

Week 5- Module 6

Contracts and Disputes

Law, Ethics and Professional Practice -
ENGI3500

WINTER 2025



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Introduction

- Engineers must be knowledgeable about contracts and disputes due to the role these aspects play in their professional engagements.
- Contracts define the terms, responsibilities, and expectations of engineering projects, serving as legally binding agreements between parties involved.
- A solid understanding of contract law enables engineers to negotiate fair terms, allocate responsibilities clearly, and establish mechanisms for dispute resolution. In the complex realm of engineering projects, disagreements and disputes may arise, and a comprehensive knowledge of contracts equips engineers to navigate these challenges effectively.

Defining a Contract

It is important for the engineer in business to understand the essential elements of a contract. For a contract to be binding and enforceable in the common-law jurisdictions of Canada, five elements must be present:

- An offer made and accepted;
- Mutual intent to enter into the contract;
- Consideration;
- Capacity to contract; and,
- Lawful purpose. (Marston, 2019)

Contractual Benefits

- Contractual benefits, such as the right to receive payment for services, can be assigned to a third party by one contracting party without needing the consent of the other party involved.
- To restrict assignment rights, contracting parties should explicitly state in the contract that no rights under it can be assigned to a third party without written consent from the contracting party.
- Parties can modify an existing contractual arrangement through mutual agreement, as long as the amendment aligns with the fundamental elements of the contract.

Good Faith

- In the context of contract law, **Good Faith** refers to the honest, fair, and sincere conduct of parties involved in contractual agreements. It involves a genuine intention to deal fairly and openly, refraining from any deceptive practices or behavior that could undermine the trust and expectations inherent in the contractual relationship.
- Good faith is often an implied duty in contracts, requiring parties to act honestly and with integrity throughout the negotiation, performance, and fulfillment of contractual obligations.

Offer and Acceptance

- An offer is a promise from an offeror to an offeree, which may involve goods or services on specified terms.
- Offers can be oral but are preferably in writing for evidentiary purposes, emphasizing the importance of maintaining a clear communication trail.
- Withdrawal is possible until acceptance, unless explicitly stated as irrevocable. A counter-offer arises if the offeree accepts with variations.

Irrevocable Offers and Option Contracts

- Irrevocable offers, common in tenders, remain open for a specific period, requiring contract consideration for binding offers.
- Option contracts preserve the right to accept an offer for a set period, preventing revocation by the offeror. Consideration, such as a nominal payment, makes it enforceable.
- Option agreements find use in various scenarios, such as prospective business purchases, mining contracts, and land development, offering flexibility in decision-making.

Ensuring Offer Stability

- Understanding the importance of irrevocable offers in business transactions, especially in the tendering process.
- Recognizing the benefits of option contracts in scenarios where decision-making requires additional time or exploration before committing to a final purchase.
- Highlighting practical applications of these concepts in different industries, emphasizing the nuanced use of irrevocable offers and option agreements for stability and flexibility in business dealings.

Professional Service Agreements

- Professional service agreements for engineering are contractual arrangements that delineate the terms, obligations, and compensation related to engineering services between a service provider and a client. These agreements serve as comprehensive documents outlining the scope of work, project timelines, deliverables, and financial considerations.
- Key elements often include provisions addressing liability, the standard of care expected, indemnification clauses, and insurance requirements. Compliance with industry standards, legal regulations, and ethical guidelines is essential, necessitating careful drafting and negotiation.

Professional Service Agreements

- Engineers must pay particular attention to dispute resolution mechanisms, termination conditions, and tailoring agreements to project-specific requirements. Legal review is advisable to ensure clarity, fairness, and protection of the parties' interests. Ongoing communication, meticulous documentation, and adherence monitoring throughout the project are important for successful contract management and dispute prevention.
- Engineers should approach professional service agreements with diligence, aiming for comprehensive agreements that align with legal requirements and industry best practices.

Transfer of Risk

- The transfer of risk in engineering contracts involves the allocation of responsibilities and liabilities between parties involved in a project. In engineering contracts, risk transfer mechanisms are employed to manage uncertainties and potential losses.
- Contractual clauses such as indemnification, insurance requirements, and limitation of liability are common tools used to shift or share risks among the contracting parties. Indemnification clauses may require one party to compensate the other for losses arising from specific events, thus transferring the financial burden associated with those risks. Insurance requirements mandate parties to maintain certain types and amounts of insurance coverage, providing a mechanism to mitigate financial losses.

