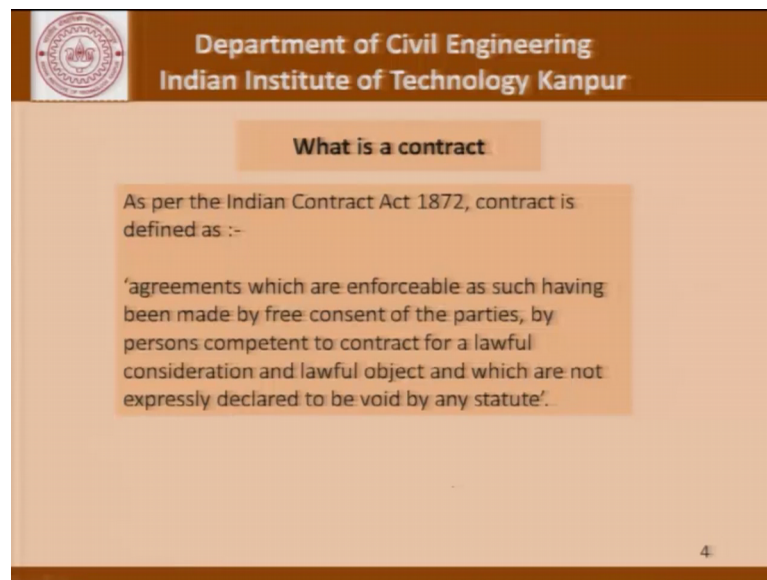


Principles of Construction Management
Prof. Sudhir Misra
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Indian Institute of Technology, Kanpur

Lecture – 34
Basics of contracting

Welcome to the series of lectures on principles of construction management. And today we will be talking about basics of contracting, what constitutes a valid contract, what is a void contract and what conditions can a contract be declared void. And basically what is a contract and how is it different from an agreement, what are the conditions that make an agreement a contract. I must acknowledge the discussions that I have had with professor K C Iyer and K N Jha of the department of civil engineering at IIT, Delhi, who initiated me into this process of understanding construction laws and the importance of having a component of understanding of contracts as part of a course in construction management.

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Now, what is a contract? As per the Indian contract act of 1872 a contract is defined as agreements which are enforceable as such having been made, by free consent of parties by persons competent to contract for a lawful consideration and lawful object. And which are not expressly declared to be void by any statute.

So, this is a technical definition of what the contract is. So, we can see that there are certain clauses or sub clauses that are underlined this definition. First thing we must understand is in the contract in our case most of the time, we will be talking of contracts signed by individuals who should; obviously, be empowered to sign that contract. So, they are basically committing their organizations or institutions to doing certain things. So, first thing is competence that those individuals should be competent to do that.

Then there has to be a free consent, there has to be the fact that whatever is being contracted for is legal and not declared illegal in any way of form. We must also remember that the legality of something is related to the social values the society. And the society has the judiciary as the arm which interprets the law. And therefore, a contract has to be seen in the context that whatever is being contracted for should be legal and whether it is legal or not it will be decided by the judiciary.

So, there is an important component of social values social thought processes and so on which is involved.

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The slide is titled "Department of Civil Engineering, Indian Institute of Technology Kanpur". It contains a list of six conditions for a contract:

1. There must be mutual agreement between the two parties.
2. There must be an offer made by one party called the promisor.
3. The other party, called the promisee, must accept the offer.
4. There must be considerations (usually payment in the form of money) for doing of an act (or abstinence from doing a particular act) by the promisee for the promise.
5. The offer and acceptance should relate to something that is not prohibited by law.
6. The contracting parties entering into agreement should be competent, i.e., not disqualified by infancy, insanity, etc. to make such agreement.

Below the list, a text box states: "The offer and acceptance constitute an agreement, which when enforceable by law, becomes a contract." This text is underlined in red. To the right of this text, there is a red circular stamp with the word "Contract" written inside it. The number "5" is visible in the bottom right corner of the slide.

When we are talking of a contract in that sense of the word, not trying to understand each of these terms a little bit more. First of all, there must be a mutual agreement between the 2 parties. So, basically what we have is that there is, an object or there is a service. Or the absence there of what somebody promises to do or promises not to do. Now in written for that there is a consideration. So, these 2 parties who are coming together through this

or for this object or service let us call them A and B. There has to be a mutual agreement between the 2 parties. It cannot be forced upon any of them.

