time: too many lawyers
 - Consequence: gap between the broad majority of ordinary people and well educated people (commonly observed phenomenon in Europe excluding Germany)
 - work overload on senior lawyers
 - Special competence for courts in area of IP
-



II. Contract Law in India



II. Contract Law in India

1. Introduction
2. Offer & Acceptance
3. Illegality / Impossibility / Frustration of Purpose
4. Specific Performance
5. Breach of Contract
6. Interpretation of contract / Freedom to contract

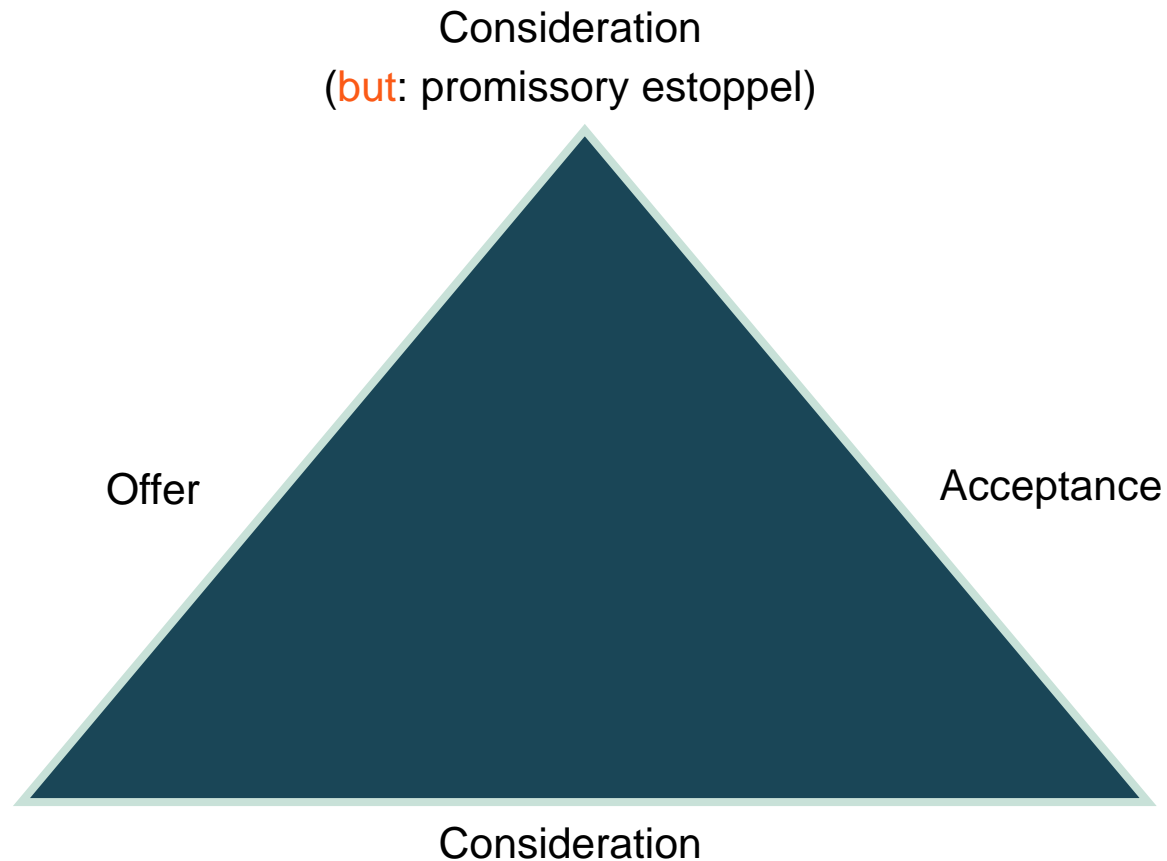
II. Contract Law in India

1. Introduction

- Civil Law vs. Common Law
 - "There is no written law in India"
 - "The first 10 pages of the contracts in India consist solely of definitions."
- Essential features apply to all contracts:
 - Sales Contract (no UN CISG!)
 - Asset Purchase Agreement
 - Share Purchase Agreements

II. Contract Law in India

1. Introduction



II. Contract Law in India

2. Offer & Acceptance

- Offer
 - There has to be a mutual and lawful consideration
 - Parties to be competent to contract
- Acceptance – mirror image rule
 - Offer when accepted becomes a promise
 - To be absolute
 - To be unconditional

II. Contract Law in India

3. Illegality / Impossibility / Frustration of Purpose

Objections to conclude a contract



Illegal (Illegality)

- Invalidity



Legal capacity
(Capacity) - Majority of age and sound
mind

- Countervailability



Gifts (Lack of Consideration)

- Invalidity
but: promissory estoppel



No Offer or Acceptance
(Defect in Offer or Acceptance)

II. Contract Law in India

3. Illegality / Impossibility / Frustration of Purpose

Objections to concluding a contract

- Mistakes in fact – Countervailability
- Deception and duress – Countervailability
- Equity considerations
- Section 56 of Indian Contract Act, 1872- An Agreement to do an impossible act is void
- Consent availed through fraud, coercion, undue influence, mistakes in law or misrepresentation