Transfer of Risk

- Limitation of liability clauses, on the other hand, establish the maximum financial responsibility that one party may have for damages. Effectively managing the transfer of risk in engineering contracts requires careful negotiation, consideration of project-specific factors, and alignment with legal and industry standards.
- Engineers must be attentive to the nuances of risk allocation, ensuring that contracts provide a fair and equitable distribution of responsibilities while minimizing potential disputes and financial exposure.
- Regular legal reviews and open communication between parties are essential to maintaining a balanced and effective risk transfer framework in engineering contracts.

Consideration

Essential Element of Contract: Consideration is a fundamental component in common-law contracts, representing the cause, motive, or price that induces parties to enter into a legally enforceable agreement.

Exchanged Value: Consideration involves the exchange of something of value between parties, such as promises or mutual undertakings. It is not solely confined to the payment of money and can encompass various forms of exchanges.

Seals and Legal Recognition: While the courts typically do not scrutinize the adequacy of consideration, the use of seals, either corporate or personal, is recognized as a substitute for consideration. Seals are particularly significant in tendering processes, providing a mechanism for irrevocable offers, but separate consideration is crucial for the promise of irrevocability to be legally binding.

Equitable Estoppel

- Equitable estoppel arises when a party makes a gratuitous promise, lacking consideration, leading to questions of moral obligations.
- Equitable estoppel prevents a party from enforcing strict legal rights when reverting to them would be deemed unfair or unjust in specific circumstances.

Discharge of Contracts

- When all parties fulfill their contract obligations, the contract concludes.
- Some contracts involve post-performance obligations, such as warranties in equipment supply or construction contracts.
- Parties can mutually agree to amend or terminate a contract.
- Amendments can be made to cancel the contract based on agreeable terms and conditions.

Discharge of Contracts

- Including termination provisions in a contract allows parties to end the agreement under specified conditions.
- Construction contracts often allow termination if work is not completed to satisfaction or other specified events occur.
- Changing circumstances beyond the parties' control may frustrate a contract, leading to discharge.
- The doctrine of frustration applies in exceptional, unforeseen situations where discharge is the only practical and reasonable solution.

Breach of Contract - General

- **Breach of Contract** is Failure to fulfill specified obligations constitutes a breach.
- The innocent party is entitled to **Remedies**, depending on the breach and contract terms.
- **Conditions and Warranties**: Essential obligations are conditions, breach of which may discharge the contract; non-essential obligations are warranties, breach of which may lead to damages but not discharge.

Breach of Contract - Repudiation

- **Repudiation** is the express refusal or conduct indicating non-performance is repudiation.
- The non-defaulting party can continue the contract or treat it as discharged, claiming damages. Communication of the intention to discharge should be done promptly.

Breach of Contract - Remedies

- Remedies for breach of contract are legal measures designed to address the harm caused when one party fails to fulfill its contractual obligations. One common remedy is the award of damages, which involves compensating the non-breaching party for the financial losses incurred due to the breach.
- Damages are intended to put the injured party in the position they would have been in had the contract been fully performed. Another remedy is specific performance, where a court orders the breaching party to fulfill its contractual obligations as outlined in the agreement. This is often used when monetary compensation is deemed inadequate, such as in unique or irreplaceable situations.