The second thing is there must be an offer made by one party call the promisor. So, basically for this object or service party A or company A has to make an offer and that is by an construction, we often talk of bids, we have a bid to be submitted. So, the bidder offers to execute the job which has been defined in a tender at a certain cost. So, there has to be an offer made by one party called the promisor. And the other party call the promisee must accept the offer. So, having a unilateral offer by one party or many parties of it is does not constitute any contract. So, the offer has to be made by the promisor and accepted by the promisee. So, once that offer has been made and accepted, then we are one step closer to the contract. There must be considerations usually payment in the form of money for doing an act or abstinence from doing a particular act by the promisee for the promise.

So, the promisor makes an offer that I am willing to do such and such a thing for such and such a cost. And the promisee agrees to that and promises to pay the promisor a certain amount of money which is usually called a consideration. One must remember that in legal parlance very often a contract without a consideration is looked upon with a lot of suspicion. Because it is not clear as to what is going on which is not part of the contract. It is not expected that a person will do something or an institution will do something for another personal institution, without any consideration say for some very specific conditions, which are also laid down in the law. So, there must be consideration usually in the form of money for doing an act or abstaining from doing an act by the promisee for the promise. The offer and acceptance should relate to something that is not prohibited by law.

So; obviously, this object to service which we are talking about should not be something which is prohibited by law. That is it should not be illegal. The contracting parties into the agreement should be competent that is there not disqualified by reasons of infancy infinity etcetera to make such agreement, in that is what is called being competent to commit an institution being competent to sign the agreement or the contract. So, this is the in a nutshell what constitutes the essential elements of a contract. In a nutshell again the offer and acceptance constitute and agreement which when enforceable by law becomes a contract. So, when there is an offer and an acceptance of the offer that is

precisely what is called an agreement. I offered to do something for some consideration and somebody else accepts that offer that is an agreement. Now whether that agreement is enforceable by law or not that will determine whether that agreement is a contract.

If it is enforceable by law yes it is a contract and to be enforceable by law, then we have to have conditions such as prohibited by law. We can have agreements which may be between children or minors they may agree to do something for each other, but that does not become contracts because that is something which is not enforceable by law for the simple reason then that agreement was entered between minors who are not considered competent to enter into an enforceable legal agreement or a contract.

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What is an agreement

Every promise and every act of promise, forming the consideration for each other, constitutes an **agreement**.

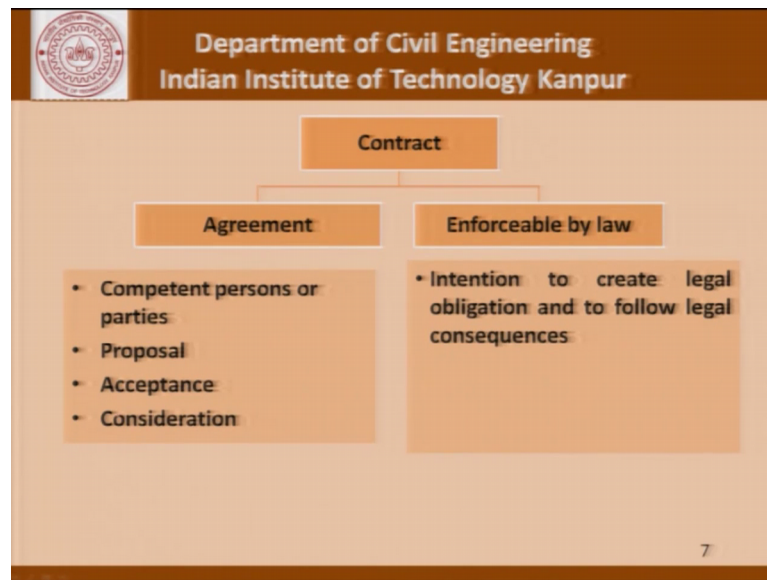
What is enforceable by law ?

All agreements are contracts if they are made by the free consent of parties, competent to contract, for a lawful consideration and with a lawful object and are not hereby expressly declared to be void

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So, now what is an agreement every promise and every act of promise forming the consideration for each other constitutes an agreement, that is what we have defined just now. And what is enforceable by law all agreements are contracts if they are made by the free consent of parties competent to contract for lawful consideration and with a lawful object. And not hereby expressly declared to be void. So, not only the object should be lawful, but even the consideration has to be lawful, if the payment has to be made in means which are prohibited by law then again of course, the contract becomes void it is not a valid contract.

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Once again to reiterate let us say the contract is an agreement which is enforceable by law. So, an agreement is between competent persons of parties it has to have a proposal and acceptance and a consideration. So, the proposal acceptance considerations and competent people that can define an agreement. Once it comes to enforceability by law there has to be intention to create legal obligation and to follow legal consequences. When people enter into an agreement or enter into a contract more a specifically they are explicitly stating their willingness to create some legal obligations towards each other. And to follow legal consequences that may arise out of following or not following that contract. So, that intention has to be very clear and understood by the people who are entering into a contract. So, enforceable by law essentially implies intention to create legal obligations and to follow legal consequences.

