This book has been written for the use of students, teachers, tutors, instructors and lecturers of Colleges of Technology, Monotechnics, Polytechnics, Universities, Research Institutes and all forms of tertiary educational institutions offering construction-related courses. It will enable students of tertiary institutions to understand the basic principles of the laws and specifications guiding the procurement and execution of construction projects. In addition, it will prepare students for career progression, upon graduation, as required by the Nigerian Institute of Quantity Surveyors (NIQS), Nigerian Institute of Building (NIOB), Nigerian Institution of Estate Surveyors and Valuers (NIESV), Royal Institution of Chartered Surveyors (RICS) and other allied professional associations.

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Construction Law and Specifications



Abdullateef Shittu

# Construction Law and Specifications

## A Guide for Students and Teachers on Laws and Specifications Regulating Construction Activities

Abdullateef Shittu

LAP LAMBERT Academic Publishing

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# CONSTRUCTION LAW AND SPECIFICATIONS
## (A Guide for Students and Teachers on Laws and Specifications Regulating Construction Activities)

**BY**

**Abdullateef Adewale Shittu**



**2022**

# PREFACE

This book has been written for the use of students, teachers, tutors, instructors and lecturers of Colleges of Technology, Monotechnics, Polytechnics, Universities, Research Institutes and all forms of tertiary educational institutions offering construction-related courses. The book will enable students of tertiary institutions to understand the basic principles of the laws and specifications guiding the procurement and execution of construction projects, as well as the rules guiding the operation of completed and delivered projects. In addition, the book will prepare students for career progression, upon graduation, as required by the Nigerian Institute of Quantity Surveyors (NIQS), Nigerian Institute of Building (NIOB), Nigerian Institution of Estate Surveyors and Valuers (NIESV), Royal Institution of Chartered Surveyors (RICS) and other allied professional associations.

This book will also serve as a course manual for teachers, tutors, instructors and lecturers of tertiary institutions offering construction-related courses all over the world and especially in West Africa and Nigeria. Therefore, this book will bridge the gap between the academia and private practice.



This book has been broken down into four (4) parts. The first part of this book addresses the general issues concerning the construction industry. The second part covers the principles of law. The third part of the book is on the concept of construction law. The fourth part addresses the basics of specification writing in construction projects. A list of references has been provided at the end of the book for further readings. The book is therefore recommended to all students and teachers of the tertiary institutions offering construction-related courses for effective teaching-learning process.

## DEDICATION

This book is dedicated to the glory of God Almighty, my loving parents (Alh. A. O. Shittu, Alhaja M. F. Shittu and Alhaja M. A. Shittu) and the memories of Dr. T. O. Ibironke (my mentor), Chief A. A. Morohunfola (my uncle), Muideen Olalekan Ibrahim (my brother in-law), Azeezat Kehinde Shittu (my daughter) and Abdulrazaq Abdulganiyu (my friend).

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# GENERAL ISSUES CONCERNING THE CONSTRUCTION INDUSTRY

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# CHAPTER ONE

# INTRODUCTION

## 1.1 Chapter Synopsis

Before discussing the concept of laws and specifications regulating activities of the construction industry, it is necessary to discuss the general issues that concern the construction industry. In the light of this, the following sections will discuss the nature, importance, stakeholders and characteristics of the construction industry among other issues.

## 1.2 Nature and Scope of the Construction Industry

The construction industry is almost as old as nature itself and unlike many manufacturing industries, it is concerned mostly with one-off projects. The construction industry has a number of characteristics common to both manufacturing and service industries. Certainly, as in manufacturing, these are physical products, and often times these products are massive in size, cost and complexity. In other words, construction is more like a service industry because it does not require significant amount of capital when compared with industries such as steel, transportation, petroleum and mining.



The construction industry is essentially an assembly of industries, assembling the products of other industries. The designer's intentions are expressed in drawings, documentation and skilled operatives guided by high level management to undertake the work of construction and assembling of components on site. Therefore, the construction industry embraces a wide range of loosely integrated organisations that collectively construct, alter and repair a wide range of different building and civil engineering structures (Ikupolati & Olaleye, 2016).

The construction industry is very important in the economic development of any nation, especially in an expanding economy like Nigeria (Ibironke, 2003). It contributes significantly to employment, Gross Fixed Capital Formation (GFCF) and Gross Domestic Products (GDP). It can be said that housing, education, religion, etc. and in fact all amenities of civilisation lay claim on the construction industry. The importance of the construction industry is not limited to the different measures of economic development alone, slumps or upsurges in its activities have a high

multiplier effect on almost every phase in the social and economic structure of the nation. It has been concluded that the high cost of house ownership in Nigeria and other housing problems of the lower income groups are results of the defect in th construction industry.

The construction industry cannot significantly influence the demand for its output or control the supply. This is because a wide range of economic factors influence the extent of activities in the industry, and these include the general economic climate, interest rates, credit availability and extent of control of public sector spending. The demand fluctuates largely with natural needs and the state of the economy. Two categories of clients can be identified in the construction industry. These are:

1. Public sector (Federal, State and Local Governments, Nationalised Industries, Public Corporations, etc.).
2. Private sector (Developers, Financial Institutions, Industry and Commerce, Building Societies, Individual Promoters, etc.).



Construction products are often built for a price established through tendering process. Also, unlike manufacturing, construction does not operate at a fixed location but it takes place from site to site wherever work is available. There is also variability of the products (projects), firms undertake range of discrete projects of relatively long duration often tailored to meet client's requirements. Construction entrepreneurs must face a daunting array of risks some of which are inherent (arising from assumptions made at the time of building), some insurable (damage to property, health and life, etc.) and others transferable (conveyed to others such as sub-contractors by contractual arrangements).

Like in any other nation, the Nigerian construction industry can be subdivided into three (3) major sectors of activities as highlighted below:

**(a) Building Works:** This generally satisfies man's need for shelter and includes such diverse buildings such as houses, flats, schools, hospitals, shops, offices, factories and warehouses.

**(b) Civil Engineering Works:** This encompasses the essential services needed to make the building functional. These include roads, bridges, reservoirs, waste water systems, railways. Power stations, harbours, dams and airports. The scope, size and extent of civil engineering works are usually considerably

more substantial than building works. Civil engineering works are more method related than with building works, and bills of quantities comprise large quantities of few items while building works comprise a small quantity of a large number of items.

(c) **Heavy Engineering and Processing Engineering:** These are special construction projects such as steelworks, aluminium smelter plants, cement plants, sugar plants, off shore steel platforms, shipyards, energy centers, and nuclear processing

## 1.3 Composition of the Construction Industry

By definition, a contractor is one who acquires an obligation to perform work or to supply materials or finished products on a large scale at a specified price. This is a broad definition that covers many operatives outside the construction industry as well as within. Even within the construction industry, there are several specialised areas of contracting and numerous firms engaged in one form or the other. The following major categories are typical areas of operations:

1. General building contractor
2. Building trades
3. Engineering construction
4. Specialised contractor



**1.3.1 General building contractor:** The General building contractor is engaged in the construction of all types of residential, commercial and industrial buildings (including general builders and speculative builders).

**1.3.2 Building trades:** These are the domain of sub-contracting, a highly specialised and fiercely competitive field. The sub-contractor usually works under a contract with a prime contractor on a job. The major categories of building sub-contractors embrace electrical works, mechanical works, plastering, etc.

**1.3.3 Engineering construction:** The engineering construction category covers general works that are planned and designed by the Engineer rather than the Architect. Typical projects falling within this classification are further divided into highway and heavy engineering groups and even more specifically into grading, bridges, municipal and utility services.

**1.3.4 Specialised contractors:** These include marine construction, oil well and drilling contractors, chemical process plant, etc.

**1.3.5 Comparison with other Industries:** Unlike other industries, construction contractors employ temporary labour. They have the work schedule halted or altered by external factors. Construction projects are changing according to specifications, and fluctuating costs, which are subject to a complete lack of price stability in the future market. In view of this, the construction industry suffers in comparison with other industries, especially, when the comparison is with respect to profits.

## 1.4 Characteristics of the Products of the Construction Industry

The construction industry has some unique characteristics due to the physical nature of its products and demands. Some of these characteristics are highlighted below:

1. No two projects are identical; most projects are one-off designs and even with prototype construction, site characteristics and location will vary, making them unidentical.
2. The products of the construction industry are manufactured on the client's property, i.e., construction site.
3. Construction works are carried out on the site where the products will be consumed.
4. Production is not carried out under controlled factory conditions. Construction activities are therefore affected by the vagaries of weather and also of ground conditions.
5. Construction products take a long time to produce and last for many years.
6. Construction works are capital intensive.
7. Its processes include a complex mixture of different materials, skills and trades.
8. The construction industry is more of a service industry than a manufacturing industry.
9. Throughout the world, the construction industry includes a small number of relatively large construction firms and a very large number of small firms.



Building construction is the product of a diverse group of sub industries, with many individuals and organisations involved in the construction of a single structure, from the manufacture of necessary components to final assembly. As a general rule, State laws require a registered Architect or Engineer, or both, to execute the design and to make sure that the design complies with public health, zoning, and Building-code Requirements. The design must at the same time conform to the requirements of the

owner. The Architect or Engineer converts these requirements into a set of drawings and written specifications that are usually sent to interested general contractors for bidding, the successful bidder or bidders in turn, subcontract plumbing, painting, electrical installation, structural frame construction and erection, and other jobs to firms specializing in these trades.

Contractors ordinarily undertake their work under the observation of an Architect or Engineer, who acts as representative of the client. State and Local inspectors review the work for general compliance with the Local Building Code. The immediate responsibility of the contractor, Architect, and Engineer ends when the Local Authorities approve the building for occupancy and the owner accepts the building. However, the contractor, Architect, and Engineer are legally responsible for any deficiencies in the construction or design for a period of several years after acceptance, the time depending on the terms of the contract and Local Laws.

## 1.5 Construction Equipment

The equipment used in the construction industry for construction activities are mainly **Earth Moving Equipment**. These are equipment used in heavy construction, especially civil engineering projects, which often require the moving of millions of cubic metres of earth. The removal of earth or materials from bottom of bodies of water is performed by dredges. These include:



### 1.5.1 Bulldozers

The primary earth-moving machine is the heavy-duty tractor, which, when fitted with endless tracks to grip the ground and with a large, movable blade attached in front, is called a bulldozer (See Figure 1.1). Bulldozers are used to clear bush or debris, remove boulders, and level ground.

Fig. 1.1: A Bulldozer (Source: Ikupolati & Olaleye, 2016)

### 1.5.2 Scraper

A scraper is a machine that may be pulled by a tractor or may be self-powered. It consists of a blade and a box or container. Dirt is scraped by the blade into the container. The dirt may then be released so as to form an even layer of a predetermined thickness, or be carried off for disposal elsewhere. Scrapers are used to level contour land, as in road construction. Figure 1.2 shows the picture of a typical scraper.



Fig. 1.2: A Scraper (Source: Ikupolati & Olaleye, 2016)

### 1.5.3 Grader

Somewhat similar to scrapers are graders, self-propelled, wheeled machines with a long, inclined, vertically adjustable steel blade. Graders are primarily finishing equipment; they level earth already moved into position by bulldozers and scrapers. A grader has a laser levelling unit mounted on its blade.; the levelling device constantly adjusts the height of the blade to ensure that the ground is made precisely flat. See Figure 1.3 for the picture of a typical grader.


Fig. 1.3: A Grader (Source: Ikupolati & Olaleye, 2016)



### 1.5.4 Tractor

Lightweight tractors fitted with wheels in place of tracks are used for comparatively light construction jobs. Equipped with a backhoe, which is an open scoop attached rigidly to a hinged boom, such a vehicle can dig shallow trenches; equipped with a front-end loader, a scoop shovel affixed to the front of the tractor, it can lift and carry gravel, stone, sand, and other construction materials (see Figure 1.4).

Fig. 1.4: A Tractor (Source: Ikupolati & Olaleye, 2016)

### 1.5.5 Dragline

Draglines and power shovels are primary forms of excavation equipment. A dragline is fitted with an open scoop supported from the end of a long boom by a wire cable. The scoop is dragged along the ground by the cable until it is filled with earth, which is then dumped elsewhere. Draglines are used primarily to excavate deep holes. Power shovels are fitted with buckets called clamshells, which dig into the earth and shovel it up. The bottom of the clamshell opens to dump the dirt into a truck for removal. See Figure 1.5 for the picture of a typical dragline.

Fig. 1.5: A Dragline (Source: Ikupolati & Olaleye, 2016)



### 1.5.6 Mobile Derrick Crane

The derrick crane moves heavy objects through the use of a motor, which winds cable around a winch, and a system of pulleys. See Figure 1.6 for the picture of a typical mobile derrick crane.

Fig. 1.6: A Mobile Derrick Crane (Source: Ikupolati & Olaleye, 2016)

### 1.5.7 Dump Truck

Dump trucks have large open beds for hauling loose materials such as gravel or soil. To empty the bed's contents, a hydraulic lift inside the truck tilts the bed, dumping the contents behind the truck. Dump trucks are common at busy construction sites, where large amounts of building materials are frequently moved (see Figure 1.7).

Fig. 1.7: A Dump Truck (Source: Ikupolati & Olaleye, 2016)



## 1.6 Effect of Government Action on the Construction Industry

The Government has a crucial role in determining demand for the construction industry's output and its growth prospects for two main reasons. Firstly, because public authorities buy about one-half of its output. Secondly, because general economic measures have a powerful influence on the demand for private housing, industrial and commercial buildings. A steady, rather than wildly fluctuating growth of demand is particularly important for the industry if it is to plan its work ahead, make sure of supplies and deploy its resources effectively.

Because the construction industry is undercapitalized, it soon experiences difficulties when monetary policies are introduced to check the economy as a whole as it became very evident about four decades ago when the Structural Adjustment Programme (SAP) was introduced. All over the world, successive governments have found it necessary sometimes to restraint and at other times to stimulate the economy, and the construction industry is invariably caught in this process. When policies of restraint operate (like during the economic recession), there is usually a reduction in the volume of public construction works, particularly: house, buildings, roads, roundabout beautification, etc., schemes are likely to be cut back or

postponed. The adverse effects on contractors will not be immediate, as contracts already at hand will normally be completed. In the long run, however, the results can be serious resulting in the following:

1. Unemployment of construction operatives.
2. Smaller construction firms being forced out of business.
3. Larger construction firms being reluctant to invest large sums in new plant and equipment with new techniques.
4. Suppliers of materials and components being unlikely to extend their plant.
5. Recruitment of persons into the industry at all levels being made more difficult.
6. The lack of continuity of construction work, which makes for increased construction costs and reduced efficiency.

# CHAPTER TWO

# NATURE OF CONTRACTS IN THE CONSTRUCTION INDUSTRY

## 2.1 Construction Contract Documents

The documents used in construction contracts should define the terms of the contract and should be designed to achieve reasonable expenditures and economic completion of the project with a minimal number of disputes and misunderstandings. The documents should concentrate particularly on the practical problems most likely to arise on site and should include all information available to the employer, which is likely to affect the tender rates. They should indicate clearly the character and quantity of work involved as well as the technical, financial and administrative considerations, which affect the execution of the work. The type of contract to be used for a project will normally affect the number and form of the documents required, but the following is a reasonably comprehensive list which can be used, in whole or in part, as occasion demands.



