

PMI 10th Benelux day
October 3rd, 2009

mr. A. Oegema



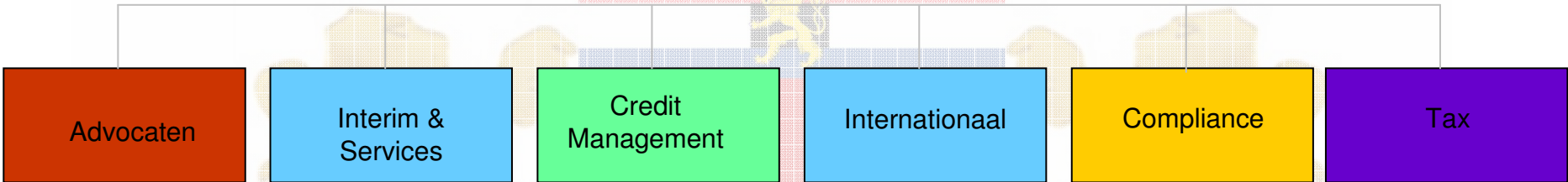
mr. W.J.B. Kenemans



Legal Awareness for Project Managers

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Aansprakelijkheids- en verzekeringsrecht					
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Programme

- PART I Termination (for breach)
- PART II Exoneration , indemnification, liability
- PART III (Unauthorized) representation

Project Managers



PART I Termination (for breach)

IT Service contract clause:

Article X.x Termination. XXXX may immediately suspend all or any part of the Services, and/or (b) terminate this Agreement (effective after the applicable notice period): (i) for Cause*; (ii) upon written notice if Customer becomes or is declared insolvent or bankrupt or is the subject of any proceedings related to its liquidation, insolvency or for the appointment of a receiver or similar officer for it; or (iii) in the event of any violation of the Acceptable Users Policy (AUP).

* **“Cause”** means the failure of a Party to perform a material obligation under this Agreement which failure is not remedied, if curable: (a) in the event of a payment default by Customer, upon five (5) calendar days written notice, or (b) in the event of any other general default, upon twenty (20) calendar days written notice (unless a shorter notice period is expressly set forth in the Agreement, in which case the shorter notice period shall apply).



Questions

Can Supplier stop delivering all services if the client

- a) stops payments ?
- b) violates the AUP ?

Project Managers



Failure in the performance

right to suspend performance

Artikel 6:52 BW :

- relationship claim and obligation
- Assumption of relationship :
 - Claim and obligation are part of same legal relationship
 - Parties have more legal relationships with each other



failure in the performance

You have the right to suspend your performance when:

- the debt is due and payable
- the other party did not perform
- claim and obligation are legally related

Exception:

- when it's impossible to cure the breach
- creditor's default
- the suspension may not be disproportionate



PART II Exoneration, liability

IT Service contract clause:

Article X.x Limitation of Liability. EXCEPT FOR CUSTOMER'S PAYMENT AND INDEMNIFICATION OBLIGATIONS EXPRESSLY SET FORTH IN THIS AGREEMENT, NEITHER PARTY, ITS AFFILIATES OR CONTRACTORS SHALL BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL, PUNITIVE OR CONSEQUENTIAL DAMAGES OR FOR ANY LOST OR IMPUTED PROFITS OR REVENUES OR LOST DATA OR COSTS OF COVER ARISING FROM OR RELATED TO THE SERVICES OR THIS AGREEMENT, REGARDLESS OF THE LEGAL THEORY UNDER WHICH SUCH LIABILITY IS ASSERTED AND REGARDLESS OF WHETHER A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF ANY SUCH LIABILITY, LOSS OR DAMAGE. CUSTOMER'S EXCLUSIVE REMEDIES FOR ANY AND ALL CLAIMS RELATED TO THE SERVICE SHALL BE LIMITED TO: (A) THOSE REMEDIES SET FORTH IN THE APPLICABLE SLA; OR (B) IF THERE IS NO SLA APPLICABLE TO THE SERVICE, THE TOTAL MRC* PAID BY CUSTOMER TO XXXXX FOR THE AFFECTED SERVICE IN THE MONTH IMMEDIATELY PRECEDING THE OCCURRENCE OF THE EVENT GIVING RISE TO THE CLAIM. XXXXX' TOTAL AGGREGATE LIABILITY ARISING FROM OR RELATED TO THIS AGREEMENT SHALL NOT EXCEED THE TOTAL MRC'S PAID BY CUSTOMER TO XXXXX PURSUANT TO THIS AGREEMENT IN THE MONTH IMMEDIATELY PRECEDING THE OCCURRENCE OF THE EVENT GIVING RISE TO THE CLAIM.