For a lawful object, lawful gains and the contract should not be void. So, these are the kind of conditions that were important to understand when it comes to enforceability by law. As we go into this discussion you will realize that most of the things that we are talking about are more or less common sense. And that is what I had said at the beginning of this module that as far as most of the laws are concerned except if it is a technically issue involved are quite common sense. And therefore, it is important for a construction manager to just have a feel for the legal provisions how they are to be interpreted under what conditions that to be integrated and so on. We simply cannot make you lawyers and complete with lawyers when it comes to a 30-minute lecture or a

4-hour discussion on construction loss, but yes I indeed hope that you will have some insight into the processes that are important, to appreciate when it comes to contracting.

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Competence ?

COMPETENT	INCOMPETENT
<ul style="list-style-type: none">• Major• Sound mind• Not disqualified by law	<ul style="list-style-type: none">• Minor• Lunatic or unsound mind

What is a proposal ?

An offer for a lawful object with certainty and possibility of performance

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Now, what is competence of people. Now as far as competence of people is concerned one thing is that they should be majors. Children cannot enter into a contract. They should be of a sound mind and not disqualified by law. There may be certain situations where due to certain reasons certain individuals may be disqualified by law to enter into any contracting position. They may be forbidden by the company or by the institution into making a legal commitment for something which may be binding on the company or the institution.

So, if so long as that is not the case the person is competent. As for as incompetence is concerned of course, then there is a minor children cannot enter into a contract lunatic or unsound mind; obviously, person who is not sound as for as mind is concerned is not able to understand, what is entering into what kind of legal implications there will be is incompetent as far as entering into an agreement is concerned. And what is a proposal it is an offer for a lawful object with certainty and possibility of performance.

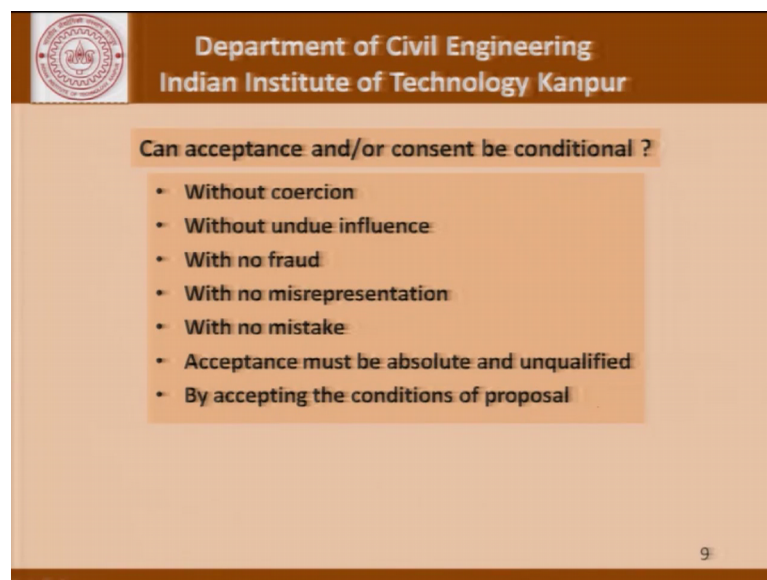
This is another interesting and a very important thing to understand that as far as construction laws are concerned there has to be a certainty and possibility of performance and increment or a contract for something which is not possible to perform, that cannot be viewed as a contract. So, impossible situations if the object is impossible

to achieve then the contract is not valid the proposal is not valid. Similarly, there has to be a certainty of performance, a reasonable certainty that yes such a such a project will be completed within such a such a time.

As we have seen in our discussion we are always talking about projects, of project may have certain foundation certain equipment certain a processes, but all of that has to be having a certain certainty of performance that yes, these things can be done for things that cannot be done with the reasonable certainty we will not be viewed as valid contracts. We must also remember that this has an issue of technology also.

Certain things which may be viewed as impossible or some certain things which were viewed as reasonably impossible, in let us say fifty sixty or hundred years ago have become possible through technology. So, this interpretation of what is certainty and what is possibility of course, is a little tricky, but you must understand the spirit of it this spirit of it being that all contract should be for objects or the proposals that we have should be objects which are reasonably performable they can be completed with reasonable certainty in a fixed or a reasonable amount of time.