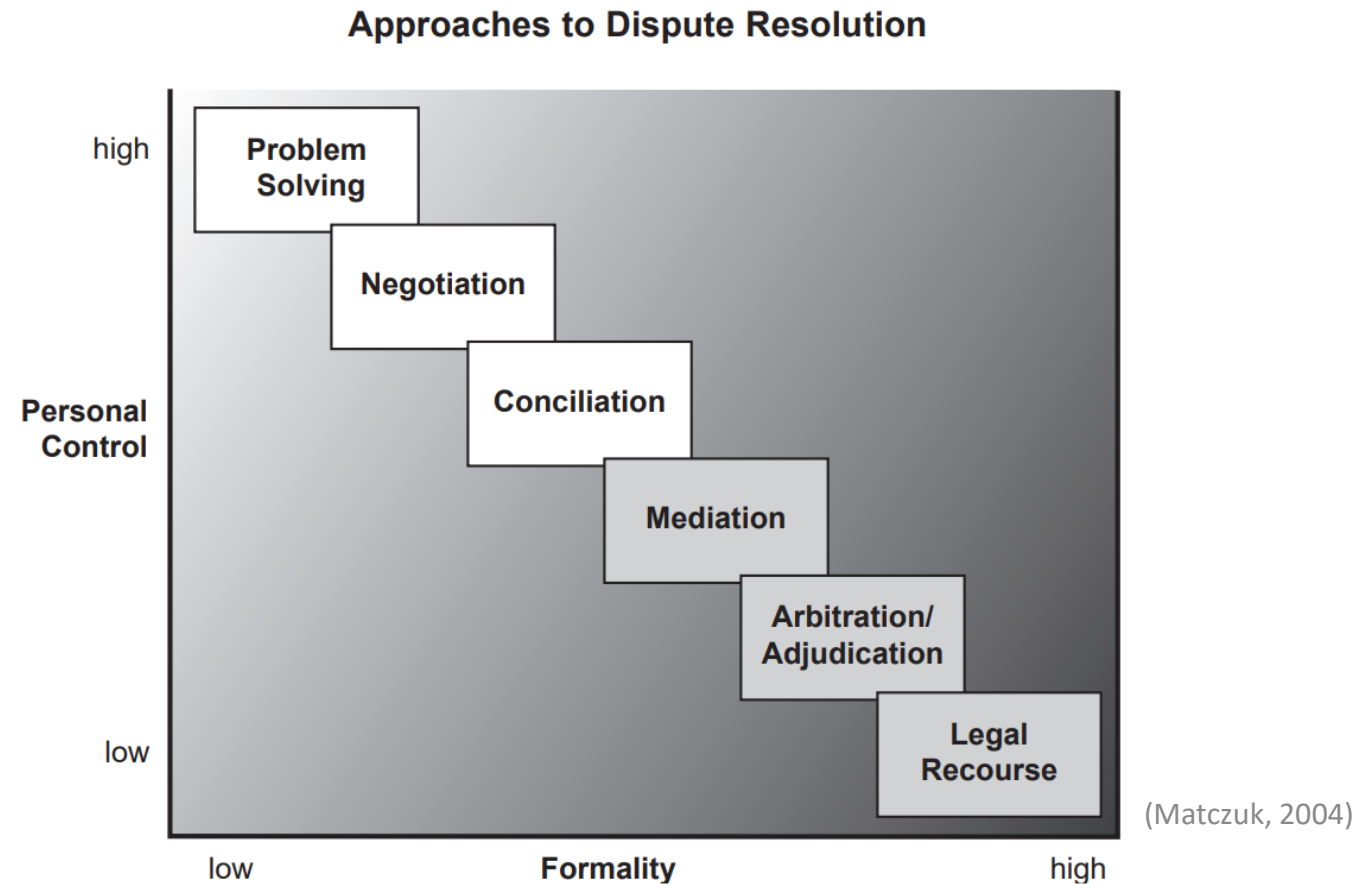
Breach of Contract - Remedies

- Rescission is another option, allowing the contract to be canceled and both parties returned to their pre-contractual positions. This remedy is typically available when there are fundamental breaches or if the contract is voidable. The choice of remedy depends on the nature of the breach, the terms of the contract, and the desired outcome sought by the non-breaching party. Courts aim to provide fair and just solutions to restore the injured party to the position they would have been in had the breach not occurred.

Direct vs. Indirect Damages

- **Direct Damages:** These are immediate and quantifiable losses resulting directly from a breach of contract. For instance, if a contractor refuses to perform after being awarded a project, the direct damages incurred by the owner are the difference between the lowest bid (original contract price) and the cost of the next lowest bidder, representing the extra expense beyond the agreed-upon contract price.
- **Indirect Damages (Consequential Damages):** Indirect damages are consequential to the breach and may include more remote or secondary losses. For example, if a contractor's improper services lead to a plant shutdown, causing lost profits, or if a contractor's actions result in fines for non-compliance with environmental regulations, these are considered indirect damages. They are often termed as "special, indirect, or consequential damages."

Dispute Resolution



Dispute Resolution

- Dispute Resolution encompasses various approaches to handling conflicts, with the option of resorting to legal proceedings such as going to court.
- The term "Alternative Dispute Resolution" refers to resolving conflicts through means other than the court system.
- Three commonly employed methods for resolving disputes without court intervention include negotiation, mediation, and arbitration.

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Litigation

Litigation Defined:

- Litigation involves utilizing the court system to settle disputes, employing an independent party like a judge or jury to address contested legal and factual issues.

Advantages of Litigation:

- Litigation offers inherent advantages, such as the court's ability to enforce orders and processes, particularly crucial when dealing with reluctant participants or cases involving bad-faith motives.

Disadvantages of Litigation:

- Despite its benefits, litigation comes with drawbacks. The primary disadvantages include substantial costs associated with hiring lawyers, expert witnesses, and other case preparations, as well as prolonged delays, often extending over years, impacting the personal investments of time, money, and emotional resources beyond initial expectations.

Arbitration

Arbitration Process Overview:

Arbitration is a private legal process allowing disputing parties to set their own rules and appoint an arbitrator (private judge). Often considered less expensive and quicker than litigation, it is widely used in Canada for labor and commercial disputes.