The employer may not intend for all the documents to be contractually binding, and if so, this should be clearly stated. In case of ambiguities and inconsistencies in the documents, it is normal to give most weight to the documents specially prepared for the particular contract by the parties, such as drawings, specification or bills of quantities as against the standard documents such as the conditions of contract. In view of this, the following are the main components or types of construction contract documents:

1. General information
2. Instructions for tendering
3. Non-collusion certificate(s)
4. Form of tender, including appendix, and where appropriate, schedule of materials
5. Form of agreement
6. Bonds and guarantees (tender or bid, performance, advance payments)
7. Conditions of contract
8. Technical specification
9. Bill(s) of quantities

10. General summary(ies) of bill(s) of quantities
11. Drawings, together with a comprehensive list
12. Dayworks schedule

## 2.2 General Information

This includes information on the conditions in the country concerned and, on the site, where the work will be carried out, especially designed to give tenderers a common basis on which to calculate prices. The general aim should be for the employer to make available the maximum amount of relevant information which he/she is in the best position to obtain and to leave the tenderer to ascertain any additional information which may be of particular significance to his/her tender. The information should be factual and given without interpretation and in such form as to discourage any unreasonable deductions. In this way, uncertainty in the tenderer's mind is reduced and he/she is able to make due allowance in his/her tender for the foreseeable risks and ensure that his/her operational planning is flexible enough to cope with any contingencies which may arise. The information is often given without any guarantee or acceptance of any legal liability. It may include anything affecting the execution of the works and particularly the following:



(a) **General:** Brief details of the organisation calling for the tenders, location and description of the type, nature and extent of the works (the scope of the works). Access routes, modes of transport, principal transport firms, forwarding agents. Details of telecommunications available in the area of the site. List of useful names and addresses.

(b) **Economic:** The relevant customs, fiscal and currency systems and banking organisations, availability of manpower resources and wages, social security charges, transport costs, prices of construction materials, cost of energy and services, and cost of living.

(c) **Technical:** Climatic conditions, site geological data, topographical details of site, comprehensive soils data from a properly planned and executed site investigation, experimental model test (where appropriate), materials, equipment and services provided by the employer for the use of the successful tenderer.

## 2.3 Instructions for Tendering

These will be unique to a particular site and their purpose is to convey advice and instructions, which apply mainly during the pre-contract period. They may or may not be contractually binding and will include the following:

**General:**

a. If the employer is using open tendering to place the contract, particulars of legal, financial and technical experience of the tenderer.
b. If the client is using selective tendering, stipulations regarding previous pre-qualification.
c. Requirements regarding the formation of joint ventures.
d. Whether the successful tenderer will be required to establish a locally registered company for the purpose of the contract.
e. Special arrangements for visiting and inspecting the site and for obtaining access to data not already issued to tenderers.
f. Details of indemnity required by the employer against all forms of personal loss and damages which might arise when the tenderer or his/her servants or agents are granted permission to enter the site for the purpose outlined in (e) above.
g. Requirements regarding the currency to be used for bidding, for payments of contract dues and for payment of materials and services acquired in other countries.



**Documents:**

a. Instructions on whether to treat the tender documents as private and confidential.
b. The number and form of documents to be duly completed and submitted with the form of tender and the mode of their completion.
c. The cost of original and additional copies of documents and the currency in which payment is required to be made.
d. Procedure for obtaining additional sets of documents and the procedure and place for the return of documents by unsuccessful tenderers.
e. The language to be used in the completion of the tender documents.

f. The procedure for explanations, revisions and additions to and deletions from document issued to the tenderers during the tender period and to what date this will apply.

**Completion and Submission of Tenders:**

a. Whether submission of tenders is to be solely in accordance with the 'Instructions' and where tenderer will risk rejections of his/her tender if he/she does not comply.
b. Place, time and date for delivery of tenders. The inscription required on the envelope and the mode of delivery.
c. Place, time and date for opening of tenders.
d. Employer's practice in relation to publication or otherwise of decision to award the contract has been taken, particularly whether a letter of acceptance will be preceded by a letter of intent and whether a contract agreement is to be entered into.



**Other Contract Documents:**

Attention is drawn to other specific contract documents as follows:

a. Whether the conditions of contract include a price fluctuation clause.
b. Attention is drawn to Table(s) showing comparative quantities of major bill items, when choice of different construction materials is permitted.
c. Attention is drawn to special requirements in the conditions of contract in relation to maintenance of public and private rights of way.
d. Attention is drawn to special requirements in the conditions of contract in relation to statutory undertakers, water authorities, NNPC, electricity distribution company, telecommunication companies, etc.
e. Attention is drawn to specification clause regarding to the need to phase the work to obviate interruption of mains and services without the prior written consent of the appropriate authority.
f. Attention is drawn to specification clause regarding traffic routing to site and to any restrictions.
g. Attention is drawn to specification clause requiring a section(s) to be completed in advance of the remainder of the works.

**Supplementary Information Required to be Submitted with Other Contract Documents:**

a. Details of insurance to meet all the requirements of the conditions of contract.
b. Details of proposed sureties for the required bonds.
c. Details of tenderer's organisation and address for purpose of the contract.
d. Preliminary programme of works.
e. Forecast of requirements for local and foreign labour and staff.
f. Names of proposed sub-contractors and details of those parts of the permanent or temporary works, which it is proposed to sub-let.
g. List of major items of plants, including details of specification, which it is proposed to employ on the works.
h. If advance payments are required, the tenderer should list the following:
    1) The items of plants to be purchased initially and at intervals during the course of the contract, and the approximate cost of each item.
    2) Quotations for the supply of materials.
    3) Cost of mobilization.
    4) Cost of commissioning, surveys, and/or studies.
    5) Cost of preliminary items such as air survey, etc.



**Currency Issues:**

a. Tenderers to state by a prescribed date which currency(ies) they wish to be used for payment if the contract is awarded to them. The Architect/Engineer should then notify his/her approval or disapproval as soon as possible.
b. Definition by the client of the exchange rates to be applied throughout the duration of the contract.

## 2.4 Non-collusion Certificate

This is used to certify that the tender is bona-fide and that no collusion has taken place in relation to the amount of this or other tender or on the conditions on which the tender was made. In Nigeria, collusive tendering is not a criminal offence. Civil proceedings to recover damages by a party injured by an unregistered restrictive tendering agreement are time consuming, expensive and uncertain in outcome.

## 2.5 Form of Tenders

The completed form of tender constitutes the tenderers written offer to execute the required work in accordance with the remaining contract documents. In some cases,

the form of tender states the total tender sum. The time for commencement and for completion., and a period of validity during which the tenderer agrees not to withdraw his/her tender. After that period, it is no longer open to acceptance. The tender can be withdrawn at any time during its validity period if it has not already been accepted by the employer, unless there is a clause in the instructions for tendering which gives contrary instructions. After expiration of the validity period, and if the employer has not accepted the tender, the tenderer is free either to amend his/her tender (including revision of price and completion date) or to revalidate it as it stands for a further period or to withdraw it completely.

## 2.6 Form of Agreement

It is usually deemed necessary to confirm the intention of the parties by signing a form of Agreement as a legal undertaking between Employer and Contractor for the execution of the work in accordance with other contract documents. Agreement can be executed either under hand (i.e., by the signatures only of the two parties to the contract together with two witnesses), or under seal when in addition to the signatures of the parties, their seals are also affixed or embossed on the document and these are witnessed by two duly authorised witnesses. Agreement under seal requires a revenue stamp to be fixed within 30 days of signing the document.



In the public sector for contracts over a certain value, which require a formal agreement, the signatories for each corporate body are required to be duly authorised for that purpose by standing orders. In the private sector, the authorization is normally contained in the Article of Association of a particular limited company.

In the construction industry, agreements for contracts of any magnitude are required to be under seal so that questions of fact cannot subsequently be questioned. By virtue of Section 2 of the Limitation Act 1939 (British), contracts under seal have the effect of extending the period of limitation from 6-12 years. This extension is of particular value to client when issues of defective materials and workmanship arise.

## 2.7 Bonds and Guarantees

A bond is a contract documents under seal (a deed) in which under stated conditions, one (the second) party promises to perform in a specified way for the benefit of the other (the first) party. It is discharged as soon as the specified performance is complete. A guarantee is a promise by a third party to be answerable to the first party

in a specified manner and extent for the default in performance of the second party. In most building and engineering contracts, guarantee is required in the form of bond and all costs are borne by the contractor. Bond/Guarantees from contracts, which are separate from the main contract and normally relate to one specified main contract. Any variation in the terms of the main contract will usually require a new bond/guarantee. Types of Bonds and Guarantee in use in construction contracts are:

(a) **Performance:** This is an undertaking given to the client by the contractor and his/her surety or guarantor for the due performance of the contract as described in the contract documents. In the event of default or breach by the contractor, e.g., as a result of bankruptcy, the employer can demand from the surety, part or all the sum guaranteed as payment for damages he/she has sustained. Any balance then remaining in the guaranteed sum may be subject to further claims for damages in the event of additional breaches. Performance Bonds and Guarantees are not normally required when selective tendering procedure is used to place contracts. In main contracts involving the supply and erection of plant, a separate performance bond/guarantee may be required by the client to ensure the specified efficiency of operations or rate of output of the plant installed. The sums guaranteed could be on a sliding scale linked to the percentage efficiency of or output of the plant as a percentage of that specified.

(b) **Tender or Bid:** This bond/guarantee is requested by the client to accompany the tender to ensure that the tenderer maintains his/her tender offer unaltered and open to acceptance during the whole of the validity period stated in the tender and that he/she accepts any contract based on the tender which may be awarded to him/her during that period. The bond is binding from the date on which the tender is submitted and is discharged by the signing of the main contract or at the expiring of the validity period of the tender. On default of the tenderer, the client will claim the full amount of the bond, which is normally between 1 and 2% of the tender sum.

(c) **Advanced Payment or Mobilisation:** This bond/guarantee is required by the client to cover payment to the contractor or part of the tender sum, before any work is performed on site for materials/equipment supplied and installed on site.

## 2.8 Conditions of Contract

These are the rules by which the contract is carried out and as they form much of the legal basis of the contract, they need to be written with great care so that the terms are clear and unambiguous. Inter alia, they define the powers of the Architect/Engineer, state the rights and obligations of and relationships between the parties simply and concisely, define the terms of payment and detail the action to be taken by the parties in the event of various eventualities during the contract. They form a practical code for the administration of a contract.

The conditions which apply to a particular contract will normally be the most relevant standard with a number of additions, substitutions and/or modifications deemed necessary to suit the individual requirements of the contract. The additions are normally incorporated separately as 'special conditions of contract'. Any alterations or additions should be simple and precise and be in similar terminology and give words the same meaning as in the main conditions. Attention should be drawn most, if not all, the amendments/additions to the conditions of contract in the Instruction for Tendering.



Examples of additional clauses for Standard Conditions of Contract are as follows:

1. Corrupt gifts and payment of commission.
2. Recovery of sums due from contractor.
3. Compliance with central government pay policy.
4. Labour relations.
5. Racial discrimination.
6. Method of measurement used in preparing Bill(s) of Quantities.
7. Balancing item for adjustment of value of variations ordered by the Architect/Engineer.
8. Precautions against pollution and/or damage to water course.
9. Certificate regarding adequacy of contractor's erection proposals and temporary works details.
10. Routening of vehicles to and from site.
11. Possession of railway track.
12. Site cleanliness during construction.
13. Fire precautions.

## 2.9 Special Requirements

These are normally additions to the standard conditions and relate to the following:

1. Statutory authorities.
2. Nigerian Telecommunications.
3. Water authorities.
4. Electricity Distribution Companies.
5. Nigerian Railway Corporation.
6. Nigerian National Petroleum Corporation (NNPC).
7. Maintenance of public and private right of way.

## 2.10 Technical Specification

Together with drawings, it should clearly and precisely indicate the extent and nature of the works, the accuracy with which they are to be constructed, the quality of the materials and workmanship required in addition to any constraints on the methods to be used during construction and any special responsibilities of the contractor not enumerated elsewhere. Absolute clarity and completeness are difficult to attain so that reasonable interpretation by both parties is required during the operation of the contract. A performance specification specifies the performance required in service for the particular section of work to which it relates and to which the contractor is permitted to construct in materials of his/her choice and to his/her design provided only that the defined performance is achieved.



It is preferable that the specification be identified as one of the tender documents and bear the initials, signature and/or stamp of the contractor's authorised agents to confirm this. General clauses in the specification may include the following:

1. The order in which various sections of the work are to be constructed.
2. Requirements regarding the submission of a programme of work and a description of the proposed methods to be used in construction and details of temporary works.
3. Particulars of facilities to be given to other sub-contractors on site.
4. Standards of construction for and routes of temporary diversions of highways.
5. Requirements regarding the traffic safety code for road works.
6. Instructions relating to supply and testing of samples and provision and use of laboratory facilities and testing equipment.

7. Details of limitation on working hours.
8. Whether, after Architects/Engineers prior statement, certain locally available materials will be acceptable for use in the contract.
9. Any special requirements in relation to site safety and security.
10. Conditions affecting the erection and maintenance of temporary or permanent fencing delineating the site boundaries.
11. Requirements regarding privately and publicly owned services.
12. Special requirements regarding noise control.
13. Details of special requirements applying to nominated sub-contractors with particular reference to work to be done or service to be provided by the main contractor.
14. Details of site offices and accommodation to be supplied for use of the Architect/Engineer.
15. Details regarding the supply, maintenance, repair and replacement of vehicles for use by the Architect/Engineer.
16. Details regarding the provision of manual operatives to assist the Architect/Engineer's representatives.
17. Details of progress photographs required.
18. A list of standard specifications for materials and workmanship, which apply to any part of the contract with additional comments as necessary.



## 2.11 Bills of Quantities

Traditional bills of quantities itemize and quantify as simply, accurately and comprehensively as possible, the work to be carried out and permit all the tenderers to present the built up of their tender sum in an identical form. Each item carried an identifying description and an estimated quantity taken from the drawings of the work to be carried out and a unit rate to be inserted by the tenderer to indicate the cost of work. The total of the product, quantity and unit rate, for each item gives the tender sum. The scope and content of each item should be self-evident from the wording of the brief description although this should preferably be read in conjunction with the other contract documents. The objectives of the Bills of Quantities are:

(a) To enable all contractors tendering for a contract to price an exactly the same information with a minimum of effort.

(b) To provide a basis for the valuation of variation which often occurs during the progress of the work.
(c) To give an itemized list of the component parts of the building with a full description and the quantity of each part and this may assist the successful contractor in ordering materials and assessing his/her labour requirements for the contract.
(d) To provide good basis for a cost analysis (after being priced), which subsequently will be used on future contracts in cost planning work.

Because of the substantial amount of labour involved in preparing a traditional bill of quantities, computer programs have been developed to suit all sizes of computer and to print out standard 'blank bill' both in traditional and activity form, which can be adopted by the user to suit his/her own needs and significantly reduce the time in preparation.

## 2.12 General Summary(ies) of Bill(s) of Quantities

Summary of bill(s) of quantities normally gives a succinct picture of what the whole bill is all about, the allocation of cost, section by section or trade by trade can be seen at a glance and can be compared and the tender sum is taken from this document which is in most cases one page.



## 2.13 Drawings

Drawings are the medium by which the Architect/Engineer pursues his/her design from the original survey to the completion of construction. In conjunction with the specifications and bill of quantities, the drawings should provide the tenderer with sufficient detail to enable him/her to make an accurate assessment of the nature and scope of the work included in the contract. Ideally, detailed design of the work should be completed before invitation to tenders but where this is not possible, the initial contract drawings, on which the tenders are invited, should be supplemented by additional or amended working drawings issued during the period of construction. In addition to design details, drawings should contain (where appropriate) geological, topographical and soil data. It is preferable to keep a clear and accurate register of drawing titles, numbers and dates of issue. Each drawing should be stamped and numbered, initiated and dated as a contract drawing.