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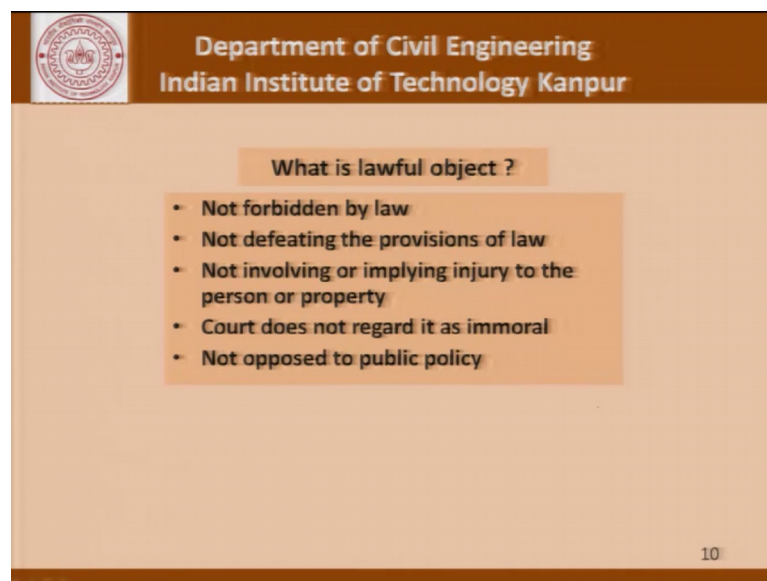


Now, let us come to another question can acceptance or the consent be conditional. So, if the proposal is made can the person accept the proposal with conditions. The acceptance has to be without coercion that is there has to be no force. The person does not have to be under duress these are the conditions which have to be applied when we are examining

whether the acceptance is acceptable as far as the law is concerned. That acceptance has to be without coercion or duress that is further it should be without undue influence nobody should be influenced into accepting an offer, there should be no fraud there should be no misrepresentation there should be no mistakes there should be no conditions that is acceptance must be absolute and unqualified by accepting the conditions of the proposal.

So, when accepting the conditions when accepting the proposal, the proposal has to be accepted along with the conditions that the promisor is placing as far as that contract is concerned. In certain cases, it does become necessary to negotiate a little bit after the proposal has been made. That well whether this condition is acceptable not acceptable and so on, but at the end of it the contract cannot be based on conditional acceptance of the offer.

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Now, let us examine what is a lawful object. We all understand what a lawful object is, but let us try to look at what the losses about a lawful object. It should be something which is; obviously, not forbidden by law. It should not defeat the provisions of the law. And it should not involve or imply injury to the property or a person.

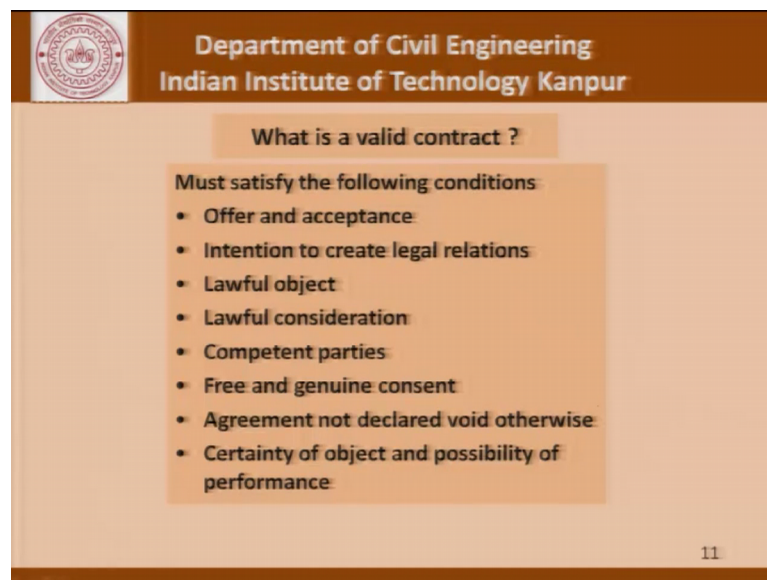
So, we cannot have a contract which will involve injury to a person or a property. Because that itself is considered an unlawful act or an unlawful, that itself will be considered an unlawful result. The implications of completing that proposal

should also be lawful. The code does not regard it as in moral. Now that is what I had said right in the beginning of this discussion today that there is an issue of morality also involved as far as interpretation of the law is concerned. And that interpretation is very often left to the courts.

That the object that we are talking about should be such that it is not immoral and is not considered immoral by the courts. We must also remember that quotes most of the time do not free in laws. The task or the job of framing the loss is left to somebody else. The codes usually confined themselves to interpreting what is a law or what is the law prevailing at that point in time at that particular place. And therefore, the issue of morality is also something which is often interpreted by the courts.

