

Lecture 7, Feb 23, 2026

Contracts (Continued)

Tenders

- A *tender* is an offer to bid or submit a quote on a project or contract (e.g. an RFP)
 - Tenders are usually done through a formal process
 - The bid or quote may be an offer which results in a contract if accepted
 - * Often this is not the case however (e.g. multiple rounds of bid selection)
- The bid submitted in response to a tender need to be detailed enough to show how to fulfill the required specifications, and at what price
 - Engineers evaluate the specification for feasibility; bidders may be held liable for incorrect information
- Contract law applies during the tendering process; the tender process itself may be a contract
- Offers to treat can be withdrawn at any time prior to acceptance
 - The call for tender may be withdrawn at any time prior to acceptance, but this may be subject to any terms outlined in the tender (e.g. deposits)

Ending Contracts

- Contracts can end in one of two ways: being void or voidable (the contract was never valid), or through termination of the agreement
- Ways for a contract to be void:
 - *Duress*: when a party is being forced to enter a contract against their will
 - *Unconscionability*: when the contract was found to not have a lawful purpose (i.e. terms are illegal/excessively unfair)
 - Mistake and misrepresentation in the contract
- Ways for a contract to be terminated:
 - Full and complete performance
 - Mutual agreement of both parties to end the contract
 - *Frustration*: the contract can no longer be fulfilled or no longer has value, due to unforeseen events, not due to fault or negligence or either party (e.g. war, natural disasters)
 - * Contracts may incorporate *force majeure* (“Acts of God”) clauses which explicitly outline which events stop the contract
 - They are usually read restrictively, and so often contain precise language (e.g. a disaster where? who defines it?)
 - * If not included in the force majeure clause, common law dictates that the event must be totally unforeseeable by either party to cause frustration
 - * Changes in supply pricing are often used to unsuccessfully claim frustration; if this is a major risk the contract should outline explicitly what price range makes the contract enforceable
 - Termination clauses
 - Breach (intentional or unintentional): when one or more of the parties fail to meet their obligations pursuant to the contract
 - * The first party to breach the contract is the one responsible; once the first breach occurs, the contract ends, so the parties no longer have obligations after that
- What constitutes a breach is based on the facts, and is often disputed
 - The test for whether a breach is substantial enough (a fundamental breach) amounts to whether it deprives the innocent party of “substantially the whole benefit of the contract”
 - * The contract can outline fundamental terms that if unfulfilled, constitutes a fundamental breach
 - Test for fundamental breach considers:
 1. Ratio of the party’s obligations not performed to the obligation as a whole
 2. The seriousness of the breach to the innocent party
 3. The likelihood of repetition of breach

4. The seriousness of the consequences of the breach
 5. The relationship of the part the obligation performed to the whole obligation
- Damages are awarded to compensate for contract breach
 - Often monetary, based on differential price
 - The court can order specific performance/actions, in the case where the need is unique
 - Can also be an injunction or declaratory order (the court setting out the rights and obligations of a party)
 - Defences can include:
 - * Mitigation: the innocent party must have taken reasonable steps to minimize their loss
 - * Remoteness: only damages foreseeable when the contract was formed are considered
 - * Causation: only damages caused by the actual breach (and not speculative losses) are considered
 - A breach can occur when there is an actual breach, or when one party says that they will be unable to perform the obligations at some point in the future (*anticipatory breach*)
 - The innocent party can claim damages (and terminate the contract) at the time of notice, or when the other party actually stops performing the obligations
 - Declaring an anticipatory breach allows the innocent party to look for alternatives and potentially lower damages, so the party in breach will likely have to pay less; this is why declaring anticipatory breach is beneficial even though the party in breach still has the same responsibilities
 - * Both parties have a responsibility to mitigate damages