## 2.14 Dayworks Schedule

A dayworks schedule is required for work ordered by the Architect/Engineer toe carried out in accordance with the relevant clauses of the conditions of contract. The dayworks schedule with include either of the following:

(a) A list of the various clauses of labour, plant and materials for which daywork rates are to be inserted by the tenderer together with a statement of the conditions under which the contractor will be paid for all work carried out on a daywork basis.

(b) A statement that the contractor will be paid for work carried out on a daywork basis at the rates and prices and under the conditions contained in the schedule of daywork carried out incidental to contract work issued by the federation of Building and Civil Engineering Contractors plus percentage additions to be made to the cost of each resource by the contractor to cover his/her overhead charge should be defined and overtime rates quoted (where applicable).

# CHAPTER THREE

# THE NIGERIAN PUBLIC PROCUREMENT ACT

## 3.1 Overview of Public Procurement

Public procurement can be defined as acquisition by any means of goods, works or services by the government (Ekwekwuo, 2010). Public procurement can also be defined as the acquisition, whether under formal contract or not, of works, supplies and services by public bodies (Okere & Idih, 2018). It ranges from the purchase of routine supplies or services to formal tendering and placing contracts for large infrastructural projects. Government procurement or public procurement is procurement of goods, services or constructions on behalf of a public authority such as a government agency. In Nigeria, government procurement or public procurement is governed by the Public Procurement Act 2007 (as amended 2016). The Act established two regulatory authorities to control and supervise government public procurement in Nigeria. These regulatory bodies are responsible for: The monitoring and oversight of public procurement; Harmonizing the existing government policies and practices by regulating, setting standards and; Developing the legal framework and professional capacity for public procurement in Nigeria. The Public Procurement Act of Nigeria is a piece of legislation passed by the Nigerian National Assembly on the 4th of June, 2007 to streamline bidding processes in public procurements and ensure the entrenchment of fairness, inclusiveness, diversity and equality in wealth creation and distribution. Persons and corporations, whether indigenous or allied with foreign partners, are given a level playing field to participate in the economy.



## 3.2 The Evolution of Public Procurement Act in Nigeria

The Public Procurement Act 2007 brought a sense of regulation or framework to the procurement process in Nigeria. Preceding this law, Nigerian public procurement was not formally regulated in the sense that there was no law, which governed procurement at the federal or State level (Olatunji *et al*., 2016). Public procurement has largely been a public sector activity in Africa. From a back room administrative function, it is however now being recognized as a major multi-stakeholder public function, with huge ramifications on public service delivery and therefore on economic and social development (Ekwekwuo, 2016). A nation's construction

industry plays a pivotal role in the nation's development through the provision of infrastructure and contribution to the country's gross domestic product. While the arrangement and organisation of participants for construction procurement are critical to project delivery, participants are often faced with a maze of possible procurement paths and regulation. It is noteworthy that the construction industry is responsible for the provision of shelter, buildings, and other infrastructure that add to or supports the quality of life of the population. Infrastructure development remains a sine-qua-non to national development regardless of the method used to procure projects.

Nigeria is one of the African countries with a new legal framework for public procurement meeting the benchmarks described by the African Development Bank Concept note. Procurement reforms in Nigeria have been part of the broader public sector reform effort, seeking to improve government effectiveness in service delivery. In 1999, there was a clear understanding by the government that weaknesses in the existing procurement system were contributing to the nagging issue of corruption (Ekwekwuo, 2016). In the last two decades or so, a good number of African Governments have implemented the Public Procurement Reforms aimed at strengthening their public procurement systems e.g., Ghana, Liberia, Sierra Leone, Kenya, Zambia, Lesotho, Nigeria etc. They all agreed that these governments have obviously realized that sound public procurement policies and practices are among the essential elements of good governance and that good procurement practices reduce costs and produce timely results whereas poor practices lead to waste and delays and often lead to allegations of corruption and government inefficiency. In 1999, Nigeria transited to a democratic government under President Olusegun Obasanjo after over a decade and a half of military dictatorship. This pointed out the need for change in governance and an argument that the government structures inherited by the new administration then, naturally had all the traditional drawbacks of dictatorship, especially with regard to the lack of accountability to the citizenry and general arbitrariness in governance. Specifically, the Federal Government of Nigeria under President Olusegun Obasanjo alerted the nation to the serious and catastrophic danger that characterized public contract processes.

It was also observed by the World Bank Country Procurement Assessment Report (CPAR) that Nigeria was losing an average of $10 Billion (Ten Billion United states dollars) annually due to various abuses associated with public procurement and

contract awards. A major initiative initially designed to respond to this challenge was setting up of Budget Monitoring and Price Intelligent Unit (BMPIU) at the presidency. The BMPIU was a stop-gap due process measure aimed at due diligence in government procurements and awards so as to facilitate fair deals for the government through price monitoring. However, the challenge with the Budget Monitoring and Price Intelligence Unit (BMPIU) stop-gap measure include absence of legal framework; inability to reduce corrupt practices as a result of collusion by public officials and the lack of clear role definitions and delineation for proper public procurement practices in line with global best practices so as to adequately ensure transparency, probity, accountability and openness. In recent years, several reforms had been initiated on virtually every aspect of public service delivery such as the Due Process Certification Policy in 2002, the National Economic Empowerment and Development Strategy (NEEDS) in 2004, infrastructure concession regulatory commission (establishment, etc.) Act, 2005 whose goal is to regulate, monitor and supervise the contracts on infrastructure or development projects; the 'Service Compact with All Nigerians' (SERVICOM) which committed the civil service to providing quality basic services to all citizens "in a timely, fair, honest, effective and transparent manner" (Federal Government of Nigeria, 2004). International development partners and other multilateral agency have invested valuable time and resources in order to assist in deepening public procurement practices across all the 36 states and 774 local government in line with the federal nature of Nigeria nation. The World Bank through the Civil Society Organizations (CSOs') has embarked on advocacy initiatives in order to achieve this objective. State governors were visited while key local government stakeholders were also encouraged to consider passage of public procurement laws in their respective jurisdiction. Studies have stated that working to convince the states and local governments in order to and make them adopt public procurement practices is a herculean task. So much time and resources have been expended with the low response from these two tiers of government. Apart from the fact that there is a low response from concerns states and local governments, there seem to be deliberate efforts by concerned states across Nigeria to whittle down their versions of public procurement laws in order to achieve certain agenda other than good governance in most states that have responded.



In view of the above, the need to fast-track development horizon in Africa and other underdeveloped countries of the world is never an easy task. It requires taking some

hard choices, punching and jettisoning old methods of doing things that have contributed to underdevelopment. However, Nigeria has made some considerable steps in these regards as noted by previous studies with an argument that the transparency and effectiveness in the expenditure of Nigeria's debt relief gains showcased the country's continual reform agenda and her ability to spend scarce funds honestly and competently. However, this ensures full compliance with the procurement act, it is required that a comprehensive and robust tracking system that would adequately and transparently monitor and evaluate the impact of the gains from debt relief should be put in place.

## 3.3 Basic Provisions of the Nigerian Act

The Nigerian Act has a total of 61 sections in 13 parts (Okere & Idih, 2018). Part 1 establishes the National Council on Public Procurement which is saddled with the responsibility of overseeing the other agencies and processes involved in public procurement in Nigeria. Part 2 establishes the Bureau for Public Procurement. It spans section 3 to section 14 and spells out the duties and powers of the Bureau, albeit not in exhaustive detail. The Bureau is directly responsible for public procurement in Nigeria. Part 3 has just one section, section 15, which shows the scope of application while part 4, which also has only one section, section 16, makes provision for the fundamental principles for procurement. Part 5 which comprises section 17 to section 24 provide for organization of procurements and part 6 spans section 25 through section 38 and shows the procurement methods for goods and services. Part 7 talks about special and restricted methods of procurement from section 39 to section 43 and section 44 to section 52 are captured under part which generally handles procurement of consultancy services. Part 9 discusses procurement surveillance and review in sections 53 and 54 while part 10 provides for proper disposal of public property in sections 55 and 56. Part 11 outlines the code of conduct for public procurement in section 57; part 12 highlights the offences relating to public procurement in section 58 while part 13 contains miscellaneous provisions in sections 59, 60 and 61. Some of the advantages of legislations on public procurement will be briefly highlighted in this segment. They include but are not limited to:

1. Improvement of national economy
2. Empowerment of entrepreneurs

3. Introduction of order in the public procurement process
4. Allows for inclusiveness
5. Entrenches fairness in the process of public procurement
6. Ensures that the rule of law is upheld

## 3.4 Qualification of Bidders Under the Act

Generally, for a person to qualify to bid for a contract, Section 5 of the Act provides that he must either be a natural person who has come of age or a legal person or a combination of both. [3]. Under the law, natural person under the age of 18 years cannot lawfully enter into contracts. This goes to say that any person under the age of 18 years cannot bid for a contract. For legal personality to be vested in a person, that 'person' must be qualified under the Company and Allied Matters Act, 1990 (CAMA). Sections 18 to 37 of the CAMA spell out in great detail the process of incorporation and acquisition of corporate personality. Generally speaking, corporate personality is acquired when two or more persons, qualified under the law with respect to age, citizenship or the appropriate permit, in the case of foreigners, and a couple of other considerations, come together and register a company under the Company and Allied Matters Act, 1990. The registered company has a separate personality from the members who registered it and is seen as a legal person. The qualification for bidders is usually categorised under three headings: these are professional, technical and financial.



**A. Professional Qualifications- S. 16(6) (a) (I & iv), S. 16(6)(b), PPA.**

All bidders must possess the necessary professional qualifications to carry out particular procurements. The nature of the contract, to a large extent, affects this qualification. Where the contract requires that the person performing it have a particular professional qualification or specialization, the bidder must show evidence of such qualification or specialization. For instance, if the contract is related to construction, whether goods or services, it goes without saying that the presence of engineers, with specialization and experience in construction is required. This qualification therefore depends on the nature and specifications of the contract.

**B. Technical Qualifications- S. 16(6) (a) (I & ii) PPA**

All bidders must possess the necessary technical qualifications to carry out particular contracts. This implies that there are certain contracts that require certain technical expertise. For such contracts, the bidder must show evidence of such qualifications.

Bidders must also possess the necessary equipment and relevant infrastructure required for the particular contract. Some contracts need specialized equipment to carry out. The bidder needs to show evince of possession of such to show capacity to handle such contracts.

**C. Financial Qualifications- S.16 (6) (a) (ii) and S. 16(6) (c) PPA**

Again, a bidder must possess the necessary financial to carry out the contract. A corporation in liquidation or in danger of liquidation cannot bid for contracts for public procurements. This implies that a bidder must show:

1. Present bank statements showing that it has the financial capacity to carry out the contract;
2. Documents from Federal Inland Revenue Service (FIRS) showing that he has fulfilled all his obligations to pay taxes- S. 16(6)(c)
3. Documents from Pension Commission (PENCOM), showing that it has fulfilled all its obligations of paying all its pensions and other social obligations.



Furthermore, by S. 16(6)(e), a bidder must not have any director who has been convicted in any country for any criminal offence relating to fraud, financial impropriety, criminal misrepresentation or falsification of facts relating to any matter

## 3.5 Conflict Resolutions for Public Procurements

Offences relating to public procurements are spelt out in S. 58 PPA. The law lists out the activities that amount to offences under the Act. The law goes ahead to provide for offences to be tried in the Federal High Court in the name of the Federal Republic of Nigeria by the Attorney General of the Federation or any legal officer representing him. Appeals from the Federal High Court usually go to the Court of Appeal and thereafter, to the Supreme Court. The law however failed to make allowance for Alternative Dispute Resolution or any other form of resolution apart from court litigation in the event of a conflict. Again, the law failed to give contractors and bidders a way out should any conflict arise. The language of the law presumes that the only conflict that may arise will take the form of a contravening of the law by offenders. This is a major lacuna as there is a possibility of contractors

or bidders being dissatisfied with the provisions of the law or the regulating authorities.

## 3.6 Recommendations for Improving the Legislative Care for Public Procurement

The Public Procurement Act governs the bidding process for public procurement in Nigeria to enhance and ultimately ensure the entrenchment of diversity, inclusiveness, fairness and equality in wealth creation and distribution in the Nigerian economy. A cursory look at the Act has shown its advantages and areas of strength. It has also shown a couple of areas that need to be looked into to achieve fair play in the bidding process. If these areas are attended to, the Nigerian service provider or contractor will have more boldness and confidence in the justice system of the law. This overview is however not exhaustive. The 21st century justice system is gradually towing the line of alternative dispute resolution. It is therefore recommended that:

1. The law is widened to include different means of alternative dispute resolution first whenever a dispute arises. This will make for peaceful dispute resolution and harmony in the contractual relationship.
2. The law makes provision for contractors to initiate court proceedings in the event of failure of the alternative dispute resolution and not just lay at the mercy of the regulating authorities.

# CHAPTER FOUR

# INSOLVENCY IN THE CONSTRUCTION SECTOR

## 4.1 Insolvency of Construction Firms

The insolvency of a company can be viewed with failure or collapse of the company. Insolvency, liquidation, or bankruptcy in the case of an individual is considered to be the end point of failure or collapse. This end point means the company has legally been ordered to stop doing its business and its assets are in the process of being sold in order to get cash to pay the company's debts. Insolvency can be defined as the inability of a company (or an individual) to pay its debts when they fall due, or when their net assets are of negative value. When this situation is reached, legal action can be applied which can lead the company to their voluntary or compulsory insolvency.

Voluntary insolvency occurs when the shareholders of the company and the company's director decided themselves to initiate the liquidation procedures of the failed company by calling in or appointing insolvency practitioners. When the liquidation procedure is initiated by the creditors of the company, the situation is known as compulsory insolvency. Bankruptcy can be defined as the realisation of the assets of an insolvent individual in order to try to meet legitimate claims of his/her creditors, while liquidation is the termination of, dissolution or winding up of a public limited company and selling out its assets for purposes of meeting the creditor's claims. Insolvency or failure of companies or firms is not a good thing. It always has negative effect on the economic and social life of the people and the public at large.



## 4.2 Effects of Insolvency of Construction Firms

The effects of insolvency of construction firms to the nation and its people are as follows:

1. Employees losing their jobs.
2. Government losing taxes and revenues from the companies.
3. Creditors lose cash and future business.
4. Bankers lose money in form of interests for loans lent to the companies.

## 4.3 Causes of Insolvency

Insolvency of companies can be caused by those factors which are from within the company (internal or organisational factors), which can be controlled by the company's management, and those factors generated from outside the company

(external or environmental factors), which their control is outside the scope of the company.