In construction contracts of course, we do not very often encounter the situations, where the morality of the proposal comes into examination. Not opposed to public policy now that again is a very important component as far as defining a lawful object is concerned the object should not be opposed to public policy.

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What is a valid contract ?

Must satisfy the following conditions

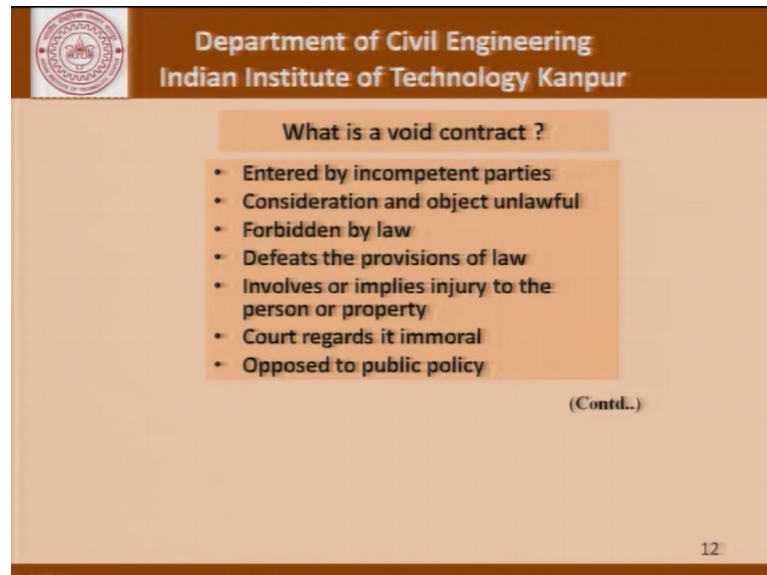
- Offer and acceptance
- Intention to create legal relations
- Lawful object
- Lawful consideration
- Competent parties
- Free and genuine consent
- Agreement not declared void otherwise
- Certainty of object and possibility of performance

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Which is also again interpreted by the courts. In order to have a valid contract what are the conditions therefore, there has to be an offer and acceptance, there has to be an intention to create legal relationship. There has to be a lawful object lawful consideration competent parties free and genuine consent un condition agreement not declared void

otherwise and uncertainty of object and possibility of promise. So, these are some of the arts takes on which we can examine whether or not a contract is valid.

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What is a void contract ?

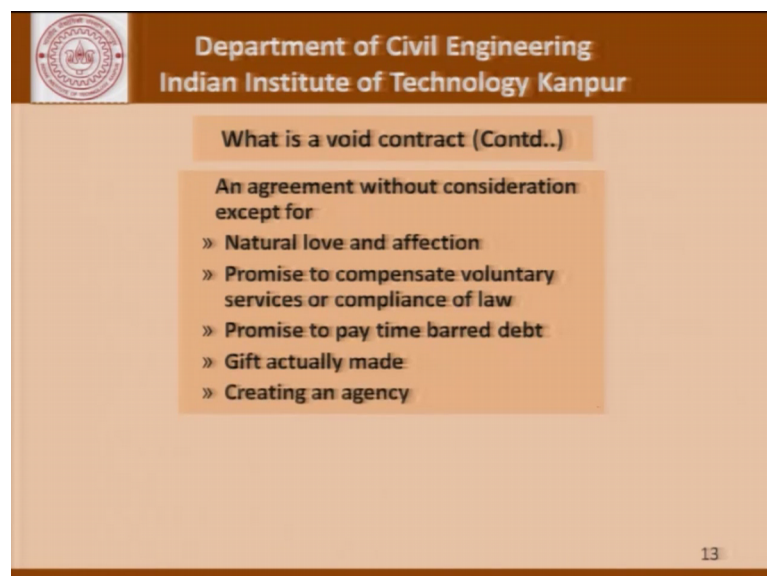
- Entered by incompetent parties
- Consideration and object unlawful
- Forbidden by law
- Defeats the provisions of law
- Involves or implies injury to the person or property
- Court regards it immoral
- Opposed to public policy

(Contd..)

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Now, on the contrary what is a void contract. A void contract therefore, will be one which has been entered by in competent parties, where the considerations and the object is unlawful. So, it is for a proposal which is forbidden by law. It defeats the provision of law involves or implies injury to persons of property courts regarded as immoral and is opposed to public policy.

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What is a void contract (Contd..)

