

- Indian Contract Act

- Definition of a contract: Sec. 2(h) :

- *"An agreement enforceable by law is a contract."*

- **Flow of the definition:**

Contract ---- Agreement ---- Promise

Accepted proposal ----- Proposal/offer

- **Definition Of a proposal: Sec. 2(a)**

When one person, signifies to another, his willingness to do or to abstain from doing anything,

with a view to obtaining the assent of that other to such act or abstinence,

he is said to make a proposal.

- **Rules of a valid proposal:**
- **It may be express or implied.**
- **It must contemplate to give rise to legal relationship.**
- **Terms must be certain.**
- **It may be specific or general.**

- **Rules of a valid proposal:**
- **Invitation to offer is not an offer.**
- **Offer must be communicated**
- **Special terms must be communicated in a special manner**
- **Offer should not contain a term the non-compliance of which would amount to acceptance.**

- **Definition Of acceptance: Sec. 2(b)**
- **When a person to whom the offer is made, signifies his assent thereto, the offer is said to be accepted.**

Rules of a valid acceptance:

- **The person to whom the offer is made must give it.**
- **It must be absolute and unqualified.**

- **Rules of a valid acceptance:**
- **Mental acceptance is ineffectual.**
- **It must be expressed in the prescribed manner or in some usual manner.**
- **It must given within a reasonable time.**
- **It must succeed the offer.**

- ***'Every contract is an agreement but every agreement may not be a contract'***
- ***Essentials of a valid contract:***
- **Offer and acceptance**
- **Intention to create legal relationship**
- **Lawful consideration**

- **Essentials of a valid contract:**
- **Capacity of the parties**
- **Free consent**
- **Lawful object**
- **Certainty of terms**
- **Possibility of performance**
- **Writing and registration**

- **Consideration: Sec. 2 (d)**
- **When,**
- **at the desire of the promisor, the promisee or any other person;**
- **has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing something,**
- **such act or abstinence or promise is called as Consideration for the promise.**

- **Essentials of valid consideration:**
 - **Consideration must move at the desire of the promisor**
 - **Consideration may move from the promisee or any other person**
 - **It may be past, present or future**
 - **It must be something of value**

- **Competency of parties to a contract:**
- **Sec.10 states:**
“Essential ingredient of a valid contract is that the contracting parties must be competent”

- **Competency of parties to a contract:**

- **Sec 11 says:**

**“Every person is competent to contract;
who is of age of majority according to
the law to which he is subject,
and who is of sound mind,
and is not disqualified from contracting
by any law to which he is subject”**

Who is a Minor?

- **As per Indian Majority Act:**

a person below age of eighteen years under normal circumstances

and

a person below age of twenty one years in case of a guardian being appointed for his person or property

- **Effects of agreement with or by a minor**
- **Usually it is Void – ab - initio
(absolutely void and inoperative)**
- **No ratification on attaining age of
majority**
- **No estoppel against a minor**

- **Sound mind: Sec. 12:**
- **“A person is said to be of sound mind for the purpose of making a contract, if, at the time when he makes it, he is capable of understanding it and of forming a rational judgement as to its effects on his interests”**

- **Disqualified from contracting:**
 - **Alien enemies**
 - **Foreign sovereigns**
 - **Convicts**
 - **Insolvent**
 - **As per any other law applicable**

- **Consent = consensus ad-idem**
- **i.e. 'Agreeing upon the same thing in the same sense'**
- **Free Consent: Section 14--**
 - Consent is said to be free when it NOT caused by any one of the following**
- **Coercion**
- **Misrepresentation**
- **Mistake**
- **Undue influence**
- **Fraud**

Coercion: (Sec 15)

" It is

- a) Committing or threatening to commit, any act forbidden by Indian Penal Code, or**
- b) unlawful detaining or threatening to detain any property,**
- to the prejudice of any person whatever,**
- with the intention of causing any person to enter into an agreement"**

Coercion: (Sec 15)

- **Effect of Coercion:**
- **Contract is voidable at the option of the party whose consent was so obtained**
- **Burden of proof that coercion was used lies on the aggrieved party.**

Undue Influence: Sec 16(1)

"A contract is said to be induced by undue influence where,

- i) the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other, and**
- ii) he uses the position to obtain an unfair advantage over the other."**

Undue Influence: Sec 16(1)

Effects of Undue influence

- **Agreement is voidable at the option of the party whose consent is so caused**