### 4.3.1 Internal/Organisational Factors

The following are the internal/organisational factors responsible for insolvency of construction firms:

1. **Bad Management:** this can be described as one-man rule, non-participating board, unbalanced top management team, lack of management depth, weak financial function, and combined chairmanship and chief executive roles.
2. **Lack of Accounting Information:** This means that there were no budgetary controls, no cash flow forecast, no costing system, and no valuation of assets.
3. **Overtrading:** This happens when the firm expands faster than the capacity it has. This leads them to borrow so as to bridge the gap. The over borrowing is what leads them to debts, and repayment with high interests.
4. **Big Project:** This happens when a company takes a project which is bigger than its capacity. Failure occurs due to under estimation of time and costs, and also the over estimation of revenues.
5. **Financial Ratios:** These are indicators which can be used to show the direction of a company, whether it is improving or it is failing. These ratios can be used in two ways; firstly, they can be used by comparison with similar ratios of other companies, and secondly, they may be used to compare with similar ratios of the same company in the previous years.
6. **Geering:** Failure due to geering takes place when a company depends too much on borrowed funds. The loans carry fixed interest rates, which do not depend upon how well or badly the company is doing.
7. **Creative Accounting:** This involves announcing wrong accounting information in favour of the company to make outsiders, like banks, to understand that the company is doing well, so that the banks do not squeeze the credit terms. Also, suppliers and customers are made to be confident with the company. The techniques used in creative accounting includes delaying in publishing the company's accounts, continuing paying dividends even if they have to raise equity on loans, and cut expenditure on maintenance until the plants are in a poor state that major maintenance is needed and this is treated as capital expenditure.

8. **Non-Financial Symptoms**: These include things like lack of morals by the workers, low quality of services to the customers, reducing size of orders from suppliers, etc. All these will be noticed in a company which is on its way to failure.

### 4.3.2 External/Environmental Factors

The external/environmental factors which result into the insolvency of construction firms are as follows:

1. **Change:** This means change in the environment. Some changes are constant, and can be predictable such as population changes. For these types of changes, the firm can cope with them. But some changes happen with shocking suddenness. It is very difficult for most of the firms to cope with sudden changes and most of the insolvency cases happen when such situations appear. It could come in form of political change, economic change, social change, technological change and competitive trends.
2. **Constraints:** There are constraints which make managers, even of powerful firms, fail to respond to changes. Some of the constraints are those imposed by customers, the employer. the State, students and men in the street.
3. **Normal Business Hazards:** These are events which by common consent do cause the failure of companies but ought not to cause it and indeed do so because the company is already too weak to survive. These normal business hazards include: a customer moves to a competitor, a supplier fails to supply materials, the government raises taxes, etc. All these are normal business hazards which the company must be able to cope with whenever the happen.

# PART II

# THE PRINCIPLES OF LAW

**CONTENTS**

# CHAPTER FIVE

# INTRODUCTION TO LAW

## 5.1 Types of Law

The types of law could be looked into from several perspectives, but in this book, law will be viewed from the angle of Natural and Man-made; Written and Unwritten or rather, Enacted and Un-enacted laws.

### 5.1.1 Natural and Man-made Laws

Natural laws deal with that which is the result of what can be deduced from known observation of cause and effect, like the laws of gravity or certain laws of economics. Man-made laws, on the other hand, are concerned with law as it ought to be, i.e., what the society thinks or lays down as a code of behaviour. This is based on the values, practices, norms and good judgement of the people. For example, a person should not deprive another person of his/her property without his/her consent. Nor should a person drive should not drive his/her car in a careless or reckless manner on the road.



It is with 'law' in this second sense, the is of concern to this book. Several attempts have been made by eminent jurists as well as anthropologists to define the word 'law'. It would be futile to examine the various definitions of 'law' within the scope of this book. To a layman, law may be seen as rules and regulations which guide human behaviour, the breach of which the people of a given state or community can enforce. Perhaps, Professor Elias has put it more clearly by stating that the law of a given community is the body of rules, which are recognised as obligatory by its members. It is clear from this definition that the rules may derive from custom, legislation or case law. In the case of custom, only that which is obligatory and which the society will enforce can be 'law'.

### 5.1.2 Written or Enacted Laws

These are laws passed by the elected representatives of the people meeting in a legislature. The law must be passed in the prescribed manner. For example, some laws may require the votes of two-third of the total member of the legislature, while others require only a simple majority. In many countries, the legislature is made up of two Houses – the Upper and Lower. In some other countries, there is a single

legislative House only. After the bill has gone through the legislature, it will be sent to the Head of State who may be President, the Governor, the King or the Queen, as in England for assent. It is after the giving of such assent in the proper manner that the bill become law.

### 5.1.3 Unwritten or Un-enacted Laws

These are a set of binding rules of conduct, which the society will enforce. There are two types in Nigeria – Customary Law and Common Law. Customary Law is derived from the immemorial customs of the people. It is noteworthy that not all customs are laws. It is only such customs as the people recognise as valid in certain situations and which will be enforced by the local community. For example, one of the essentials of a valid marriage under the customary law is the payment of bride price.

The common law, on the other hand, is a judge-made law, that is, the common law grows as a result of decisions handed down by the Courts, which may be followed in subsequent cases. Here law owes its existence, not to the legislature or custom, but to the decisions of judges. Once such decision is rendered by the highest Court of the land, e.g., Supreme Court of Nigeria, it will become the law of the land until it is changed by the legislature. Thus, the doctrine of judicial precedent is an invention of the Common Law. The whole idea of 'Precedent' is to introduce some stability and certainty into the law, so that litigants may be able to forecast the result of a case.



Within this system of the Common Law has grown another doctrine called 'Equity'. This too has developed through case law, that is, through precedents, it was invented in the medieval period, by the Lord Chancellor of England in order to temper the rigidity of the Common Law. For example, the Common Law does not recognise the institution of trusts. This is because of the rigid adherence of the Common Law to the doctrine of privity of contract. Thus, if 'A' sets up a trust for his/her children and gives the subject matter of the trust to 'B' to use for their benefit, the law recognises only 'A' and 'B' who have concluded an agreement and so will not help the children to enforce the trust. But the Court of Equity, being a Court of conscience, will decree that 'B' fulfils his/her promise and use the trust property only for the benefit of 'A''s children.

A series of maxims have been developed by Equity. One maxim is 'He who comes to Equity must come with clean hands.' This means that to get equitable relief, your conduct must be irreproachable. Another maxim says that 'Delay defeats Equity', that is, that a person aggrieved must take early Court action, or he will not get any assistance in Equity. One must not sleep on one's right. Before the Judicature Acts 1873-5 in England, both the Common Law and Equity were administered in separate Courts. Since that date, however, it is the same Court or judge that has been deciding issues of both Common Law and Equity. Under our own enacted laws in Nigeria, the position is the same here. What this means is that there is a fusion of Courts, but not a fusion of law and equity. However, where there is any conflict or variance between the rules of Equity and the rules of Common Law, with reference to the same matter, the rules of Equity shall prevail.

## 5.2 Branches of Law

The branches of law can be viewed from several perspectives. These are: Criminal Law and Civil Law, or Public Law and Private Law.



### 5.2.1 Criminal Law and Civil Law

Criminal law is the law of crime. A crime or an offence is an act or omission punishable by the State. Civil law is the law governing conduct which is generally not punishable by the State. No clear distinction can be drawn between a crime and a civil wrong. Thus, a motorist who, as a result of his/her negligent driving, injures a pedestrian, has committed an act which may constitute a crime as well as civil wrong. Criminal proceedings are instituted principally for the purpose of punishing wrongdoers. Civil proceedings are taken mainly to enable individuals to enforce their rights and receive compensation for injuries caused to them by others.

Criminal proceedings are controlled by the State although private persons may sometimes institute such proceedings. Individuals usually take civil proceedings but the State may be a party to a civil proceeding. As a general rule, an act or omission is not a criminal offence unless its definition and punishment for it are contained in a written law. The only exception is contempt of Court. On the other hand, written law does not govern many civil wrongs.

## 5.2.2 Public and Private Laws

Public law is that part of the law which primarily involves the State. It regulates the relationship between the organs of the government and the relationship between individuals and the State. Private law is the law which deals primarily with the relationship between individuals.

### 5.2.2.1 Public Law

The main branches of public law are Criminal Law, Constitutional Law, Administrative Law, And Revenue Law. Criminal law is the law that deals with crime as already stated. Constitutional law is the law which regulates the structure of the principal organs of the government and the relationship between them and determines their principal functions. Administrative law deals with the functions of government agencies. Revenue law governs taxation and other sources of government revenues.

### 5.2.2.2 Private Law

The main sub-divisions of private law include the law of contract, the law of torts and the law of trusts. Other main branches include the law of property, company law, commercial law, family law, law of succession, private international law, law of evidence, law of remedies, and law of procedure.



Law of contract deals with agreement enforceable at law, a breach of it by a party entitles the other to compensation as damages. A tort is a civil wrong which occurs independently of an agreement and leads to the award of damages to the party wronged.

A trust is the relationship which arises when a person who holds property has an obligation in equity to deal with it for the benefit of another. The person who gives the property is the settlor; the person who holds it is the trustee; and the person for whose benefit it is held is the beneficiary. Generally, there is a breach of trust if the trustee deals with trust property improperly, for example, if the trustee who is not also a beneficiary uses trust property for his/her own purpose.

The law of property governs title to or interest in property. Property may be classified into real property (realty) and personal property (personality). Real property consists of all landed property excluding leases and tenancies. Property other than real property is personal property.

Personal property may be divided into two classes, namely: tangible property (tangible chattels), that is, property that can be touched, and intangible property is property that cannot be touched. Tangible chattels are called “chose in possession”. Items of intangible property excluding rights relating to land are “chose in action”. Examples of chose in action are stocks, shares and copyright. Leases and tenancies of land are termed “chattels real”, property may also be classified as movable property and immovable property.

Company law is that part of the law which governs association of persons having a common object, usually a business undertaking. Partnership law governs agreements between two or more persons to carry on a business and share the profit and losses of the business determined proportions. Commercial law is the law that regulates trade or commerce. Family law deals with the family. The law governs such matters as marriage, the relationship between parent and child, custody and guardianship of children and adoption of children.

The law of succession governs the devolution of property on death. Private international law or conflict of laws is the law that deals with cases involving more than one legal system. A conflict of law cases arises, for example where a Nigerian goes through a ceremony of marriage in France with a citizen of Ghana and the Court has to determine what legal system governs the validity of marriage.

The law of evidence relates to proof of facts before the Courts. The law of remedies governs remedies given by the Courts. The remedies include damages (common law – either injunctions or specific performance).

# CHAPTER SIX

# SOURCES OF NIGERIAN LAW

## 6.1 Introduction

The following are the sources of Nigerian law:

1. Customary law
2. English law
3. Local legislation
4. Law reports
5. Textbooks
6. Judicial precedents

## 6.2 Customary Law

The various bodies of customary law form the most important source of our law, primarily because they govern most of our personal laws. Subjects such as marriage and divorce, succession and inheritance, land tenure, chieftaincy matters are still governed by customary law. Nigeria is made up of many ethnic groups with diverse customs and culture. Sometimes, within the same group, customs do vary from place to place. But as has been said already, a custom will have the force of law only if recognised as such by the majority of the people and enforced by the Courts. In the Northern part of Nigeria, which is predominantly Muslim, Section 2 of the Native Courts Law provides that 'Native Law and Custom' include Muslim Law which can also be called Sharia Law.



The attributes of a valid customary law are as follows:

(a) In **Lewis Vs. Bankole**, Speed, Ag. CJ, said that the first essential characteristics of customary law is that 'it must be the existing native law or custom and not the native law or custom of ancient times.' Therefore, the prevailing native law and custom existing at a point of time is the touchstone of a valid customary law. Thus, in **Dawodu Vs. Danmole**, the question was as to how the property of a deceased who left behind a number of wives and several children should be shared. Would it be through 'Idi-Igi', that is a sharing rule according to the number of wives, or 'Ori-Ojori', that is between the children equally? It was held by the Judicial Committee of the Privy

Council that 'Idi-Igi' represented the true rule of the prevailing customary law.

(b) Another condition of the validity of an alleged rule of customary law is the 'it must not be repugnant to natural justice, equity and good conscience.' This enables the Court to control the existing customs by the use of what has been called the Doctrine of Repugnancy. It must be said that the determination of what is repugnant to natural justice, equity and good conscience is left to the Judge. The Judge is thus free to import into the customary law his own notion of what is or is not good.

(c) A third requirement is that 'the native law and custom must not be incompatible either directly or by implication with any law for the time being in force.' Thus, an alleged rule of customary law must neither be forbidden by any provision of a written law nor be in conflict with a valid judicial decision on the same subject matter. This means that once there is a local enactment or a decision of the Supreme Court on a point formerly covered by customary law, then the customary law becomes a rule of enacted law or case law.



Since customary law is largely unwritten, an alleged rule of it must be specially proved in the Court by evidence, that is, by calling witnesses who are deemed to be versed in the particular body of customary law. Such persons may be traditional chiefs or other persons having special knowledge. They merely give evidence of an alleged custom; the judge is not bound to accept their evidence.

## 6.3 English Law

In 1863, English Law was introduced into the colony of Lagos. On the amalgamation of the North and the South in 1914, it was extended to the rest of Nigeria. This body of English Law, which has thus been introduced or received, consists of three branches as follows:

(a) The Common Law of England
(b) The Doctrines of Equity
(c) The Statute of General Application in England on the date of introduction of English Law into the country.

In 1954, Nigeria adopted Federation and each Regional Legislature as well as the Federal Legislature passed laws making English Law applicable in their respective areas of jurisdiction. As it has been dealt with for common law and equity, it is essential to discuss what 'statutes of general application' mean. There has been a good deal of controversy as to whether such law must be applicable throughout England only or the whole of the United Kingdom, in order to be applicable here. Decided cases show that the determining factors is the subject matter of the statute and not the extent of its application – that is, whether it has to apply to England only or to the whole of the United Kingdom. Brett, F. J., in **Lawal Vs. Yonman**, took the trouble to enumerate the statutes which were in force in England on 1 January 1900 and which are still applicable in Nigeria. He was of the opinion that they fell into two groups: Statutes relating to property and conveyance, and Statutes which govern commercial transactions. He said that 'with a few exceptions, statutes which have been held inapplicable have this in common – that grave inconvenience would follow if they were held totally inapplicable.'

It is also evident that a statute may be of general application, and yet the Courts will not apply it in Nigeria. As Brett, F. J., observed: I think the Court will be free to hold that local circumstances did not permit a statute to be in force if it produced results which were manifestly unreasonable or contrary to the intent of the statute.



## 6.4 Local Legislation

These include Statues and Decrees & Edicts.

### (a) Statutes

These are laws passed by the legislatures. To become law, they must go through the necessary procedure and must be assented to by the President or by the Governor, as the case may be.

### (b) Decrees and Edicts

These are the modes of exercising legislative powers since the Army took-over in January 1966 and up till 29th May, 1999 when they voluntarily relinquished power to a democratically elected civilian government in Nigeria. These Decrees and Edicts become laws immediately the Head of the Federal Military Government and the State Military Government has signed them respectively. An example is the 'Hemp

Decree' under which anybody found in possession of hemp may be sentenced to between ten (10) and fifteen (15) years' imprisonment.

## 6.5 Textbooks

The Courts turn to textbooks written by notable authors on customary laws when such points have not been previously decided in the Court and where there is no reliable witness available. Evidence Act provides that 'any book or manuscript recognised by natives as a legal authority is relevant.' There is no doubt that the weight to be attached to particular books must vary with the standing of their authors.

## 6.6 Law Reports

In a common law system like ours, law reporting is essential for the growth of case law. The most important of the early Law Reports were the Nigerian Law Reports (Volume 1-21) and the West African Court of Appeal Reports (Volume 1-16). Since the introduction of the Federal system of government in Nigeria, each State has had its own Law Reports. A series compiled and edited in the Federal Ministry of Justice in Lagos since independence is the All-Nigerian Law Reports that contains all the important judgements delivered by the superior Courts throughout the country. Also, a group of lawyers got together to compile and edit a series – the Nigerian Monthly Law Report that reports the decision of the Supreme Court and the various High Courts in the Federation.