An agreement without consideration except for

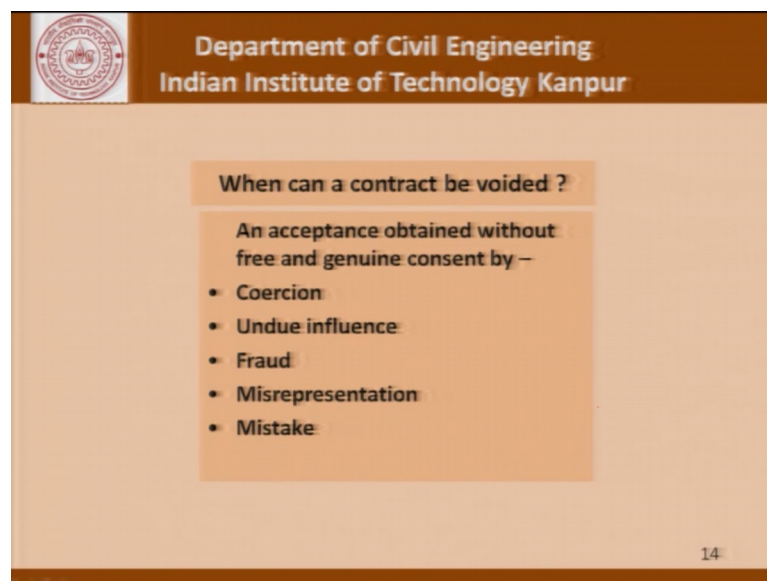
- » Natural love and affection
- » Promise to compensate voluntary services or compliance of law
- » Promise to pay time barred debt
- » Gift actually made
- » Creating an agency

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And continuing it could be an agreement without consideration, except for natural love and affection. So, now, had said at the beginning of this discussion. Today that usually an agreement without a consideration that is the promisor offers to do something or not to do something, but does not expect anything in return no consideration. This is going to be looked upon with a lot of suspicion and construction contrast or any contrast for that matter except for the condition such has a natural love and affection.

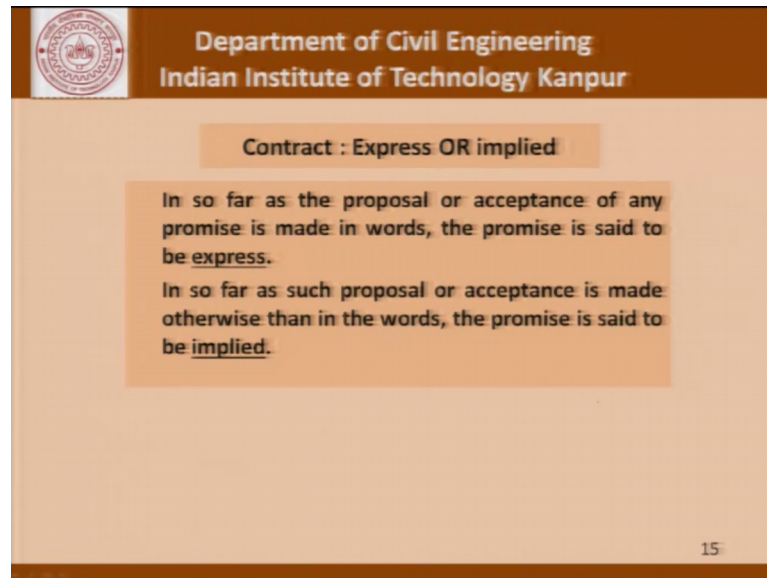
Now, one very simple example of natural love and affection is the kind of relationship which apparent may have towards the child or a child my have towards the parents. So, there yes there can be a contract which has no consideration. So, that is something which is accepted and incorporated into the legal process itself. Then there are other condition such as promised to compensate voluntary services or compliance of law promise to pay time barred debt gift actually made and creating an agency.

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Then let us try to examine when a contract can be avoided. That is again retraction of something which we have already done and acceptance obtained without free. And genuine consent by coercion, undue influence, fraud, miss representation or mistake if any one or more of these conditions are found to be applicable. Then the contract can be avoided which means that even if a contract has been signed, it can be declared as void at a later point and time by a court of law.

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There is what is called and express or a implied contract. Contracts could be express or implied. Now what is the difference between that? In so far as the proposal or the acceptance of any promise is made in words the promise is said to be express, that is it is explicitly stated in words that this is what is going to be done. This what the consideration will be and so on. So, if it is expressed in words explicitly then the contract is said to be express contract. Contrary to that or on the other hand in. So, far as the proposal or acceptance is made otherwise than in words the promise is said to be implied. That is, it is something which is not explicitly stated what is implicit in certain other statements being made usually it will be difficult to establish implied promises except in very simple situations. Then therefore, very often as first contracting is concerned we should try to make it as explicit as possible and try to work with express contracts.

