

Law for Professional Engineers and Professional Geoscientists

Contracts

Law and Ethics Seminar
Fall 2018

Contracts: Overview

- Enforceable voluntary agreement
 - Enforceable – will the courts uphold the contract?
- Sets out rights, responsibilities and liabilities of parties, but also allocates risk and obligations between parties
- Terms: express or implied
- Most contracts need not be written
- Only parties **privy** to the contract can sue on it

Essential Elements

- Essential elements of a contract to be enforceable:
 - offer and acceptance
 - consideration
 - capacity to contract
 - intention to create legal obligations
 - lawful purpose

Contract Formation: Offer and Acceptance

- Offers must contain all essential terms
- Acceptance must be unequivocal agreement, or else it will be a counteroffer
- Invitation to treat: call for offers (advertisement)
- Rejection: must be communicated to the offeror; counter-offer has effect of a rejection
- In the past, no general duty to negotiate in good faith (unless required by agreement or by statute) but courts may be reconsidering this (*Bhasin* case at SCC)

Consideration

- Each party must give, or promise to give, something of value
- Is a prerequisite for an enforceable contract
- Lack of consideration will result in an unenforceable promise to give a gift
- The consideration given by each party does not have to be of equal value
- Forbearance (e.g. giving up the right to sue) may be valid consideration
- Amendments: must have fresh consideration

Other Elements

- Capacity
 - Minors, drunks and lunatics
 - Contract may be voidable by person lacking capacity
- Intention to Create Legal Relations
 - court will not enforce “agreement to agree”
- Legal purpose
 - Void if contrary to statute (ex. cannot contract out of Worker’s Compensation) or common law (ex. contrary to public policy in restraint of trade)

Agreements to Agree

- Agreements to agree are not enforceable as contracts
- Letter of intent or MOU: expression of intention to form a contract in the future
 - Reference: Lethal Energy Inc. v Kingsland Energy Corp, 2014 SKQB
- Dangers of letters of intent or MOU:
 - Parties may not appreciate they are unenforceable
 - Parties may commence performance without ever creating a formal contract
 - On the urging of one of the parties, it may be interpreted by the court as an enforceable contract

Voiding a Contract

- Mistake
- Misrepresentation
- Duress
- Unconscionability
- Frustration

Mistake

- Three prerequisites to void a contract for mistake
 - The mistake must be material (significant)
 - The mistake must be mutual (both parties must have been mistaken)
 - Mistake must have been made at the time the agreement was made
- There is no remedy for a mistaken party if the mistake was not mutual

Misrepresentation

- Misrepresentation: untrue factual statement that induces the other party to enter the contract
- Three categories:
 - fraudulent (intentional false statement, most serious)
 - negligent (statement carelessly made)
 - innocent (difficult to obtain a remedy)
- Damages are generally available for fraudulent and negligent misrepresentation
- Common case arises with subsurface soil conditions

Duress, Unconscionability and Frustration

- **Duress:** Improper pressure, threats or coercion used to induce a party to enter into a contract
 - Must be extreme pressure: "coercion of will so as to vitiate consent"
- **Unconscionability:** so unfair, oppressive and one-sided that the courts won't enforce it
 - Generally requires extreme inequality of bargaining power at the time of contract formation. Fine line between legitimate business pressure, and duress
- **Frustration:** occurs when an unforeseen event makes performance impossible, or of no value
 - Event must not be a risk that was anticipated by the parties
 - *Force majeure* clauses: prescribe the consequences of unlikely events

Amendment of Contracts

- Amendments must be agreed upon by both parties
- Original contract may specify formalities for amendment, and these should be obeyed
- Requirements for contract apply: agreement, consideration, certainty of terms, intention to create legal obligations
- Amendments may be voided e.g. for duress

Waiver and Estoppel

- Waiver: when a party, by words or conduct, relieves the other party of the duty to perform
- Estoppel: "to be stopped"; a party is estopped from enforcing rights that it has waived
- Estoppel requires a clear expression that the waiving party intended to waive its rights, and reliance by the party benefiting
- Formalities for amendments often waived

Repudiation and Anticipatory Breach

- Repudiation: When one party, by words or actions, makes it known that it does not intend to perform its obligations under the contract
- Anticipatory Breach: When one party lets the other know, before the time for performance, that it will not be performing its obligations, the anticipatory breach will be a repudiation

Drafting and Interpretation of Contracts

Principles of Interpretation

- Key principles of interpretation:
 - give effect to the objective intention of the parties
 - apply the canons of contract construction
 - if necessary, consider additional evidence
- The court should not re-write the contract for the parties, but rather, interpret the contract the parties made