## 6.7 Doctrine of Judicial Precedent

One of the consequences of the reception of English common law in Nigeria is the adoption of the doctrine of judicial precedent. It means that the decision of superior Courts will be followed by the inferior Courts in appropriate case. Thus, it is closely connected with the hierarchy of Courts. It follows that the decision of the highest Court will bind all other Courts, thus becoming the law of the land until changed by statute.

# CHAPTER SEVEN

# CONSTITUTIONS

## 7.1 Introduction

A constitution is the body of laws, rules and procedures by which a society is governed or which determines the conduct of affairs of that society. It is "the collection of principles" according to which the powers of the government, the rights of the governed and the relations between the two are adjusted. In order to ensure peace, order and stability in the State, the conduct of the citizens have to be regulated. And to avoid the rise of autocracy or dictatorship, leaders' actions have to be subject to certain limitations. This makes necessary the drawing of a constitution.

## 7.2 Sources of Constitution

The nature and contents of a constitution may come from a number of cultural, social, historical, economic and political sources or influences. Some of these sources include the following:



1. Conventions and usage
2. Past Legislations, Decrees and Edicts
3. Constitution of other countries
4. Judicial decisions
5. Writings of Eminent Judges
6. Ideology

## 7.3 Types of Constitution

Constitution can be classified into written and unwritten, Federal and unitary, and flexible and rigid.

### 7.3.1 Written and Unwritten Constitutions

A constitution is written when all the provisions of it are contained in one single document. Examples include that of Nigeria and America. On the other hand, it is unwritten when its provisions are not contained in a single document. Parts of it may be written but in different documents. Example is the constitution of Britain.

### 7.3.2 Federal and Unitary Constitutions

A constitution is Federal when it provides for the division of government powers between a Central Government and a number of component regions or States. Examples include those of Nigeria and America. It is, on the other hand, Unitary if it provides for the concentration of government powers in one central political authority. Powers in one central political authority, as in the case of Britain, Ghana and Togo.

### 7.3.3 Rigid and Flexible Constitutions

A constitution if rigid if the procedures for its amendment are cumbersome and rigorous. It is usually associated with Federal States with written constitutions. Hence, none of the levels of Government, not even the Central Government, can single-handedly alter any provision of the constitution. A flexible constitution, on the other hand, is one whose amendment procedures are so simple as the passage of ordinary laws by parliament. It is often associated with unitary States like Britain where the Central Government can effect changes in the provisions of the constitutions.

This is the technique and equipment used to extinguish fires and limit the damage caused by them. It consists of removing one or more of the three elements essential to combustion, fuel, heat, and oxygen or of interrupting the combustion chain reaction.

# CHAPTER EIGHT

# SYSTEMS OF GOVERNMENT

## 8.1 Introduction

There are several forms of government but in this book, discussion shall be focused on the presidential and cabinet systems of government.

## 8.2 The Presidential System of Government

A presidential system of government is one in which the ceremonial and executive powers in the State are vested in a single person. In this system, there is a relatively marked separation of powers. The election of the chief executive (i.e., the Executive President) is either by a direct vote of the lectorates as is the case in Nigeria or indirectly through an Electoral College as practiced in the United States of America. The President is solely responsible for the execution of government policies and performance of State functions. To help him/her with his/her duties, he has a cabinet made up of Ministers appointed by him/her (not only from his/her own party). He/she has complete control over them and can change them on their portfolios (positions or departments) at will, so long as the legislature ratifies it.



### 8.2.1 Features of the Presidential System of Government

The most striking characteristics of the presidential system of government are the exercise of executive and ceremonial powers by the same individuals. Unlike in the cabinet system where the Head of State is a mere figurehead confined only to ceremonial duties, the executive president exercises real executive powers in addition to State functions.

The Ministers chosen by the executive with the ratification of the senate are accountable to him/her for their actions. The chief executive is accountable to the electorates rather than to the legislature. And again, the theory of separation of powers is fairly more pronounced in the presidential system of government than in the cabinet system of government. The president does not sit in the parliament nor take part in its proceedings. By virtue of the concept of collective responsibility, he/she is held responsible for the things done or left undone by his/her regime.

### 8.2.2 Advantages of the Presidential System of Government

The following are the main advantages of the presidential system of government:

1. Since the president who is also the chief executive has full executive powers, it gives him/her a free hand in conducting the affairs of the government. Urgent matters can thus be handled with dispatch.
2. The separation of powers encouraged by the system ensures the preservation of fundamental human rights of the citizen, so long as they are obedient to the laws of the land.
3. The in-built mechanism of checks and balances serves a useful means of pinning down the rise or development of a dictatorship.

### 8.2.3 Disadvantages of the Presidential System of Government

The following are the main disadvantages of the presidential system of government:

1. With such enormous powers vested in the president, the system is very likely to give birth to a dictatorship. Human beings are known to be hardly satisfied with what they have, including political power. The president in Nigeria, for instance, is the chief executive, ceremonial head and commander-in-chief of the Armed Forces. The case of Field Marshal Idi Amin of Uganda is a glaring example here while Emperor Bokasa of Central Africa Republic serves as its back up.
2. Two good heads are better than one, as the saying goes. The exercise of executive and ceremonial powers by a single person over looks the need for a useful advice which would have come from a second-in-command were the executive and State powers to be split between two persons. Moreover, the executive president may not be versatile enough to have the best answers to all questions and all problems.



## 8.3 The Cabinet System of Government

This is a system of government in which different persons exercise the ceremonial and executive powers. In monarchical societies like Great Britain, the Queen of King performs this ceremonial power, while in republican States, it is vested in the President. The Prime Minister, on the other hand, performs the executive function of the government. In place of separation of power, the cabinet system allows a fusion of powers. For example, the Prime Minister who is the head of the executive arm of the government is also a member of the legislature and can take part in its proceedings.

The Head of State, Queen, King or President is a mere figurehead. In England for instance, the Queen only assents to Bills and represents the State on National events but takes no part in policy execution. Hence, the popular phrase: "The Queen reigns but does note rule". The executive is responsible to the legislature rather than to the electorates.

### 8.3.1 Features of the Cabinet System of Government

The following are the features of the cabinet system of government:

1. **Fusion of Powers:** There is a fusion of powers between the executive and legislature. Ministers are chosen from among members of parliament, i.e., the legislature and those so chosen still retain their membership of the parliament.
2. **Collective Responsibility:** The Ministers are collectively responsible to the parliament for every policy taken by the Government. The entire members can be asked to resign should the parliament successfully pass a vote of no confidence in the cabinet. And any cabinet member opposed to a policy or decision taken by the Council of Ministers will have to resign his/her membership or else he/she is deemed to be a party to such decision.
3. **The Prime Minister must be the leader of the party that won majority of the seats in the parliament:** He/she appoints his/her ministers solely from members of his/her party in the parliament on the advice of the Head of State.
4. **Different persons head both the State and the Government:** While the President, Queen or King heads the State, the Government is headed by the Prime Minister. For example, UK, Australia and Canada.



### 8.3.2 Advantages of the Cabinet System of Government

The following are the main advantages of the Cabinet System of Government:

1. The exercises of Executive and State powers by different persons will help to prevent the rise of a dictatorship. Moreover, this will also encourage the cross-pollination of ideas, as two good heads are better than one.
2. With the support of the majority of his/her party men in the parliament, the Prime Minister is assured of parliament's support for his/her policies. He/she is thus saved the problem of rigorous debates and opposition characteristics of the presidential system.

### 8.3.3 Disadvantages of the Cabinet System of Government

The following are the main disadvantages of the Cabinet System of Government:

1. This system is likely to lead to a collective dictatorship as those who make the law also execute it.
2. As the Prime Minister is sure of the support of the parliament, he/she may formulate unpopular policy. And with bandwagon effect in the parliament, this will be easily passed into Law.

## 8.4 The Doctrine (Theory) of Separation of Powers

The theory or doctrine of separation of powers states that the three powers of government; Legislative, Executive and Judiciary, should not, whatsoever, be exercised or be held by one person or a body of persons at the same time. In other words, the three organs of government; the Legislative, Executive and Judiciary should function separately. A member of one organ should not at the same time be a member of any of the other organs.



This theory or doctrine rests on the fear that the freedom and liberty of individuals in the State may be at a discount if all the powers of government are concentrated in one single authority. Such will breed autocracy and dictatorship. It therefore follows that in order to avoid tyranny; the legislature, the judiciary and the executive should each remain separate and independent.

### 8.4.1 The Legislature

The legislature is defined as the law-making organ of the government.

#### 8.4.1.1 Functions of the legislature

The following are the basic functions of the legislature:

i. **Law making:** It is the function of the legislature to formulate and enact laws for the peace, order and good government of the State,
ii. **Amendment of laws and of the constitution:** In order to respond to change and adjust to new political ideas, existing laws and sometimes, to the constitution, may have to be altered or amended. This is done by the legislature.
iii. **Representation:** The legislature acts as a means through which diverse interests, groups, opinions and associations are represented in the government.

It is thus the hyphen that joins the ruler with the ruled and bridges the gap between the two.

iv. **Political education and creation of political awareness:** In a democratic State that maintains a relatively open system, the proceedings of the legislature and some other activities of the government are made public by the legislature. This helps to educate the electorates and create political awareness and consciousness in them.

v. **Control of public fund and check on the executive:** The executive usually tables before the legislature, its proposal for raising and spending fund for each fiscal year. In order to forestall frivolous spending by the executive, the legislature may refuse or withhold approval to such proposals. In this way, it screens and supervises the expenditure of the executive.

vi. **Ratification of appointments and treaties:** It is also the function of the legislature to approve or disapprove of the appointment of public officers made by the chief executive. Agreements and treaties entered into with other countries are also subject to ratification by the legislature.

vii. **Removal of public officers:** Defaulting public officers may be removed by the legislature through impeachment.



### 8.4.1.2 Types of legislatures

There are two types of legislatures: these are Bi-camera and Uni-camera.

i. Bi-Camera Legislature: A legislature is bi-camera if it consists of two chambers or two houses – a lower and an upper house. A good example is Nigeria, Britain and USA.

ii. Uni-Camera Legislature: Uni-camera legislature is one that consists of only one chamber, e.g., Greece, Turkey, Yugoslavia and Bulgaria.

## 8.4.2 The Executive

The executive sees to the execution of the laws enacted, and the implementation of the policies formulated by the legislature. Executive comprises of the President or Prime Minister, as the case may be, Ministers, Commissioners, Civil Servants and such agencies as the police, the customs, etc. one can distinguish between two types of executives – parliamentary and presidential executives.

### 8.4.3 The Judiciary

The judiciary, simply put, is the organ of government concerned with the interpretation and application of law. The executive executes the law and apprehends lawbreakers. These are brought to the judiciary where they will pay the price of disobedience as prescribed for the particular offence committed. The following are the basic functions of the judiciary:

i. **Interpretation of the constitution:** One of the functions of the judiciary is the explanation, interpretation or clarification of terms and concepts used in the constitution. Some of these terms or clauses may be double-edged, ambiguous or confusing. It is the Supreme Court that has the last say as to what they are intended to mean.
ii. **Punishment of offences:** It is also the duty of the judiciary to ensure that due punishment is dispensed to those who defiantly break the law as a deterrent to future offenders. Such punishments vary according to the weight or gravity of the offence.
iii. **Resolution or settlement of disputes:** Conflicts and disputes are common in human societies. It may be between different levels of government. The judiciary has always been the last resort for settlements.
iv. **Protection of human rights:** The judiciary ensures, among other things, that the fundamental rights of citizens are protected. These rights are enshrined in the constitution and any act of government capable of endangering them be nullified by the judiciary.
v. **Advice to the government:** The judiciary offers invaluable advice to the government, especially on legal, legislative and constitutional matters.
vi. **Watchdog of the constitution:** It serves as custodian of laws and the constitution by ensuring that acts of government and those of individuals are both legal and constitutional.

# CHAPTER NINE

# THE NIGERIAN COURTS

## 9.1 Introduction

Courts in Nigeria may be classified in several ways. However, the most important forms of classification of Courts in Nigeria are:

1. Superior Courts and Inferior Courts
2. Courts of Record and Courts other than Courts of Record

## 9.2 Superior and Inferior Courts

Superior Courts are usually described as Courts of unlimited jurisdiction. In the strict sense of the term "unlimited jurisdiction", no Court in Nigeria has such jurisdiction. But Superior Courts are so described because the limits to their jurisdiction are minimal. They have minimal jurisdictional limits with respect to the type of subject matter but they are not limited in jurisdiction with respect to the mere value of the subject matter of a case. Thus, the High Court of a State is a Superior Court for it has unlimited jurisdiction throughout the State with respect to the value of the subject matter. On the other hand, Inferior Courts are Courts which have jurisdictional limits with respect to the type and value of subject matter. Magistrates' Courts are examples of Inferior Courts. Inferior Courts are normally subject to the supervisory jurisdiction of High Courts.



## 9.3 Courts of Records and Courts other than Courts of Records

Formerly, a Court of record was a Court which kept a record of its acts and judicial proceedings and had power to punish a person for contempt. Nowadays, the only essential feature of a Court of record is its power to punish contempt. Any Court which has a power to punish contempt is a Court of record and any Court which does not have such power is not a Court of record. A Court of record may be a Superior Court or an Inferior Court. For example, the High Court of a State is a Superior Court of record and a Magistrate's Court is an Inferior Court of record.

At common law, a Superior Court of record has power to punish a person summarily for contempt whether the offence is committed in the face of the Court or out of the Court. But an Inferior Court of record has power at common law to punish contempt summarily only where the offence is committed in the face of the Court. Thus, where

the offence of contempt is committed in the face of the Court of record, whether Superior or Inferior, the Court can punish the offender by imposing a sentence of fine or imprisonment immediately; but where the offence is committed out of Court, only a Superior Court of record can impose punishment summarily.

Punishing contempt summarily should be distinguished from imposing punishment on a person formally charged with the offence of contempt. An Inferior Court of record for example, Magistrate's Court may have jurisdiction to try a person on a charge of contempt under the appropriate criminal code or penal code where the offence was committed out of Court, and power to impose punishment in accordance with the code but the Court cannot punish the offender in the absence of such a charge. In other words, the Court cannot punish the offender summarily.

## 9.4 Supreme Court of Nigeria

The Supreme of Nigeria was established in 1963 by the constitution of the Federation which provides that: the judges of the Court are the Chief Justice of Nigeria and such a number of other Judges known as Justices of the Supreme Court as may be prescribed by an Act of the National Assembly. The power to appoint a person to the office of chief justice of Nigeria and to dismiss the holder of the office is vested in the President of Nigeria in his/her discretion, subject to confirmation of such appointment by the Senate. A person shall not be qualified to hold the office of chief justice of Nigeria or of a justice of the Supreme Court, unless he/she is qualified to practice as a legal practitioner in Nigeria and has been so qualified for a period of not less than 15 years.



For the purpose of the final determination of a case, the Court is constituted by a minimum number of 3 judges of the Court. The Court usually consists of this number but a 7-member panel sometimes sits to hear and determine very important cases. In general, a single judge of the Supreme Court is empowered to exercise any power vested in the Court other than the final determination of a case or matter, but in criminal cases, if a judge of the Court refuses an application for the exercises of any power, the applicant is entitled to have his/her application determined by the Supreme Court, and in civil cases, direction or decision made or given by a single judge of the Court in the exercise of any such power may be varied, discharged or reversed by the Supreme Court. At present, the Court sits in Lagos, Abuja and a number of State capitals as occasion demands.