***"MRC"** means a monthly recurring charge as set forth in an Order Form with respect to the Services.



Question

- **Pacta sunt servanda?** If you are the supplier in this contract and you lost all your customers data, do you think you have the right to invoke this exemption clause?



Exemption clauses in IT-contracts

Are parties free to exclude or limit their potential liability for damage caused by a breach of contract or a tort by agreeing on an exemption clause?

Mindset:

- Parties are free to allocate risks
- Contracting is allocating risks
- Entering into exemption clauses is also allocating risks
- Courts should respect this freedom as much as possible



Contract: Exoneration

Supreme Court case: Saladin/HBU

General rule:

Unacceptable: Exception of willful misconduct or conscious recklessness of the supplier or of the supplier's top level management.

a contrario: other clauses can under circumstances be acceptable.



A contrario circumstances:

Possibility to rely on an exoneration clause depends on:

- the seriousness of gross negligence, in particular in relation to the nature and gravity of the related interests;
- the nature and content of the agreement;
- the social position of the parties and their mutual relationship;
- the way in which the agreement was formed;
- the extent to which the other party was aware of the clause's purpose



PART III Representation & Warranties

IT Service contract clause:

Article X.x Customer Representation and

Warranties. Customer represents and warrants that the person executing this Agreement and all other documents related to this Agreement has all right, power and authority to execute documents on behalf of Customer. XXXX may act in reliance upon any instruction, instrument, or signature reasonably believed by XXXX to be genuine. Customer agrees that any employee of Customer who gives any written notice, Order, or other instruction in connection with this Agreement has the authority to do so.