Interpretation: The Intention of the Parties

- Courts aim to give effect to the intention of the parties
- Establish the *objective* intention of the parties by reviewing the terms of the contract
- Objective intention is what reasonable parties would have intended by agreeing to the specified terms; what the parties subjectively intended is not relevant

Canons of Construction

- Are not rules of law, but guiding principles
- Canons include:
 - Plain and ordinary meaning: the "golden rule"
 - Special Meaning: if the context requires it
 - Reading the contract as a whole
 - Giving effect to all parts of the contract: don't read one part in a way that makes another part redundant

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Canons of Construction (Continued)

- Canons (Continued)
 - Restriction by express provisions: special conditions trump general provisions
 - Commercial purpose: presume the parties did not intend a commercially unreasonable result
 - Context: read the words in context
 - Contra proferentem: construe ambiguous provisions against the party that who drafted the contract

Additional Evidence

- The contract itself is the primary evidence
- Parol evidence rule: where the contract is clear and unambiguous, extrinsic evidence of the parties intentions will not be considered
- The parol evidence rule does not preclude evidence of the factual matrix i.e. background
- Where the contract is ambiguous, subsequent conduct of the parties may be considered

Drafting Contracts

- Three principal purposes of drafting:
 - Reflect the business arrangement between the parties
 - Clearly allocate risk between the parties to minimize the likelihood of disputes
 - Provide protections and incentives for the parties
- Carefully consider the fundamental elements
- Consider "what if" scenarios

Getting to Contract

Overview

- Goals for all contracts: to be completed on time, within budget, to a high quality
- There are different methods for getting to contract e.g. call for tenders, negotiation, request for proposals; each has advantages and disadvantages
- Buyers must choose the delivery system and the method of payment e.g. fixed price, cost plus, public-private-partnership

Transfer of Risk and Obligation

- A key aspect of contract negotiation is distributing risks (e.g. cost increases) and obligations (e.g. design responsibility) between the parties
- Risks can be assigned to a party, shared between the parties, or transferred to a third party e.g. supplier, insurer, bonding company
- Generally, costs are minimized when risks are optimally distributed

Choosing a Procurement Process: Overview

- Buyers generally start by appointing a consultant
- Early on, the buyer must select a suitable procurement process
- Some buyers, e.g. government institutions, may be obligated to use a formal tender process because it is fair and transparent
- Using a tender process precludes negotiation

Tendering

- The law of contract applies
- Large amounts of money at stake: failure to abide by the rules of the process may result in lost contracts for bidders & liability for buyers
- Law of mistake applies, but courts are reluctant to allow bidders to withdraw bids
- Bid depositories resolve some of the problems inherent in tendering
- Know the process if it is within your field of practice

Selection of Method of Project Delivery

- The nature of the project drives the choice of project delivery model
- Transparency and fairness requirements for public projects may necessitate a tender process
- Labour and materials markets may influence the choice of project delivery model
- Innovative delivery models are sought to alleviate the adversarial relationship that has traditionally existed between buyers and sellers

Methods of Project Delivery

- Design-Bid-Build
- Construction Management
- Design-Build
- Design-Build-Operate
- Design-Build-Operate-Finance

International and Interprovincial Trade Agreements

- Set rules for the transfer of goods and services
- May influence procurement and dispute resolution processes
- International agreements: NAFTA, WTO
- Interprovincial agreement: Agreement on Internal Trade (AIT), New West Partnership
- Treaties have criteria for determining which transactions they cover

Specific Contracts and Clauses

Overview

- The method of payment often defines the form of contract e.g. lump sum, cost plus
- Other contracts are defined by the roles the parties will perform e.g. design-build
- Some contracts confer rights (e.g. licensing agreements); others provide for the provision of services (e.g. professional service agreements)
- In all contracts, the roles and duties of the parties must be clearly defined

Standard Form Contracts

- Created by industry groups for use by their members, and generally favour the interests of their members over the parties their members will contract with
- Most standard form contracts require modification to suit the particular context
- Standard form contracts are often used without modification to save costs, but this can lead to far greater costs if litigation results

Examples of Contract Types

- Fixed price contracts (CCDC2)
- Cost Plus Contracts
- Unit Price Contracts
- Construction Management Contracts (CCA5)
- Design Build Contracts (CCA14)
- Public Private Partnership

Professional Service Agreements: Introduction

- Should define the scope of work and expected outcomes
- May be fixed price, cost plus, or a percentage of the actual construction costs
- Often have limitation of liability clauses that protect the consultant from claims in excess of the available insurance coverage
- May give the owner alternative remedies in the event the claim is not covered by insurance
- Field review clauses are often contentious: the scope and purpose of the review should be clearly set out