The Court is a Superior Court of record. It has appellate jurisdiction in civil and criminal cases. It has no original jurisdiction except in the case of any question referred to it under the constitution and as may be conferred upon it by an Act on the National Assembly; provided that no original jurisdiction shall be conferred upon the Supreme Court with respect to any criminal matter. The Supreme Court shall have jurisdiction to the exclusion of any other Courts to hear appeals from the Federal Court of Appeal. The Supreme Court hears appeals from the National Industrial Court and Sharia Court of Appeal of each of the Northern States. The Supreme Court of Nigeria, as the highest Court for Nigeria, has contributed in some measures to the development of the law. Since its establishment in 1963, the Court has made some efforts to play the role of moulder of the law, notably in the fields of criminal law and constitutional law.

## 9.5 The Federal Court of Appeal

The Federal Court of Appeal (or simply called Court of Appeal) is a Superior Court of record established on the 1st of October, 1976 by the constitution of Nigeria. The constitution of Nigeria provides that the judges of the Court shall consist of the President of the Court of Appeal and such number of justices of the Court of Appeal, not less than 15, of which not less than 3 shall be learned in Islamic Law, and not less than 3 shall be learned in Customary Law, or as may be prescribed by an Act of the National Assembly. The appointment of a person to the office of President of the Court of Appeal shall be made by the President on the advice of Federal Judicial Service Commission subject to the confirmation of such appointment by the Senate. The President on the recommendation of Federal Judicial Service Commission shall make the appointment of a person to the office of a justice of the Court of Appeal. A person shall not be qualified to hold the office of President or of a justice of the Court of Appeal unless he/she is qualified to practice as a legal practitioner in Nigeria for a period of not less than 12 years.



The Court is mainly a Court of appeal. It has exclusive jurisdiction to hear appeals from state High Courts, Federal Revenue Courts and such other Courts or Tribunals as may be specified by law. The Court has jurisdiction throughout the country. The Court of Appeal has original jurisdiction in addition to its appellate jurisdiction. Its original jurisdiction is provided for by the constitution. The constitution gives the Court exclusive original jurisdiction in any dispute between the Federation and a

State or between States to the extent that disputes involve any question of law or fact provided the existence or extent of a legal right depends on that question.

For the purpose of exercising any jurisdiction conferred upon it by the constitution or any other law, the Court of Appeal shall be duly constituted if it consists of not less than 3 justices of the Court of Appeal and in the case of appeal from:

(a) A Sharia Court of Appeal, if it consists of not less than 3 justices of the Court of Appeal learned in Islamic law; and
(b) A Customary Court of Appeal, if it consists of not less than 3 justices of the Court of Appeal learned in customary law.

For the purpose of final determination of an appeal, the Court of Appeal is constituted by at least 3 judges, except that any one of the judges sitting who disagrees with the majority may deliver a dissenting judgement. Any one of the judges who has sat as the Court and fully heard an appeal before the Court may deliver a reserved judgement on behalf of any of the others who is absent at the time of delivery of the judgement. Section 10 of the Federal Court of Appeal Decree 1976 provides that in general, a single judge of the Court may exercise any power vested in the Court except the power of final determination of a case.



## 9.6 Courts of Resolution

The Court of Resolution law governs the Court of Resolution of each of the Northern States. It consists of the Chief Judge of the State as President, the Grand Khadi, one Judge of the High Court nominated by the Chief Judge and one Judge of the Sharia Court of Appeal nominated by the Grand Khadi. Where the opinions of the members of the Court are evenly divided on a matter before it, the opinion supported by the Chief Judge is to be declared the opinion of the Court.

The Court has jurisdiction to resolve conflicts of jurisdiction arising between the High Court and the Sharia Court of Appeal. In cases where there is no such conflict between the 2 Courts but each of them decides that it has no jurisdiction, the Court of Resolution is empowered to determine which of the 2 Courts has jurisdiction. Section 7 of the Court of Resolution Law provides that the decision of the Court in any matter referred to it in accordance with the provision of the law is final.

## 9.7 Sharia Court of Appeal

There shall be, for any State that requires it, a Sharia Court of Appeal for that State. The Sharia Court of Appeal is a superior Court of record which hears appeals from the Upper Area Courts in cases involving "Muslims personal law". Muslims personal law of the Maliki School governs the following matters:

(a) Any question of Muslim law regarding a marriage concluded in accordance with that law, including a question relating to the dissolution of such marriage or a question that depends on such a marriage relating to family relationship or the guardianship of an infant.
(b) Where all the parties to the proceedings are Muslims, any question of Muslim law regarding marriage, including the dissolution of that marriage, or regarding family relationship, a founding or the guardianship of an infant.
(c) Any question of Muslim law regarding a Wakf, gift, will or succession where the endower, donor, testator or deceased person is a Muslim.
(d) Any question of Muslim law regarding an infant, prodigal or person of unsound mind who is a Muslim or the maintenance or guardianship of a Muslim who is physically or mentally infirm, and
(e) Any other question where all the parties to the proceedings (whether or not they are Muslims) have by writing under their hand requested the Court that hears the case in the first instance to determine the case in accordance with Muslim law.



The only criminal jurisdiction given to the Court is summary jurisdiction with respect to contempt of Court. Accordingly, jurisdiction in category (e) above under the definition of Muslim's personal law is limited to civil jurisdiction. The Sharia Court of Appeal of the State shall consist of:

(a) A Grand Khadi of the Sharia Court of Appeal; and
(b) Such number of Khadis of the Sharia Court of Appeal as may be prescribed by the House of Assembly of the State.

The appointment of a person to the office of Grand Khadi of the Sharia Court of Appeal of a State shall be made by the Governor of the State on the advice the State Judicial Service Commission subject to the confirmation of such appointment by the House of Assembly. The appoint of a person to the office of Khadi of the Sharia

Court of Appeal of a State shall be made by the Governor of the State acting on the recommendation of the State Judicial Service Commission. A person shall not be qualified to hold office as Grand Khadi or Khadi of the Sharia Court of Appeal of a State unless:

(a) He/she is a legal practitioner in Nigeria and has been so qualified for a period of not less than 10 years and has obtained a recognised qualification in Islamic Law from an institution acceptable to the State Judicial Service Commission; or
(b) He/she has attended and has obtained a recognised qualification in Islamic Law from an institution acceptable to the State Judicial Service Commission and has held the qualification for a period of not less than 10 years; or
(c) He/she either has considerable experience in the practice of Islamic Law or he/she is a distinguished scholar of Islamic Law.

## 9.8 Federal Revenue Court



The Federal Revenue Court was stablished by the Federal Revenue Court Decree 1973 as a Federal High Court of Justice. The Court consists of President of Federal Revenue Court and such number of judges (minimum of 4) as the President of the Federal Republic of Nigeria may prescribe by order. A single judge duly appointed constitutes the Court. The appointment of a person to the office of President of the Federal Revenue Court shall be made by the Federal Judicial Service Commission subject to the confirmation of such appointment by the Senate. The President, on the recommendation of Federal Judicial Service Commission, shall make the appointment of a person to the office of justice of the Federal Revenue Court. A person is not eligible for appointment to the office of a judge of the Court unless:

(a) He/she is or has been a judge of a Court having jurisdiction in appeals from any such Court; or
(b) He/she is qualified for admission as a legal practitioner in Nigeria and has been so qualified for not less than 10 years; provided that in computing the period during which any person has been qualified for admission as a legal practitioner any period during which he/she has held office as a judge or magistrate after becoming so qualified shall be included.

The Court has civil and criminal jurisdiction in cases:

(a) Relating to the revenue of the Government of the Federation in which the said government or an organ thereof or a person suing or being sued on behalf of the said government is a party.

(b) Connected with or pertaining to:
   (i) The taxation of companies and of the bodies established or carrying on business in Nigeria and all other persons subject to federal taxation,
   (ii) Customs and excise duties.
   (iii) Banking, foreign exchange, currency or other fiscal measures.

(c) Arising from:
   (i) The operation of the Companies and Allied Matters Decree of 1990 or any other enactment regulating the operation of companies.
   (ii) Any enactment relating to copyright, patent, designs, trademarks and merchandise marks.

Before the creation of the Federal Revenue Court, the jurisdiction conferred on it had been exercised by the State High Courts as Federal Courts under the authority of Federal Legislation. The Court is normally a Court of original jurisdiction but Section 27 of the Federal Revenue Court Decree 1973 empowers the Court to hear appeals from:



(a) The decision of appeal commissions established under the Companies Income Tax Act 1961 and the Personal Income Tax Act 1961 in so as applicable as Federal Law.

(b) The decisions of the Board of Customs and Excise established under the Customs and Excise Management Act 1958.

(c) The decision of magistrates' Courts in respect of civil and criminal cases or matters translated to such Courts pursuant to the Decree.

(d) The decisions of any other body established by or under any other federal enactment or law in respect of matters concerning which jurisdiction is conferred by the Decree.

## 9.9 State High Court

The structure, organisation and jurisdiction of the State High Courts are generally uniform. The High Court of each of the States consists of the Chief Judge of the State and such number of judges of the High Court as may be prescribed by a law of the House of Assembly of the State. The power to appoint a person to the office of

Chief Judge of a State is vested in the Governor of State acting in his/her discretion, subject to the confirmation of such appointment by the House of Assembly of the State. The power to appoint a person to the office of a Judge of a State High Court shall be made by the Governor of the State acting on the recommendation of the State Judicial Service Commission.

A person shall not be qualified to hold the office of Chief Judge of the High Court of a State or Judge of the High Court of a State unless he/she is qualified to practice as a legal practitioner in Nigeria and has been so qualified for a period of not less than 10 years. In all States where Customary or Area Courts exist, the High Court has no original jurisdiction in specified customary law cases. Such jurisdiction is reserved for Customary or Area Court which presumably is considered to be versed in the applicable law.

The High Courts are generally Courts of unlimited jurisdiction; their jurisdiction being unlimited with respect to the monetary value of the subject matter of a case. Their jurisdiction and powers include such jurisdiction and powers as "are vested in or capable of being exercised by the High Court of Justice in England". The High Court hears appeals from the lower Courts. They also exercise supervisory jurisdiction over inferior Courts to do a thing relating to his/her or its office and in the nature of a public duty.



An order of prohibition directed to an inferior Court prohibits the continuance of specified proceedings before the inferior Court in excess of its jurisdiction. It thus forbids the inferior Court to continue to exceed its jurisdiction. Where an inferior Court has exceeded its jurisdiction with respect to proceeding before the Court, an order of ***certiorari*** directed to the Court by the High Court removes the proceedings to the High Court in order that the proceedings may be dealt with by the High Court. On the removal of the proceedings to the High Court, the proceedings include the decision of the inferior Court if it has already been given are quashed. In general, the order of ***certiorari*** is not issued where there is an alternative remedy. But sometimes, in the interest of justice, the order is issued even where there is an alternative remedy.

## 9.10 Magistrates' Courts

There are Magistrates' Courts in every State in Nigeria. A single magistrate constitutes a Magistrates' Court. In each State, magistrates are divided into a number of classes; the classification being in general, the basis of defining the jurisdiction and powers of each magistrate. For example, a State can have Chief Magistrate, Senior Magistrate I, Senior Magistrate II, Magistrate I, Magistrate II, and Magistrate III. Under the law in force in some of the States, a person is not eligible for appointment as a magistrate unless he/she is qualified to practice as a barrister and solicitor in a Court of unlimited jurisdiction in civil and criminal matters in a part of the commonwealth and he/she has attained a specified minimum of post-qualification experience expressed in terms of years. Magistrates' Court in the Southern States have civil and criminal jurisdiction. Those in the Northern States have criminal jurisdiction only.

## 9.11 District Courts (Northern States)

On the creation of States in 1967, each of the Northern States had District Courts established by the District Court Laws. A single judge constitutes a District Court. District Courts are divided into four classes: Senior District Judge, District Judge Grade I, District Judge Grade II, and District Judge Grade III. State Governors acting on the recommendation of the State Judicial Service Commission, appoint District Court Judges. A District Court is a Court of civil jurisdiction. It is the equivalent of a Magistrates' Court in any of the Southern States sitting in the exercise of its civil jurisdiction. Thus, in general, a District Court has jurisdiction subject to prescribed monetary value limits where the subject matter is money or is capable of estimation in terms of money:

(a) In personal suits.
(b) In suits between landlord and tenant.
(c) In civil proceedings for the recovery of money recoverable under a local enactment where it is not expressly stated in the enactment that the money is recoverable only in some other Court.
(d) In civil proceedings in which jurisdiction has been conferred on a District Court by the land tenure law.
(e) In civil proceedings outside (a) and (b) in respect of which jurisdiction has been conferred on a District Court by a local enactment.

## 9.12 Customary Courts

A Customary Court shall consist of a President and such number of Judges of the Customary Court as may be prescribed by a law of the House of Assembly of the State. A Customary Court in the State has civil and criminal jurisdiction. It has unlimited civil jurisdiction in two classes of cases namely:

(a) Matrimonial cases and other matters between persons married under customary law.
(b) Suits relating to the guardianship and custody of children under Customary Law.

In general, a Customary Court in the State has criminal jurisdiction in the following cases:

(a) Any offences against the provisions of an enactment, which expressly confer jurisdiction on the Court.
(b) Offences against rules and byelaws made by a Local Government Council.
(c) Contempt of Court committed in the face of the Court.

But it has no jurisdiction in the following cases:

(a) Homicide;
(b) Treason;
(c) Sedation;
(d) Rape; and
(e) Defilement of girls, etc.



Customary Courts in the State are under the general supervision and control of the Ministry of Justice of the State. Appeals lie from the decisions of a Customary Court to a Magistrates' Court.

## 9.13 Area Courts

An Area Court in a State is established by warrant by the Chief Judge of the State. A Judge, designated Area Judge, sitting alone or an Area Judge sitting with one or more members constitutes it. All members of Area Courts including Area Judges are public officers in the public services of the State. All grades of Area Courts have unlimited jurisdiction in the following cases:

(a) Any offences against the provisions of an enactment, which expressly confer jurisdiction on the Court.
(b) Offences against rules and byelaws made by a Local Government Council.

## 9.14 Juvenile Courts

Juvenile Courts are special Courts established for the trial of young offenders and for the welfare of the young. Magistrate sitting with other members appointed by an appropriate authority constitutes a Juvenile Court. The law provides for preferential treatment for the young in respect of punishment. When a child or young person is found guilty of an offence, the Court must consider the appropriate method of dealing with him/her.

## 9.15 National Industrial Court

National Industrial Court was established by Section 14 of the Trade Dispute Decree 1976 for the purpose of dealing with trade disputes and collective agreements. The Court has exclusive jurisdiction to determine questions concerning the interpretation of:



(a) A collective agreement.
(b) An award made by arbitration on the Court itself under the decree.
(c) The terms of settlement of a trade dispute as stated in a memorandum, in case where a conciliator is appointed under the Trade Dispute Degree to deal with a trade dispute.

The Court consists of a President and four other members. The four other members must be persons of good standing who, to the knowledge of Minister of Labour charged with responsibility for matters relating to the welfare of labour, are well acquainted with employment conditions in Nigeria. A person is not qualified to hold the office of the President of the Court unless:

(a) He/she has been a Judge of a Court of unlimited jurisdiction in civil and criminal matters in some part of Commonwealth or a Court having jurisdiction in appeals from any such Court, or
(b) He/she is qualified for admission as an advocate in Nigeria and has been so qualified for not less than 10 years.