Types of Arbitration:

Parties can opt for mandatory or voluntary binding arbitration through contract clauses, or choose non-binding arbitration for an advisory opinion. The key decision involves selecting an arbitrator, typically a respected professional with expertise in the field, chosen by mutual agreement or, if needed, appointed by the court.

Advantages and Disadvantages:

Advantages of arbitration include privacy, the arbitrator's subject matter expertise, and flexibility in evidence presentation. However, it has drawbacks, such as costs, potential delays due to arbitrators' schedules, and challenges in involving third parties. Some lawyers caution against mandatory arbitration clauses due to the risk of inconsistent findings in different forums. Overall, while it offers speed and cost advantages, the process lacks the control of a judge in litigation.

Negotiation

Negotiation Overview:

Negotiation involves discussions aimed at resolving disputes through compromise. It lacks formal rules, leaning more towards an art than a science. Professionals often learn negotiating skills through study and experience, and hiring skilled negotiators, like lawyers, can significantly enhance the process.

Advantages of Negotiated Settlements:

Negotiated settlements offer key advantages over litigation and arbitration. Parties retain control over procedures, the process is typically more cost-effective, and it eliminates uncertainty upon reaching an agreement. For instance, a quick \$50,000 settlement through negotiation may be preferable to the uncertainties and costs of litigating a \$100,000 claim.

Privileged Nature of Negotiation:

One notable benefit of negotiation is its privileged nature. If negotiations don't result in a settlement, the discussions and evidence remain confidential and cannot be used against parties in subsequent court proceedings. This assurance encourages open and candid discussions during the negotiation process.

Mediation

Mediation Process Overview:

Mediation is a facilitated negotiation process involving a neutral third party who guides settlement discussions. It is effective for both intricate multiparty disputes and simpler cases. For successful mediation, parties need a genuine willingness to reach a settlement, representatives with settlement authority must attend, and there must be trust in the mediator by all parties.

Phases and Confidentiality in Mediation:

The initial phase often involves opening statements from each party, followed by the mediator meeting separately with each party to discuss their positions. Unlike judges or arbitrators, mediators can hold private sessions with parties, maintaining confidentiality. Mediators provide a reality check, helping parties regain objectivity and may uncover new facts to overcome obstacles. Confidentiality ensures that all information shared during mediation remains privileged if no settlement is reached.

Settlement and Documentation:

If parties reach a mediated settlement, the terms are recorded in a settlement agreement. The mediator or one of the parties takes on the task of documenting the agreed-upon terms, and once signed by the parties, the settlement agreement becomes a binding resolution.

Mini-Trials

Mini-Trials Overview:

Mini-trials share similarities with mediation and involve a condensed trial version in front of a judge. Parties may present evidence, with some opting for written summaries instead of witnesses. The judge issues a non-binding ruling based on this evidence, offering parties insight into the likely trial outcome. Parties can then decide whether to proceed with litigation. Importantly, the judge in a mini-trial doesn't act as the trial judge.

Settlement Conferences Defined:

A settlement conference is an informal or, in certain jurisdictions, formal mediation process with a judge. The judge's role is to aid parties in settling the case before formal litigation. Some jurisdictions require parties to attempt settlement through mediation or a settlement conference before pursuing litigation.

Variations and Considerations:

Various alternatives include binding mediation (mediation/arbitration), court-appointed masters and referees, and summary jury trials. Before choosing these processes, parties should evaluate factors such as cost, time, involvement of an independent party, their qualifications, the binding nature of the process, and the right to appeal an unfavorable decision to a higher authority or court.

Expert Witnesses

Role of Expert Witnesses:

Expert witnesses possess skills, training, and experience, providing opinions to courts or arbitration tribunals. They are an exception to the general rule disallowing opinion evidence, admissible when the subject matter is technically complex. Professionals like architects and engineers often serve as expert witnesses, offering impartial opinions on technical matters relevant to a case.

Neutrality and Professionalism:

Expert witnesses have an obligation to remain neutral, offering honest opinions irrespective of client interests. They navigate grey areas in technical problems, acknowledging multiple plausible explanations. Presenting an unlikely theory as a valid alternative is considered unprofessional conduct and may lead to professional sanctions.

Testimony on Standard of Care:

Expert witnesses commonly testify on the standard of care, crucial in negligence or contract claims against professionals. They assist the court in understanding technical aspects, emphasizing their role is not that of a hired gun. Charging a fee contingent on case outcome is prohibited, ensuring the expert's impartiality and preventing potential inadmissibility of their opinion.

Homework Before Next Class

- Complete assigned chapter readings in the Critical Path.
- Review Handout “Chapter 14: Dispute Resolution and Expert Evidence”

THANK YOU.



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