Engineering Service Agreements

- Commonly used standard form contract: ACEC 31
- The parties should address the following issues in detail when using ACEC 31:
 - Site inspections
 - Copyright
 - Limitation of liability
 - Termination

Geoscience Service Agreements

- Commonly used standard form contract: AAPG Contract for Geoscience Services
- The parties should give special attention to the following clauses:
 - The scope of services
 - The responsibility for workers' compensation insurance premiums
 - Termination of the relationship
 - The liability of the Geoscientist

Licensing Agreements

- A license is a grant of rights
- Exclusive license: licensee obtains the exclusive right to use the rights granted by the licensor
- The "grant provision" is the most important in a license agreement; it defines the scope of the license
- Commonly used in intellectual property and real property
- The license fee may be based on profits made by the licensee

Geoscience Agreements

- Define rights and responsibilities in exploration projects
- Take many forms e.g. joint ventures, limited partnerships
- Grubstake agreement: contributions are made to the prospector's exploration costs in return for a stake in the resources discovered
- Option agreements: provide the optionee with the right to purchase land at a specified price within a specified time frame

Requirement of Writing

- Some contracts must be in writing to be enforceable
 - *Statute of Frauds (1677)*
 - Examples:
 - Transfer of an interest in land
 - Contract in which one party becomes a surety (ex. guarantee the debt of another)

Other Contract Issues and Special Clauses

Agency and Authority

- An agent is a person authorized to act on behalf of another party; the principal
 - Engineer is often the agent of the owner
- Agency relationship can be created by
 - Actual authority is an actual agreement between the agent and the principal
 - Apparent authority is the representation by the principal to a third party
- The principal is bound by the acts of the agent that are done within the scope of the agency

Indemnities

- An indemnity is an agreement to bear the financial loss of another party for a specified event
- Insurance policies are contracts of indemnity
- Many indemnities simply reflect the common law that each party is responsible for the harm it causes; these clauses add clarity to avoid litigation, and give the indemnified party contractual remedies

Change Orders

- Changes to the scope of work frequently occur on construction projects
- Extra: increase in the contract price
- Credit: decrease in the contract price
- Change Orders result from
 - Design changes (design error, cost saving, changes to building regulations)
 - Unforeseen conditions

Extras for Design Negligence

- Contractors are entitled to extras resulting from design changes
- Owners may have the right to recover the costs of design changes from the consultant, but generally waive this right if the amounts are relatively small

Impact Costs

- Impact costs occur when extra work is requested that may impact the schedule and efficiency of the rest of the work
- When agreeing to a price for an extra, contractors are expected to incorporate all impact costs arising from that extra
- However, the parties may agree that the contractor retains the right to claim impact costs at some later time

Performing Under Protest

- Ideally, the parties agree on the cost of the extra before the work is done
- In reality, the owner may instruct the contractor to do the extra work before a price is agreed upon: change directive
- To reserve the right to dispute payment for a change directive, the contractor should file a notice of performance under protest

Unforeseen Conditions

- "Unforeseen" refers to conditions that are known to be possible, but are not expected to occur e.g. large amounts of subsurface rock
- Unforeseen conditions commonly result in extras, but may also lead to credits
- The owner is required, at the tender stage, to divulge all available information regarding unforeseen conditions

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Unforeseen Conditions

- The contract documents may shift the risk of unforeseen conditions onto the contractor
- Bidders will seldom have time to thoroughly assess the risks associated with unforeseen conditions e.g. by doing a soils investigation
- It is often economically inefficient to have the contractor bear the risk of unforeseen conditions

Contract Administration

- The contract administrator is typically the owner's agent: architect or engineer
- Consultant may play a dual role: owner's agent and initial arbiter of disputes
 - As arbiter, the consultant must act fairly to the contractor, and not favour the owner's interest
- The administrator must perform tasks in timely manner
- The administrator's field review duties may not be clearly detailed in the contract, but must be adequate in frequency and scope giving consideration to the purpose
- The administrator must not interfere with the right of the contractor to choose the method and order of work

Contract Termination

- Contract may end by:
 - Complete performance
 - Frustration
 - Mutual agreement
 - Breach

Termination Clauses

- The parties may incorporate a termination clause into the contract
- Termination clauses specify acts that justify termination of the contract

Concurrent Liability in Contract and Tort

- Historically, it was not possible to sue in tort when the parties had a contract covering similar duties
- *Central Trust v. Rafuse*, [1986] 2 S.C.R. 147: a duty in tort can co-exist with a duty in contract so long as the contract does not define the nature and scope of the duty of care
- Therefore, if the parties want to control the rights between them, they should exhaustively define the duty of care in their contract

Questions

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