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In a position to dominate the will of the other means:

b) where he stands in a *fiduciary relation* to the other

• (fiduciary relation = relation of mutual trust and confidence) eg. Father & son, Guru & disciple

c) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

Misrepresentation: Sec 18—

"It means and includes-

a) the positive assertion in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true:

or

_b) any breach of duty, which without any intent to deceive, gains an advantage to the person committing it, by misleading other person to his prejudice

or

_c) causing, however innocently, a party, to make a mistake as to the substance of the thing which is the subject of the agreement

Fraud: Sec 17—

It means and includes any of the following acts committed by a party to the contract—

- i)The suggestion that a fact is true when it is not true, by the one who does not believe it to be true**
- ii)The active concealment of a fact by a person who has knowledge or belief of the fact**
- iii)A promise made without any intention of performing it**
- iv)Any other act fitted to deceive**
- v)Any such act or omission as the law specially declares to be fraudulent**

- **Representation =**
- **statement of fact made by one party to another**
- **either before or at the time of contract**
- **relating to some matter essential to the formation of the contract**
- **with an intention to induce the party to enter into the contract**

An innocent wrong statement

= Misrepresentation

**A deliberate or intentional statement to deceive the
other = Fraud**

Effects of Misrepresentation

- **The aggrieved party has two options**
 1. **He can rescind the contract, treating it as voidable**
 2. **He may affirm the contract and insist that he shall be put in a position in which he would have been, if the statement was true.**

- **Effects of Fraud:**

The aggrieved party has three remedies

- 1. He can rescind (set aside) the contract, treating it as voidable**
- 2. He may affirm the contract and insist that he shall be put in a position in which he would have been, if the statement were true.**
- 3. He can also sue for damages, if any, because fraud is a civil wrong and hence compensation is payable**

Mistake= erroneous belief concerning something

Discharge of contract

- **by performance- actual or attempted (tender)**
- **by mutual consent or agreement**
- **by supervening impossibility**
- **by lapse of time**
- **by operation of law**
- **by breach of contract**

- **Quasi Contracts:**

1. **Claim for necessaries supplied to a person incapable of contracting**

2. **Reimbursement to a person paying money due by another in payment of which he is interested**

3. **Responsibility of finder of goods**

4. **liability of a person to whom money is paid or things delivered by mistake or under coercion**

- **Contract of Indemnity:**

It is a contract by which one person promises to save the other from any loss caused to him by the conduct of the promisor himself or by conduct of any other person.

➤ **Indemnity holder or indemnified = one protected**

➤ **Indemnifier = one who gives protection**

THE CONSTRUCTION CONTRACTS

- THE NATURE OF CONTRACTS
- PRIMARY INGREDIENTS
- WRITTEN CONTRACTS
- TERMS AND CONDITIONS
- DEFAULTS AND REMEDIES
- QUALITY RELATED FUNCTIONS
- ROLE OF THE DESIGNER
- DOCUMENTATION
- INDUSTRY STANDARD DOCUMENTS
- INTERNATIONAL CONTRACT DOCUMENTS

THE NATURE OF CONTRACTS

- All construction is done within a contract except that done by a person for himself.
- A contract determines the actions of the parties in their dealings with each other. The parties to a contract are bound to each other for a certain period of time by a unique and exclusive relationship (privity of contract) they have created for their mutual benefit, which gives them both obligations which they have agreed to accept so that both may benefit.
- This contractual relationship persists until the contract is discharged or terminated (because of impossibility, agreement, bankruptcy, or breach of contract).

THE NATURE OF CONTRACTS

(cont.)

- The construction contract documents define the agreement between the owner and the contractor. It is a two-party agreement that does not include the designer (For DBB project delivery).
- It is important that the construction contract, whatever form it may take, accurately documents a “meeting of the minds”; states clearly the roles and responsibilities of the parties without overlaps or voids; and aims squarely at achieving a quality project.

PRIMARY INGREDIENTS OF CONTRACTS

- Mutual Agreement and Genuine Intention
- Offer and Acceptance
- Capacity to Contract
- Consideration in a Contract
- Lawful Object of a Contract
- Contract Time

Mutual Agreement and Genuine Intention

- *Mutual agreement* is the fundamental and mutual consent which is normally expressed by the parties to a contract in the offer originally made by one, which then is accepted by other.
- Sometimes the acceptance of an offer may be unspoken and indicated or accepted by an action, rather than by actual words.
- A contract may be defined as a promise enforceable by law, and there must be genuine intention on the parties to take on obligations agreed in the contract.
- Although contracts are legislated, there are large areas of contractual dealing relatively free from judicial and governmental control in democratic countries.