An example which I can think of as for as express contracts is concerned could be keeping the foundation area dry during construction. So, if it is said that if the contract provides for keeping the foundation area dry during construction of the footing or the column that is below the ground level and so on. Then it is implied that the contractor will de water the footing, if there is any need to do that. Now whether we want to enter into a situation where we just say that the contractor shall keep the footing area drive or we should include de watering explicitly into the description of the item. That keeping the area dry including cost of dewatering if any and so on. So, this situation where de

watering has be made implicit in our statement that the area shall be kept dry is something which may be challenged. And that is why I am saying that we should try to have explicit contracts as far as possible. So, as to avoid any difficulty in the interpretations at the later point in time.

The situation is becoming more complex these days when we have international contracts with people from different countries trying to do projects in other countries. Apart from all the other things the contract should explicitly mention what the agencies will be in case there is an arbitration, which is required that is dispute resolution is what has to be done. What are the rules of arbitration the controls of country a or country b or some international agreement what will be the framework in which a dispute arising between 2 parties belonging to different countries will be educated?

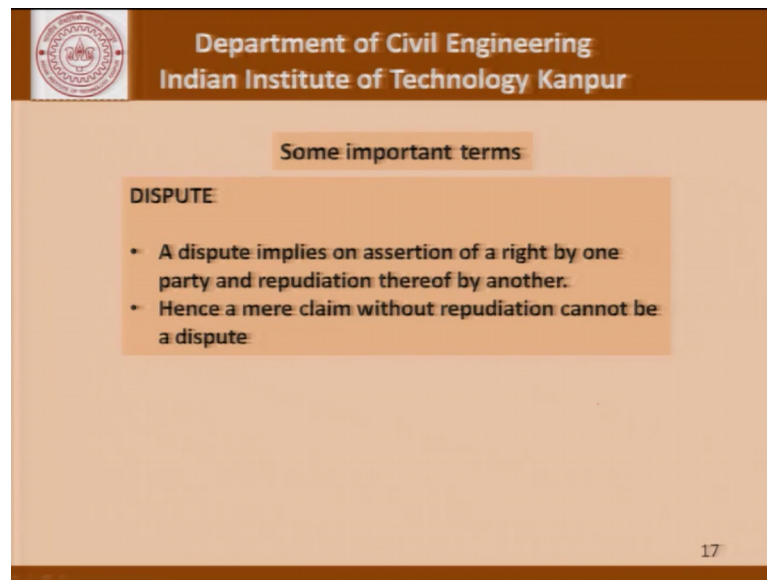
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The laws applicable and the venue of arbitration other legal proceedings. Because; obviously, if it comes to arbitration and dispute resolution under those conditions then they will be a lot of travel which would be involved and therefore, it is important that the venue of arbitration and legal proceedings we laid down in the contract itself.

Now, in the next discussions, we will have a small discussion on disputes and dispute resolution.

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Some important terms

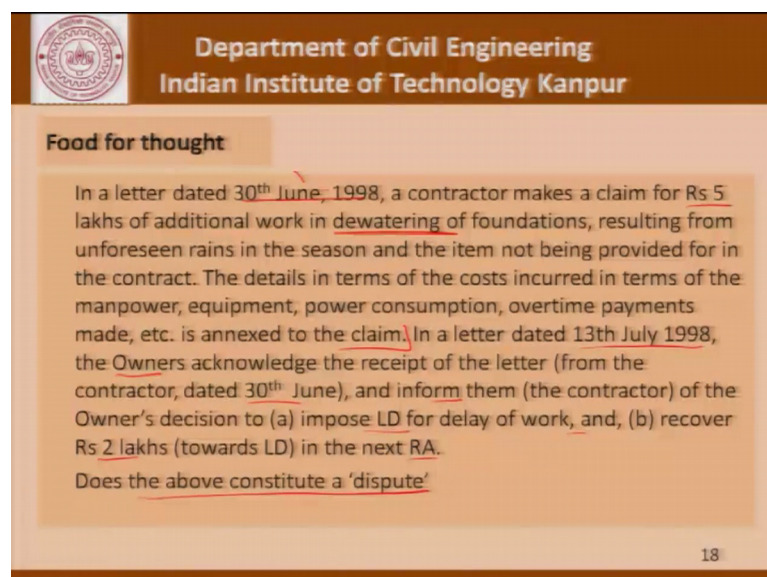
DISPUTE

- A dispute implies an assertion of a right by one party and repudiation thereof by another.
- Hence a mere claim without repudiation cannot be a dispute

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So, therefore, I would like to throw at you the whole idea of what really constitutes a dispute before we close the discussion today. A dispute implies an assertion of a right by one party and the repudiation thereof by another. So, it is important that there has to be an assertion, that assertion has to be repudiated or dismissed by the other party as a corollary to that mere claim without repudiation or a claim and a counter claim do not constitute a dispute.