II. Contract Law in India

4. Specific Performance

- **Exception** for non-fungible goods
 - fulfilment of contractual obligations:

obligation to be performed at the debtor's place of business
debt to be discharged at creditor's domicile

II. Contract Law in India

5. Breach of Contract

Perfect tender rule

- Impossibility
- Subsequent consultations

Termination of contract only possible as long as no obligations have been performed. [Accord, Satisfaction]

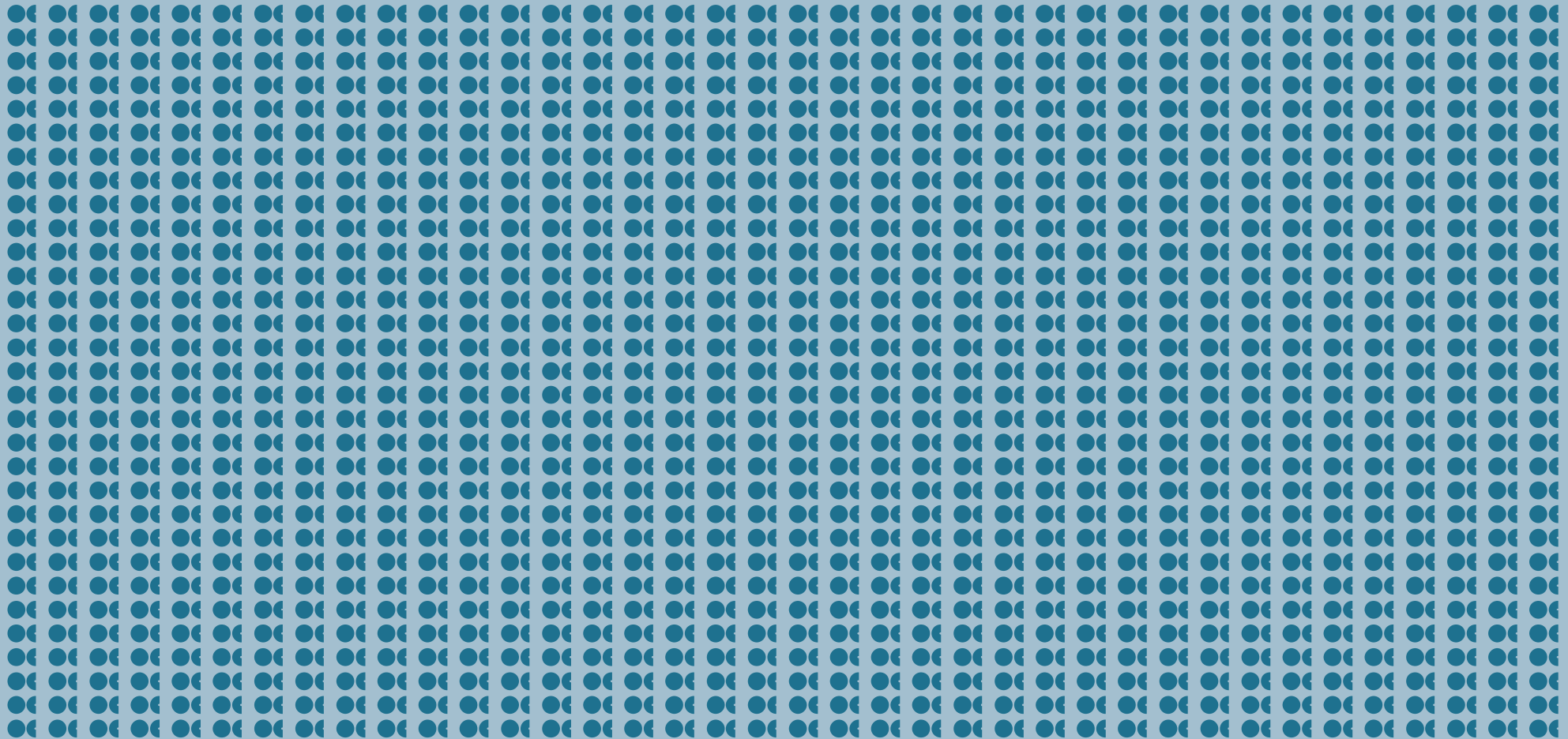
II. Contract Law in India

6. Interpretation of contract / Freedom to contract

Freedom to Contract and legal restriction)

1. General Freedom of Contract
2. Statutory restrictions: consumers
3. Statutory restrictions: businessmen
4. Contracts with other countries: UN CISG not applicable!