Offer and Acceptance

- Offer and acceptance of the offer are natural expressions of mutual agreement. As such, both the offer and the acceptance must be identical to their substance.
- When an offer is made it should be accepted without qualification. No change to an offer should be made in the acceptance, and what is offered should be accepted as it is offered. Otherwise, the offer should be refused, and, if required, notice may then be given that a different kind of offer is sought.

Offer and Acceptance (cont.)

- An offer may be withdrawn at any time prior to its acceptance.
- Mutual agreement must be based on free assent without duress or undue influence, so that there is a real meeting of the minds of the parties. Anything less than this may result in an invalid contract.
- Once an offer is accepted, however, the offer cannot be withdrawn because it has been changed by its acceptance into a contract.

Offer and Acceptance (cont.)

- The primary purpose of a bid bond is to guarantee the owner that the bidder whose bid he accepts will enter into and perform the contract; or, failing this, that the bidder will pay to the owner money damages in the amount that his bid is less than the amount of the next lowest bid that the owner then accepts to make a contract.
- Most construction bids must be accepted within the prescribed period of time (usually 30 days) stated in the instructions to the bidders, and often that stipulated period is made part of the wording of the bid, or the proposal.

Capacity to Contract

- *Capacity* refers to the competency to make valid and enforceable contracts.
 - A citizen who is
 - Not under the age of majority
 - Sane, and not a drunkard
 - Not under legal restraint
 - Not restricted by his or her occupation or profession
- has the greatest possible freedom to enter into and make contracts

Consideration in a Contract

- *Consideration* is something of value given by one party in a contract to the second party in exchange for something else.
- A contract is an agreement with consideration.
- In contract law, consideration can be anything of value and the law usually is not concerned with the amount of value. Its sufficiency is a matter for the parties to bargain over and agree to.
- Consideration can be a promise not to do something such that the result will be of value to the other party.

Lawful Object of a Contract

- *The object of a contract* must be lawful, for the law will not enforce a contract for an illicit purpose.
- It is more probable to see illegal work done under a contract's change order, because changes are not always subjected to the same official scrutiny as the work originally proposed and shown in the contract documents, and it is possible that a change could be made to do construction work that would be illegal (e.g. increase room's seating capacity beyond its legal limit).

Contract Time

- Time is the scarcest of all construction resources (capital, labor, material, equipment, etc.).
- Contract time affects contract sum since most costs depend on time (e.g. costs of labor, equipment use, and move job overhead costs).

WRITTEN CONTRACTS

- Contracts usually need not be in writing to be valid, but they may need to be in writing to be enforceable.
- Usually a contract must be in writing, if it cannot be performed within a year. Therefore, most major construction projects require a written contract
- An oral contract is unsubstantial and difficult to prove, and because it cannot be demonstrated by tangible evidence (except to the extent it has been performed), it is always a potential source of misunderstanding.

WRITTEN CONTRACTS (cont.)

- Some believe the execution of a written contract always requires a lawyer. These beliefs are incorrect, but in many cases the advice of a lawyer is desirable or necessary, especially when large sums and real property are involved.
- The written instrument of most ordinary contracts is a printed standard form. The majority of building construction jobs have a lot in common and the use of standard forms of construction contracts is both economical and practical.
- Every construction contract should be in writing, but it is not always necessary to use even a standard form. For minor construction jobs, a written contract can be made by an exchange of suitable letters.

WRITTEN CONTRACTS (cont.)

- An important aspect of written contracts is the parol evidence rule that excludes all prior oral and written agreements between parties, and all contemporaneous oral agreements that contradict the final written agreement.
- If a contract is not in writing when the law requires that it must be, then it is not a valid contract. If a contract is not in writing and the law does not require it to be in writing, it may be valid but unenforceable.

TERMS AND CONDITIONS OF CONTRACTS

- In some construction contracts, the order of superiority of the several parts of a written contract is as follows:
 - Agreement(first)
 - General conditions
 - Supplementary conditions
 - Specifications
 - Drawings (last)
- All the several parts go together as one (complementary); but should there be discrepancies the contract may say that a stipulated order of superiority determines which part governs.

TERMS AND CONDITIONS OF CONTRACTS (cont.)

- Standard forms of construction contracts have two main parts:
 - The agreement
 - The general conditions
- The agreement is quite brief and appears to consist mostly of statements of fact, whereas the general conditions section deals primarily with matters that pertain generally to be construction work and the persons involved.
- In other words, the agreement appears to consist of statements and the general conditions appear to be terms, or conditions.