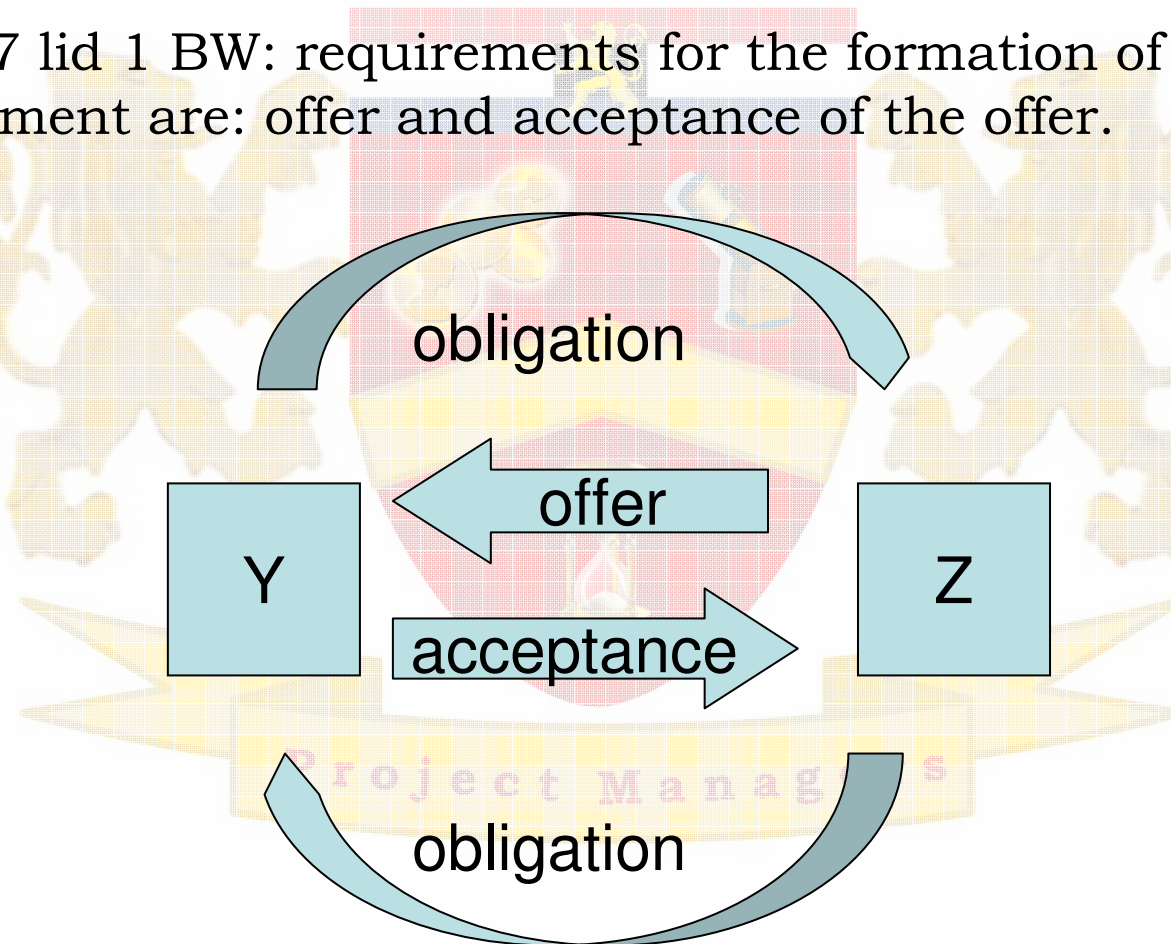
Questions

1. Do parties have an obligation to investigate the authority to represent when signing this contract?
2. Is this agreement legally valid in case of unauthorized representation?



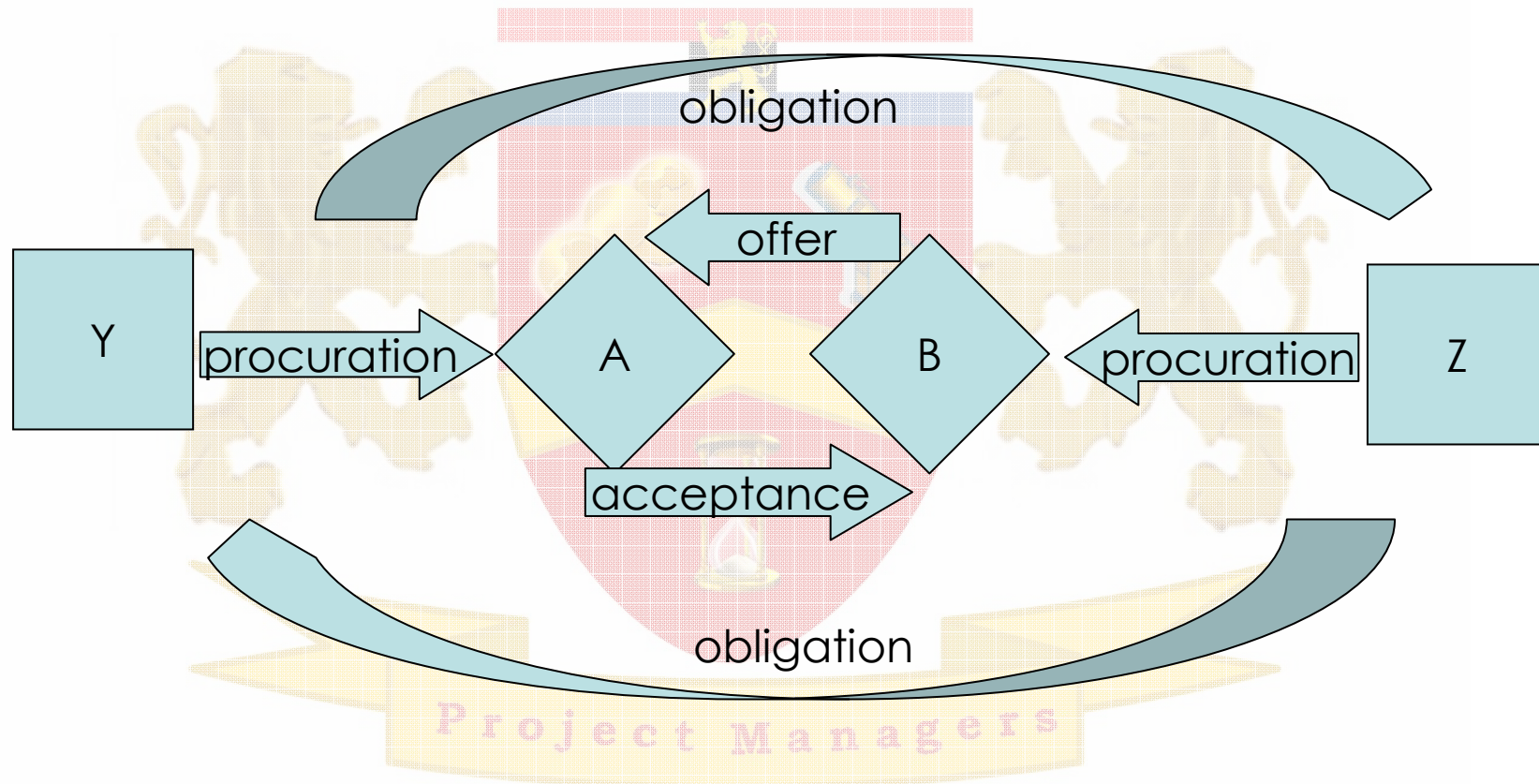
Representation formation of a contract

Art. 6:217 lid 1 BW: requirements for the formation of an agreement are: offer and acceptance of the offer.