III. Liability in breaches of contract



III. Liability in breaches of contract

- Liability regime in India different from German Law
 - direct vs indirect damages
 - no punitive damages



III. Liability in breaches of contract

- Performance and Breach of contract

Guaranty
"Garantie"



Warranty
"Gewährleistung"

III. Liability in breaches of contract

Damages are given for:

Delay

Non-Performance of a contract

Malfeasance



III. Liability in breaches of contract

Scales of liability:

Simple negligence:

Breach of duty of care (running a red light in traffic)

Gross negligence:

Significant breach of duty of care (knowingly driving in the Alps in December without snow tires)

Intent

III. Liability in breaches of contract

Extent of liability – different types of damages:









Direct damage: Loss suffered as the immediate result of defects-
wider definition as in Germany!

Indirect damage: Other loss suffered as result of the defect (e.g. financial loss, loss of use)- **are excluded in India!**

Consequential damage caused by a defect:

Loss from a peril that is not the immediate cause of loss

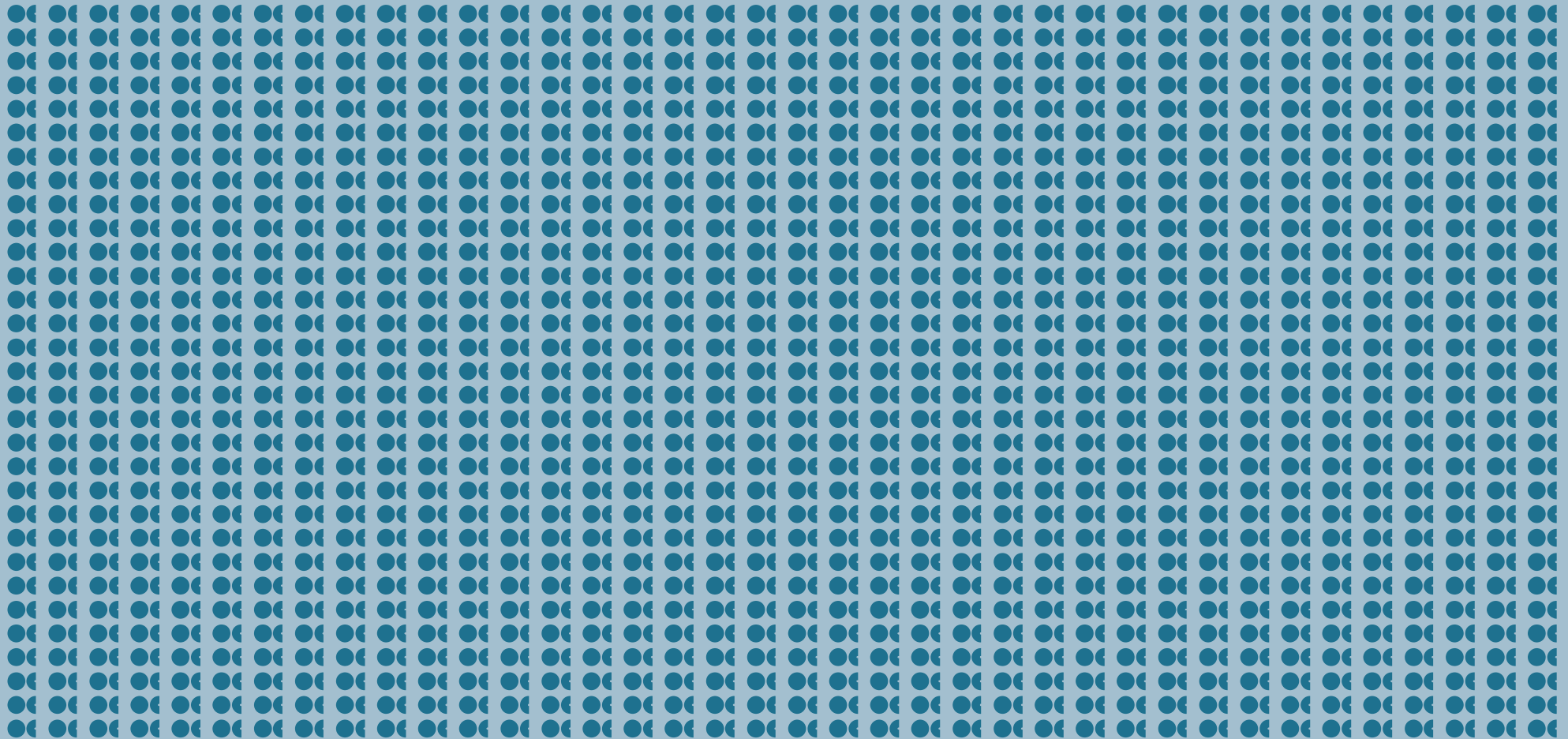
III. Liability in breaches of contract

	Simple negligence	Gross negligence	Intent	Consequential damage caused by a defect & Indirect damage
Unlimited Liability		 ↑	 	
Limited Liability		 ↑		
Excluded Liability				

 = Contract rsp. Industry standard

 = Statutory → predictable damage

IV. Cultural issues in contract negotiations



IV. Cultural specificities in contract negotiations

Doing Business in India

Understanding contract negotiations in India:

- Initiation
- Preparation
- Negotiations
- After the negotiation is before the negotiation!

Questions?



Contact



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