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Food for thought

In a letter dated 30th June, 1998, a contractor makes a claim for Rs 5 lakhs of additional work in dewatering of foundations, resulting from unforeseen rains in the season and the item not being provided for in the contract. The details in terms of the costs incurred in terms of the manpower, equipment, power consumption, overtime payments made, etc. is annexed to the claim. In a letter dated 13th July 1998, the Owners acknowledge the receipt of the letter (from the contractor, dated 30th June), and inform them (the contractor) of the Owner's decision to (a) impose LD for delay of work, and, (b) recover Rs 2 lakhs (towards LD) in the next RA.

Does the above constitute a 'dispute'?

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So, now if you look at this example which is given as a food for thought for the day, in a little let us dated 30th June of 1998 a contract a mixer claims for rupees 5 lakhs of additional work in dewatering of foundations, resulting from unforeseen rains in the season and the item not being provided for in the contract.

So, on 30th June let us see the contract makes an assertion that a payment of 5 lakhs is due because of additional cost in dewatering. The details of the cost incurred in terms of man power equipment power consumption overtime payments etcetera is annexed to the claim. So, basically the contractor has made a case that due to unforeseen raise in that season, certain places for flooded and had to be dewatered in order to continue the work dewatering was not provided for in the contract. And therefore, an additional payment of or an extra payment of 5 lakhs has been passed along with all the details of overtime payments and so on and so forth.

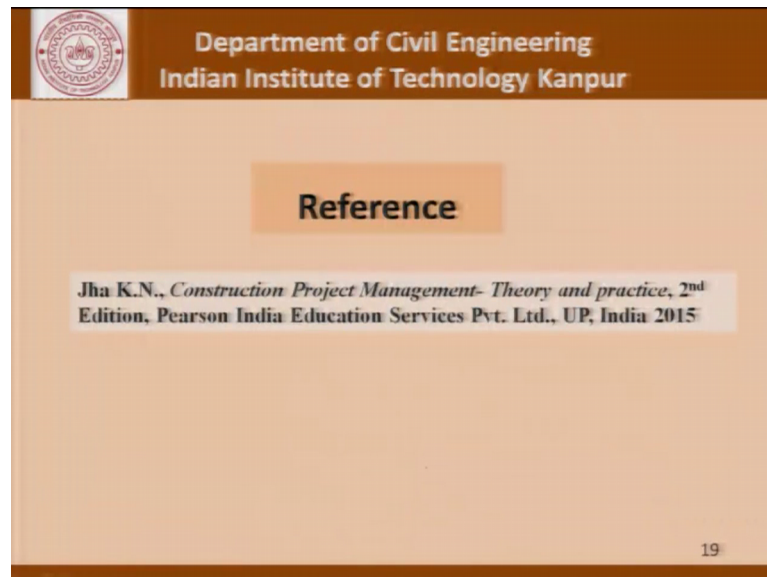
Now in a letter dated 13th July which is after this later the owners or the other party let us see acknowledge the receipt of the letter from the contractor of 30th June. So, they say that yes we were received your letter and inform them that is the contractor of the owners decision to impose, L D; L D is liquidated damages that is the cost of the delay in the project. And recover let us say 2 lakhs towards that liquidated damages in the next running account bill.

So, here we have a situation then on 30th June the contractor makes a claim for 5 lakhs and on 13 July while accepting or acknowledge, it is not accepting it is acknowledging the fact that yes we have got your claim, but what we are doing is we are imposing a liquidated damages of 2 lakhs on you, and it will be recovered from the next running bill. The question of the food for thought is that does the above constitute or dispute. Now what we have just discussed that a claim and a counterclaim or the claim without it is reputation does not constitute a dispute.

And in that framework of things this discussion here this case, here does not qualify for a dispute there is a claim which is not been repudiated and there is a counterclaim being made. And that is also of course, not being repudiated from the amount of information available with us. And therefore, what we have here is at best situation of a claim and a counter claim and therefore, it does not constitute a dispute.

So, these are the kind of things that we have to be aware of when we talk of construction laws. We will talk about disputes and dispute resolution in a subsequent discussion later on and for the today this slide here.

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Gives you some references which might help you understand the issues on the definitions of the terms that we have talked about today better. And I will look forward to seeing you in a subsequent discussion.

Thank you.