Representation



A and B represent Y en Z. A and B are no longer involved after concluding the contract. Only Y and Z have obligations.



Representation

Artikel 3:61 BW:

Procuration: explicit or implied authorization

The other party has a legitimate reason to assume ample procuration:

When a juridic act is performed in the name of another

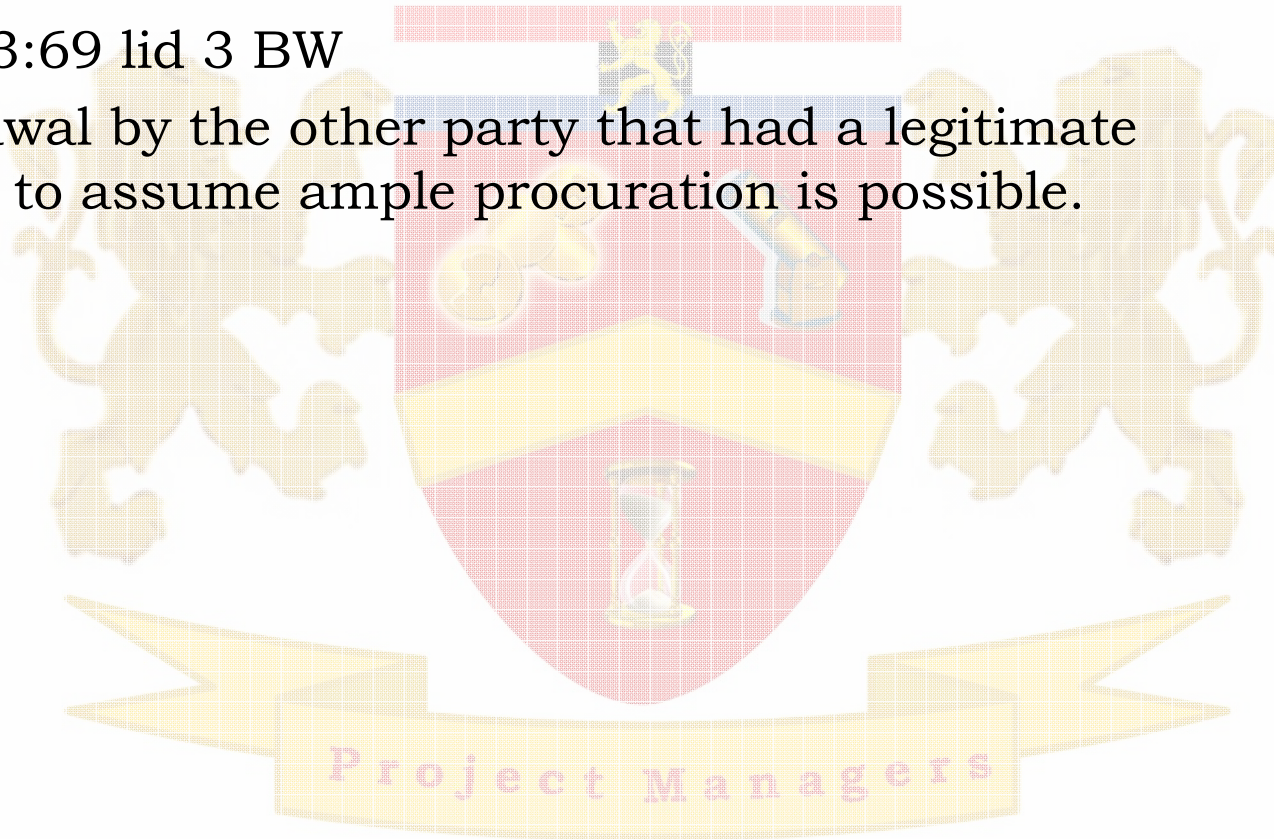
and based upon a statement or behavior it is reasonable to assume ample procuration.



Representation

Article 3:69 lid 3 BW

withdrawal by the other party that had a legitimate reason to assume ample procuration is possible.



END



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