TERMS AND CONDITIONS OF CONTRACTS (cont.)

The agreement should contain:

- The names of contracting parties
- A brief description of the work
- A list of contract documents, including agreement, general conditions, drawings, and specifications.
- The contract sum, or amount (lump-sum contract)
- The procedures for payment
- The contract time, or dates for start and completion
- The signatures of contracting parties and witnesses

TERMS AND CONDITIONS OF CONTRACTS (cont.)

- The general conditions of a construction contract are, as the name implies, those terms and conditions of such a general nature that they apply to the work as a whole.
- A condition has been defined as “something established or agreed upon as a requisite to the doing of or taking effect of something else”

DEFAULTS AND REMEDIES IN CONTRACTS

- When a contract is breached, the party not guilty of the breach is relieved by law from his duties arising out of contract, and he may seek a remedy for the breach at law.
- The law provides two common remedies:
 - Damages to be paid in money to the hurt party by the party in breach of contract
 - Specific performance of the contract by a court order.
- In construction contracts money damages are much more common than specific performance.

DEFAULTS AND REMEDIES IN CONTRACTS (cont.)

- If a construction is breached because of a lack of money, damages might be difficult to collect. That is one reason for a *performance bond* in which a surety company purportedly guarantees a contractor's performance.
- Bonds to guarantee an owner's performance exist, but are not yet common place in construction contracts.
- The contractor's usual remedy for such a breach of contract is to place a lien on the property – the work and the land upon which it stands.

DEFAULTS AND REMEDIES IN CONTRACTS (cont.)

- A *lien* is a legal charge and a registerable claim against the property of an owner on whose land work has been done, or in some jurisdictions to which materials have been delivered. The owner's land is effectively the security for a debt owed to one who did work on or supplied material to the land. (i.e. the site)
- Some lien statutes require an owner to retain a percentage of payments made to potential lien claimants to create a fund from which, through the court, a lien claim may be settled.
- On a project where a lien legally is not possible an alternative may be *payment bond* guaranteeing payment by the contractor of all his legal debts.

QUALITY RELATED FUNCTIONS OF CONSTRUCTION CONTRACTS

- The contract documents can be considered a procedures manual to help ensure quality. (They set forth procedures and quality requirements for management and administration of the contract, such as schedules, shop drawings, and inspections.)
- Construction contract can also be used as a planning tool for quality. Parties can look to the various components (specification requirements, submittals, inspections) to help ensure that proper attention is given to quality.

ROLE OF THE DESIGNER IN THE CONTRACT DOCUMENTS

- Although contract is an agreement between owner and contractor under DBB, it may include a description of the various services and functions the designer may provide during construction.
- The designer may also have a major role in preparing many of the contract documents and compiling documents for use by bidders and the parties.
- The contract documents for design-build include design criteria, performance specifications, or outline specifications.

CONSTRUCTION CONTRACT DOCUMENTATION

Construction contract documents generally include:

- The agreement
- General conditions
- Supplementary conditions
- Drawings
- Specifications
- Addenda issued before submittal
- Notice to proceed
- Performance and payment bonds
- Change orders or contract modifications

CONSTRUCTION CONTRACT DOCUMENTATION (cont.)

- Preparation and assembly of the contract documents for review and approval by the owner and his or her legal counsel may be done by the owner's staff or a third party design professional, or a combination.
- AIA Doc.521 and EJCDC Doc. 1910-16 address the question of where to place or find a specific subject in contract documents and offer a uniform approach to the organization of contract documents.

INDUSTRY STANDARD CONTRACT DOCUMENTS

- Several components of the construction contract documents may be available as standard forms to define the agreement for a particular project.
- These standard forms typically include the agreement form, general condition and survey bond forms.
- The benefit is to include efficiency in preparation as well as efficiency in bidding.
- AIA, AGC, DBIA, and EJCDC have developed high quality standard forms, agreements, general conditions, and other documents.

INTERNATIONAL CONSTRUCTION CONTRACTS

- International construction documents are also often based on industry-prepared standard forms.
- A number of organizations prepare recommended standard general conditions and associated forms. Such as:
 - ENAA (Engineering Advancement Association of Japan)
 - FIDIC (International Federation of Consulting Engineers)
 - ICE (Institute of Civil Engineers, United Kingdom)
 - JCT (Joint Contracts Tribunal)