A person is appointed to the office of the President of the Court by the President of the Federal Republic of Nigeria on the advice of Federal Judicial Service Commission subject to the confirmation of such appointment by the Senate. For the purpose of dealing with any case, the Court is duly constituted at the discretion of the President by either all the five members or the President and any two ordinary members.

## 9.16 Military Courts

There are Military Courts in the country. Normally, only members of the armed forces – the Nigerian Army, the Nigerian Navy and the Nigerian Air Force – are subject to the jurisdiction of Military Courts.

## 9.17 Tribunals

Many bodies not designated "Courts" under the law perform judicial or quassi-judicial functions. They are usually designated "Tribunals" by the law establishing them. A Tribunal performing judicial or quassi-judicial functions may be regarded as a Court having special jurisdiction. A body performing such functions may be called a "Tribunal" rather than a "Court" by the legislature merely because the legislature requires the body to consist of experts in a particular area of the law or to deal with particular area of the law, or to deal speedily with certain aspects of the law, or to adopt a procedure different from the usual Court procedure, or for any two or more of those reasons.

# PART III

# CONCEPT OF CONSTRUCTION LAW

# CONTENTS

# CHAPTER TEN

# LAW OF CONTRACT

## 10.1 Introduction

A contract may be defined as an agreement enforceable by law; between two or more persons to do or abstain from doing some act or acts their intention being to create legal relations and not merely to exchange mutual promises both having given something, or having promised to give something of value as consideration for any benefit derived from the agreement.

### 10.1.1 Offer

An offer is an undertaking by the offeror that he will be bound in contract by the offer if there is a proper acceptance of it. An offer may be made to a specific person or any member of a group of persons, and in cases of an offer embracing a promise for an act designed to produce a unilateral contract to the world at large (Carlill Vs. Carbolic Smoke Ball Co. 1893).



### 10.1.2 Acceptance

On the existence of an offer has been proved the Court must be satisfied that the offeree has accepted the offer, otherwise there is no contract. An agreement may nevertheless be informed from the conduct of the parties. The person who accepts an offer must be aware that the offer has been made. Thus, if Mansur has found Ahmed's lost donkey, and not having seen an advertisement by Ahmed offering a reward for its return, returns it out of goodness of heart. Mansur will not be able to claim the reward. He cannot be held to accept an offer of which he is unaware. However, as long as the acceptor is aware of the making of the offer, his motives in accepting it is immaterial. It should be noted that an acceptance brings the offer to an end because the offer then merges into the contract.

### 10.1.3 Essentials of a Valid Contract

The essential elements of the formation of a valid and enforceable contract are as follows:

1. There must be an offer and acceptance, which is in effect the agreement.
2. There must be consideration (unless the agreement is under seal).
3. There must be an intention to create legal relation.

4. There is a requirement of written formalities in some cases.
5. The parties must have capacity to contract.
6. There must be genuineness of consent by the parties to the terms of the contract.
7. The contract must not be contrary to public policy.

## 10.2 Discharge of a Contract

A contract is discharged when the obligation created by it ceases to be binding on the promisor, who is then no longer under a duty to perform his/her part of the agreement. Discharge may take place in various ways as thus:

(a) **Discharge by Agreement:** A contract is made by agreement, and it is also possible to end it by a subsequent agreement if there is new consideration for the discharge, or if it is under seal.

(b) **Discharge by Performance:** A contract may be discharged by performance, the discharge taking place when both parties have performed the obligations that the contract places on them.

(c) **Discharge by Frustration (or Subsequent Impossibility):** If an agreement is impossible of performance from the outset, it is not a contract. Sometimes, however, parties may make a contract that at the time is possible of performance but subsequently becomes impossible to carry out in whole or part.



In ***Re Shipton, Anderson &Co. and Harrison Bros' Arbitration (1915)***, a contract was made for the sale of wheat lying in a warehouse in Liverpool. Before the seller could deliver the wheat, and before the property in it had passed to the buyer, the government requisitioned the wheat under certain emergency powers available in time of war. **Held** – Delivery being impossible by reason of lawful requisition by the government, the seller was excused from performance of the contract.

In ***Taylor Vs. Caldwell (1863)***, the defendant agreed to let the plaintiff have the use of the Surrey Gardens and Music Hall for the purpose of holding four concerts on four named days in June, July and August, 1861. Before the first concert was due to be held, the music hall was destroyed by fire, and the plaintiff now sued for damages because of the defendant's breach of contract in not having the premises ready for

him. **Held** - The contract was impossible of performance and the defendant was not liable.

**Note:** The case illustrates that destruction of the subject matter need not be total. The Surrey Gardens seemed to have survived without damage. Thus, destruction in the frustration does not mean complete physical destruction but destruction in terms of the commercial viability of the subject matter.

(d) **Discharge by Lapse of Time:** Contracts entered into for a specific time are discharged when that period of time has elapsed. In other cases, time is of no effect as regards discharged, but lapse of time may render contracts unenforceable in a Court of law.

(e) **Discharge by Operation of Law:** This may occur in certain cases as thus:

1. **Merger:** A simple contract is swallowed up, or merged into a subsequent deed covering the same subject matter, and in such circumstances, an action lies only on the deed. Similarly, a judgement which is a contract of record, merges the contract debt on which the action was brought, so that all future actions are based on the judgement.
2. **Material alteration:** An alteration of a material part of a deed or written contract made by one party intentionally and without the consent of the other party, will discharge the contract.
3. **Death:** Death will discharge a contract for personal services. Other contractual rights and liabilities survive for the benefit, or otherwise, of the estate.
4. **Bankruptcy:** A right of action for breach of contract possessed by a debtor, which relates to his/her assets, will pass to his/her trustee in bankruptcy, e.g., a contract with a third party to deliver goods or to pay money to the debtor. The right to sue for injury to the debtor's character or reputation does not pass to the trustee, even though it arises from a breach of contract.

In ***Wilson Vs. United Counties Bank (1920)***, a businessman left his business affairs in the hands of the bank whilst he went to serve in the war of 1914 – 18. The bank mismanaged his affairs, and he was eventually adjudicated bankrupt. The trader and his trustee brought this action against the bank for breach of their contractual duty.

Damages of £45,000 were awarded for loss of estate, and of £7,500 for the injury caused to the trader's credit and business reputation. With regard to the damages, the Court **held** that the £45,000 belonged to the trustee for the benefit of creditors, and the £7,500 went to the trader personally.

(f) Discharge by Breach: A breach does not of itself discharge a contract, but it may in some circumstances give the innocent party the right to treat it as discharged if he/she so wishes. There are several forms of breach of contract as thus:

1. Failure to perform the contract is the most usual form, as where a seller fails to deliver goods by the appointed time, or where they are not up to standard as to quality and quantity.
2. Express repudiation arises where one party states that he/she will not perform his/her part of the contract.

In ***Hochster Vs. De la Tour (1853)***, the defendant agreed in April 1852, to engage the plaintiff as a courier for European travel, his duties to commence on 1st June 1852. On 11th May 1852, the defendant wrote to the plaintiff saying that he no longer required his services. The plaintiff commenced an action for breach of contract on 22nd May 1852, and the defense was that there was no cause of action until the date due for performance, i.e., 1st June 1852. **Held** – The defendant's express repudiation constituted an actionable breach of contract.



3. Some action by one party which makes performance impossible. For example:

In ***Omnium D'Enterprises and others Vs. Sutherland (1919)***, the defendant was the owner of a steamship and agreed to let her to the plaintiff for a period of time and to pay the second plaintiff a commission on the hire payable under the agreement. The defendant later sold the ship to a purchaser, free of all liability under his agreement with the plaintiffs. **Held** – The sale by the defendant was a repudiation of the agreement and the plaintiffs were entitled to damages for breach of the contract. In view of this case, any breach which takes place before the time for performance has arrived is called an anticipatory breach.

## 10.3 Remedies for Breach of Contract (Liquidated Damages)

The remedies where a contract has been discharged by breach are an action for damages if any have been suffered, or, if the parties have stipulated the damages to be payable on breach, an action for that sum which is called liquidated damages. Therefore, liquidated damages are damages that are fixed at an agreed sum of money in the contract. For instance, 'A' covenants with 'B', not to carry on a particular business for a certain time, within a certain area and to pay "as and for liquidated damages", the sum of =N=1,000 on breach of covenant. Here, the parties have between themselves, assessed the amount of damage that will be sustained by 'B' if 'A' commits a breach of covenant. The sum agreed upon is not always recoverable, however, for if the amount is greatly in excess of the damage which is likely to follow a breach, it will be regarded as a penalty which the Court will not enforce, and the injured party will have to rely on his/her right to claim liquidated damages for the breach of contract. The sum agreed upon will be considered as liquidated damages if it is a reasonable estimate of the damage which are likely to be incurred having regard to the circumstances that existed at the date when the contract was made.



Where the amount agreed upon is less than the actual loss suffered, that amount will be treated as liquidated damages and no larger can be recovered as damages. But if the breach causes loss of kind that was not contemplated when the parties fixed the liquidated damages, a further sum may be awarded as damages in addition to the liquidated damages.

In the case of anticipatory breach, the innocent party may treat the contract as discharged at once and sue for damages, though the Court may have regard to whether the contract could have been carried out by the plaintiff at the time scheduled for performance. Alternatively, he/she may ignore the breach and wait until the time for performance arrives. It may be dangerous to wait since the contract may later become impossible of performance, so providing the party who was in breach with a good defence to an action.

Other remedies that may be available include the following:

1. A right of action on a quantum meruit.
2. A right to sue for specific performance or an injunction.

3. A right to ask for rescission of the contract.
4. A refusal of any further performance by the injured party.
5. A right of common law when paying the contract price to deduct damages due in respect of breaches committed by the other party, and, if sued, to set up against the plaintiff such breaches of contract in diminution or extinction of the price.

# CHAPTER ELEVEN

# LAW OF CONTRACT OF EMPLOYMRENT

## 11.1 Insolvency of Employer

Employer can be defined as the person or body of persons or entity that employs others while employee can be defined as a person employed for wages. An employee whose employer becomes insolvent is entitled to obtain payment of certain debts that are owed to him/her through the Redundancy Fund. The legal rights and remedies in respect of debts covered are transferred to the Minister of Employment so that he/she can try and recover from the assets of the insolvent employer the cost of any payments made. Employees must apply for payment to the employer's representative, e.g., receiver or liquidator, who will submit the application to the Minister of Employment for payment from the Redundancy Fund.



## 11.2 Dismissal

A dismissal means the termination of an employee's contract of service by the employer. Constructive dismissal is included, as where the employee is forced to terminate the contract because the employer breaks, or proposes to break the contract, e.g., by changing, or proposing to change, the nature of the employment, the place of employment, or important terms of the contract, such as pay. In fixed-term contracts, as where a person is employed for, say, five years, there is dismissal if the contract is not renewed when the fixed-term ends, though this is not so where the fixed-term is one year or more and the employee has agreed not to complain of unfair dismissal.

### 11.2.1 Reasons Justifying Dismissal

Dismissal may be justified if an employee is dismissed because of the following reasons:

(a) **Lack of capability:** This would usually arise at the beginning of employment, where it becomes clear at an early stage that the employee cannot do the job in terms of lack of skill or mental or physical health. The longer a person is in employment, the more difficult it is to establish lack of capability.

(b) **Conduct:** This is always a difficult matter to deal with, and much will depend upon the circumstances of the case. However, incompetence and neglect are

relevant, as are disobedience and misconduct, e.g., by assaulting fellow employees. Immorality and habitual drunkenness could also be brought under this head.

(c) **Redundancy:** Where a person is redundant, his/her employer cannot be expected to continue the employment, although there are safeguards in the matter of unfair selection for redundancy.

(d) **Other grounds:** Apart from the specific grounds mentioned above, whether the dismissal is fair depends in the last analysis on whether the employer can satisfy an industrial tribunal that it was reasonable to dismiss the employee in all the circumstances of the case. It is difficult to generalize from the cases, most of which depend upon their own facts. For example, the dismissal of an employee absent through sickness may be regarded as unfair in most situations, but has been held to be fair where the employee concerned was the sole driver of a business operating deliveries with only one van.

### 11.2.2 Unacceptable Reasons for Dismissal

The unacceptable reasons for dismissal are as follows:



(a) **Trade Union membership:** The dismissal of an employee regardless of his/her length of services, because he/she is a member of, or intends to join a Trade Union, or has taken, or proposes to take part in its activities, or because he/she has refused to join a Trade Union on the grounds of religious belief, is unfair.

(b) **Unfair selection for redundancy:** Even an employee dismissed for redundancy may complain that he/she has been unfairly dismissed if he/she is of the opinion that he/she has been unfairly selected for redundancy, as where the employer has disregarded redundancy selection arrangements, e.g., 'last in, first out'. Nevertheless, the employer may defend him/herself by showing a 'special reason' for departing from that procedure, e.g., because the person selected for redundancy lacks the skill and versatility of a junior employee who is retained.

(c) **Lock-outs and strikes:** If an employee is dismissed during a lock-out or a strike, that dismissal will not be regarded as unfair unless other employees involved were not dismissed or, if dismissed, were afterwards offered re-engagement.

(d) **Pressure on employer to dismiss unfairly:** It is no defence for an employer to say that pressure was put upon him/her to dismiss an employee unfairly.

### 11.2.3 Complaints of Unfair Dismissal

Employees may make a complaint of unfair dismissal to an industrial tribunal at any time from the date on which they receive notice until three months after the date of dismissal. An industrial tribunal will not hear a complaint until a conciliation officer has had a chance to see whether he/she can help. A copy of the complaint made to the industrial tribunal is sent to the conciliation officer, and if he/she is unable to settle the complaint, nothing said by employer or employee during the process of conciliation will be admissible before the tribunal.

### 11.2.4 Hearing y Tribunal

Where an industrial tribunal hears the case, the procedure is as follows:

1. It must be established that the employee has been dismissed and is eligible to complain, e.g., on the grounds of continuous service;
2. The employer must then attempt to justify the reason for dismissal, i.e., that circumstances were reasonable, and the way in which it was done was reasonable.



### 11.2.5 Remedies

If complain of unfair dismissal is upheld, there are the following possibilities:

1. Reinstatement or re-engagement: The employee must be told of his/her right to reinstatement or re-engagement, and asked whether he/she wishes such an order to be made. If he/she does, the tribunal must consider whether it would be practicable and reasonable in all the circumstances to make such an order. If such an order is made, the employer who does not comply with it when it is practical for him/her to do so, may find that the tribunal will increase the amount of compensation payable by an amount equal to between 13 and 26 weeks of the employee's pay; or where the dismissal involved racial or sexual discrimination, or was because of trade union activities, to between 26 and 52 weeks' pay.
2. Compensation: If the tribunal does not make an order or reinstatement or re-engagement, or makes one which the employer does not comply with, although it would have been practicable and reasonable for him/her to do so,

the tribunal must make a basic award of compensation and may make, in addition, a compensatory award. The basic award is calculated according to the formula for redundancy payments. There may be a compensatory award based on financial loss as a result of dismissal.

## 11.3 Redundancy

Redundancy occurs where the services of employees are dispensed with because the employer ceases, or intends to cease carrying on business, or does not require so many employees to do work of a certain kind. Employees who have been laid off or kept on short time without pay for four consecutive weeks (or for six weeks in a period of 13 weeks) are entitled to a redundancy payment if there is no reasonable prospect that normal working will be resumed. Employees who have completed two years' continuous service since reaching the age of 18 are eligible for a redundancy payment. An employee who accepts an offer of suitable alternative employment with his/her employer is not entitled to a redundancy payment.

## 11.4 Trade and Labour Unions

The Trade Union and Labour Relations Act 1974 and Trade Dispute Act 1976 provide that a trade union shall not be treated as if it were a body of corporate but it is capable of making contracts. The property of the trade union is vested in trustees on trust for the union. It is capable of suing and being sued in its own name, whether in proceedings relating to property or founded on contract or tort (though liability in tort is restricted) or any other cause of action whatsoever.



Proceedings for any offence alleged to have been committed by it or on its behalf may be brought against it in its own name and any judgement made in proceedings of any description brought against a trade union are enforceable, e.g., by way of execution against the property held in trust for the union as if the union were a corporate body. The Act extends the identical provisions to an employer's association where it is unincorporated. However, an employer's association may be a corporate body.

Trade unions, which are unincorporated associations, have certain immunity in the law of tort. No action in tort may be brought against a trade union unless it is an action in negligence, nuisance, or breach of duty, which has resulted in personal injury or is an action arising out of a breach of duty imposed in connection with the

ownership, occupation, possession, control, or use, of property, and even those actions may be brought only if they do not arise from an act done in contemplation or furtherance of a trade dispute. Therefore, all an employer can do in regard to the activities of trade union during a strike is to try to negotiate either directly with the trade union or through IAT who will assist him/her if he/she wishes.

However, a person injured by the negligent driving of a trade union official's chauffeur whilst on official business would be able to sue the union as vicariously liable because that is a tort which has resulted in personal injury and has not arisen in the course or furtherance of a trade dispute. Although, a trade union enjoys immunity in tort for industrial action taking for any reason, the individual participants are given immunity from actions in tort only if their action is taken in contemplation or furtherance of a trade dispute.

# CHAPTER TWELVE

# NATURE AND FORM OF CONSTRUCTION CONTRACTS

## 12.1 Introduction

The law relating to construction contracts is one aspect of the law of contract and tort (civil wrongs). It is accordingly desirable to have an appreciation of the law relating to contracts generally before considering the main characteristic and requirements of construction contracts. A contract has been defined as an agreement, which directly creates and contemplates an obligation. The word is derived from the Latin *contractum*, meaning drawn together. The phrase 'construction contract' in the context of this book is used to include any contract where one person agrees for valuable consideration to carry out construction works for another. It thus covers every contract from e.g., a simple oral agreement to repair a garage roof to elaborate public works contracts. The law of construction contracts is a part of the general law of contract.



The essence of a construction contract is agreement. In deciding whether there has been an agreement and what its terms are, the Court looks for an offer to do or forbear from doing something by one party and an acceptance of that offer by the other party, turning the offer into a promise. The law further requires that a party suing on a promise must show that he/she has given consideration for the promise unless the promise is under seal. We all enter into contracts almost every day for the supply of goods, transportation and similar services, and in all these instances we are quite willing to pay for the services we receive. As our needs in these cases are comparatively simple and we do not need to enter into lengthy or complicated negotiations, no written contract is normally executed. Nevertheless, each party to the contract has agreed to do something and is liable for breach of contract if he/she fails to perform his/her part of the agreement. In general, Nigerian law requires no special formalities in making contracts, but for various reasons, some contracts must be in a particular form to be enforceable and, if they are not made in that special way, then they will be ineffective. Notable among these contracts are contracts for the sale and disposal of land, and 'land' for this purpose includes anything built on the land such as houses.

It is sufficient to create a legally binding contract if the parties express their agreement and intention to enter into such contract. If, however, there is no written agreement and a dispute arises in respect of the contract, then the Court, which decides the dispute will need to ascertain the terms of the contract from the evidence given by the parties, before it can make a decision on the matters in dispute.

On the other hand, if the contract terms are set out in writing in a document which the parties subsequently sign, then both parties are bound by these terms even if the do not read them. Once a person has signed a contract, he/she is assumed to have read and approved its contents, and will not be able to argue that the document fails to set out correctly, the obligation which he/she actually agreed to perform. Thus, by setting down the terms of a contract in writing, one secures the double advantage of affording evidence and avoiding disputes. The law relating to contracts imposes upon each party to a contract a legal obligation to perform or observe the terms of the contract, and gives to the other party the right to enforce the fulfilment of these terms or to claim 'damages' in respect of the loss sustained in consequence of the breach of contract.



## 12.2 Invitation to Tender

The employer, normally acting through his/her prime consultant or Project Manager, sends out an invitation to tender for the proposed works. These documents usually include the proposed condition of contract, drawings, specification and blank bills of quantities. An invitation to tender is not normally an offer binding the employer to accept the lowest or any tender.

## 12.3 Tender and Estimates

The contractor's offer to carry out the works is usually termed a tender. It may well happen that as a result of negotiation it is the employer who eventually makes the offer. If any event, for a statement to amount to an offer, it must be definite and unambiguous. There may be an offer, although the contractor makes it on a document called estimate.

## 12.4 Standing Offers

Tenders are sometimes invited for the periodic carrying out of work. If the contractor tenders and there is an acceptance, the result depends upon the construction of the documents, but can have one of these well-known consequences:

1. A contract for the carrying out of a definite amount of work during a certain period.
2. A contract in which the employer agrees to order such work as he/she needs during the period.
3. There may be a standing offer on the part of the contractor to carry out certain work during the period if and when the employer chooses to give an order.

## 12.5 Formalities of a Contract

The general rule of law is that no formalities are required for the formation of a contract. To this rule, there are exceptions for the purposes of the law relating to construction contracts. These are:

1. Contracts which are not enforceable unless evidenced in writing.
2. Contracts with a corporation.

The contracts to be evidenced in writing are:

1. **Contract for the sale of land:** A contract for the sale or other disposition of land or any interest in land cannot be enforced unless it is in, or evidenced by writing, signed by the person to be charged of his/her agent. Such a contract does not include the normal construction contract because the contractor is merely given a license to enter the land.
2. **Contracts of suretyship and guarantee:** A contract to answer for the debt, default or miscarriage of another must be contained in or evidenced by writing signed by the surety or his/her agent although the writing need not show the consideration for which the promise was given.



## 12.6 Enforcement of Contracts

An agreement can only be enforced as a contract if:

1. The agreement relates to the future conduct of one or more of the parties to the agreement.
2. The parties to the agreement intend that their agreement shall be enforceable at law as a contract.
3. It is possible to perform the contract without transgressing the law.

## 12.7 Validity of Contract

The legal obligation to perform a contractual obligation only exists where the contract is valid. In order that the contract shall be valid, the following conditions must operate:

1. There must be an offer made by one person (the offeror) and acceptance of that offer by another person (offeree), to whom the offer was made. Furthermore, the offer must be definite, and made with the intention of entering into a binding contract. The acceptance of the offer must be absolute, be expressed by words or conducts, and be accepted in the manner prescribed or indicated by the person making the offer. An offer is not binding until it is accepted and, prior to acceptance, the offer may come to an end by lapse of time, by revocation by the offeror or by rejection by the offeree, and in these cases, there can be no acceptance unless the offer is first renewed.
2. The contract must have 'form' or be supported by 'consideration'. The 'form' consists of a 'deed' which is a written document, which is signed, sealed and delivered, and this type of contract is known as a formal contract or contract made by deed. If a contract is not made by deed, then it needs to be supported by 'consideration', in order to be valid, and this type of contract is known as a simple contract. Consideration has been defined as some return, pecuniary or otherwise, made by the promise in respect of the promise made to him/her.
3. Every party to a contract must be legally capable of undertaking the obligations imposed by the contract. For instance, persons under 18 years of age may, in certain cases, avoid liability under contracts into which they have entered. Similarly, a corporation can only be a party to a contract if it is empowered by a statute or charter to enter into it.
4. The consent of a party to a contract must be genuine. It must not be obtained by fraud, misrepresentation, duress, undue influence or mistake.
5. The subject matter of the contract must be legal.



## 12.8 Remedies for Breach of Contract

Whenever a breach of contract occurs, a right of action exists in the Courts to remedy the matter. The remedies generally available are as follows:

1. Damages
2. Order of payment of a debt

3. Specific performance
4. Injunction
5. Rescission

### 12.8.1 Damages

In most cases, a breach of contract gives rise to a right of action for damages. The damages consist of a sum of money, which will, as far as it is practicable, place the aggrieved party in the same position as if the contract has been performed. The parties to a contract, when entering into the agreement, may agree that a certain sum shall be payable if a breach occurs. This sum is usually known as liquidated damages (as already elaborately discussed in Chapter Ten of this book) where it represents a genuine estimate of the loss, which is likely to result from the breach of contract. Where, however, the agreed sum is in the nature of a punishment for the breach of contract, then the term 'penalty' is applied to it, and penalties are not normally recoverable in full. For instance, in construction contracts, it is often stipulated that a fixed sum shall be paid per day or per week if the contract extends beyond the agreed contract period. If this sum is reasonable, it constitutes liquidated damages and, unlike a penalty, is recoverable in full.



In ***Sunley and Co. Ltd Vs. Cunard White Star Ltd (1940)***, the defendants agreed to carry a machine, belonging to the plaintiffs, to Guernsey, but because of delays for which the defendants were responsible, the machine was delivered a week late. The plaintiffs were not able to show that they had an immediate use for the machine, and could not prove loss of profit. However, it was **held** that to compensate the plaintiffs for the defendants' breach of contract, they should recover £10 as interest on the capital cost.

In ***Cox Vs. Philips Industries Ltd (1976)***, an employee was demoted because of breach of contract by his employers though, he remained on the same salary for several months. The demotion upset him and he was eventually persuaded to leave with full salary in lieu of notice. Mr. Justice Lawson decided that he could recover damages of £500 for the mental distress which he suffered as a result of his working conditions.

### 12.8.2 Order for Payment of a Debt

A debt is a liquidated or ascertained sum of money due from the debtor to the creditor and is recovered by an 'action of debt'.

### 12.8.3 Specific Performance

The term 'specific performance' refers to an order of Court directing a party to a contract to perform his/her part of the agreement. The Courts now only apply it on rare occasions when damages would be an inadequate remedy but specific performance constitutes a fair and reasonable remedy and is capable of effective supervision by the Court. This remedy will not be given if it requires constant supervision of the Court.

### 12.8.4 Injunction

An injunction is an order of Court directing a person not tom perform a specified act. For instance, if 'A' has agreed not to carry out any further construction operation on his land, for the benefit of 'B', who owns the adjoining land, and 'B' subsequently observes 'A' commencing construction operations, then 'B' can apply to the Court for an injunction restraining 'A' from the construction. Damages, in this circumstance, would not be an adequate remedy.



### 12.8.5 Rescission

Rescission consists of an order of Court cancelling or setting aside a contract and this results to setting the parties back in the position that they were before the contract was made.

## 12.9 The Concept of Construction Law

Construction law falls into two main categories – Non-contentious and Contentious. On the non-contentious side, lawyers are involved in negotiating contracts and general procurement, before the actual construction work begins. Construction projects involve a wide variety of people and organisations, and construction lawyers will therefore work with those initiating the project (for example developers, or government bodies); those financing the project (for example, banks), those designing the building (architects); those doing the actual construction (construction companies, developers, contractors), and so on.

Construction law becomes 'contentious' when something goes awry, for example, the project is running late, or terms of the contract have been breached. The contracts drawn up at the procurement stage will set out how any disputes should be dealt with, and usually (in an effort to minimise costs) it is resolved through adjudication, or arbitration. If a case does go to court, a specialist barrister from the construction bar would usually be appointed to advocate.

Construction law is an aspect or branch of law that deals with matters relating to building construction, engineering, and other related fields in the construction industry. It is in essence an amalgam of contract law, commercial law, planning law, employment law and tort. Construction law covers a wide range of legal issues including contract, negligence, bonds and bonding, guarantees and sureties, liens and other security interests, tendering, construction claims, and consultancy contracts.

Construction law may affect the participants in the construction industry, including financial institutions, Surveyors, Quantity Surveyors, Architects, Builders, Engineers, Construction Workers, and even Planners. Construction law builds upon general legal principles and methodologies and incorporates the regulatory framework (including security of payment, planning, environmental and building regulations); contract methodology including the olden method of contracting. Construction law covers a whole lot of major areas which will be studied in this course as we proceed.



## 12.10 Importance of Construction Law

A wide variety of issues and concerns can come up related to construction projects and construction laws are available to help parties resolve their concerns. Construction law protects parties involved in a construction project including commercial and residential projects. Recent problems in the housing industry and economy have resulted in a number of canceled and abandoned construction projects. As a result, the need for the knowledge of construction law becomes more imperative today than ever before. Construction projects involve a multitude of various contracts and many different people. Construction law is not as cut and dry as other types of law because of this. Each construction law firm specializes in different areas, but will likely address legal issues such as:

i. Construction delays – Delays have become a very serious issue as money becomes a problem for contractors. But even if the contractor or the person who spearheaded the project no longer has money to finish a project, he or she still owes a great deal of money to investors. Many projects have been abandoned because of this issue.
ii. Cost overruns and change orders – This is when an individual investing in a construction project believes that he or she was lied to when the deal was first sold and a solid monetary number was listed.
iii. Contracts – As previously mentioned, there are many contracts involved in any construction project. There are contracts between investors, contractors, employees, renters, etc.
iv. Defective work claims – When money starts to dry up, it is common for contractors to try to cut corners by finishing the work on the project in a very cheap and poor manner.
v. Defects such as roofing defects, water intrusion, structural life safety issues
vi. Liens
vii. Insurance coverage disputes
viii. Mold and mildew claims
ix. Documents related to the project including loan documentation



## 12.11 Terms in a Building Contract

Having known that a Contract is an agreement, enforceable by law; between two or more parties or persons to do or abstain from doing some act or acts, their intention being to create legal relation and not merely to exchange mutual promises, both having given something or having promised to give something of value as consideration for any benefit from the agreement. Thus, a Construction/building contract is an agreement between the client and the contractor to construct, renovate, rehabilitate or to demolish a building or structure at a particular period of time, for a known price and to a given standard.

There are basically two types of clients that use construction contracts - Residential and Commercial. Each client has different requirements that determine what is included in the contract. A residential construction contract requires these basic elements

i. Project Scope

ii. Schedule of work
iii. Payment details

The property owner who has requested the work and the project manager for Construction Company must sign the contract. The project scope is a statement of exactly what construction is included in the contract. This section should include detailed schematics, artistic rendering and any specific instructions. Both parties must agree that this section provides an exact representation of the required work.

A schedule of work represents or indicates the start date, the mile stone and the project completion date. The payment details section includes total project cost and payment date. All construction projects are paid on a percentage of completion basis. A deposit of not more than 5% of the total cost is provided at the start of the project. The next payment is made when the predefined section of work is completed. Commercial construction contract has procurement processing details, specification about legislative coverage, contingency plans, and dispute resolution instructions.

The principal signatory document lists all the people who are involved in the project, as it ensures that all parties have agreed to the authorization of changes, payments and design elements. A construction contract is a document which specifies the details of a construction project. The purpose of construction contract is to:

i. Allocate the duties between the parties
ii. Recognise and allocate the risks to the different parties and
iii. Reduce the uncertainties surrounding the projects and allow the parties to plan for the project and the future.



The rights and obligations of the parties to a contract are defined by the contractual terms. Thus, the terms of a building contract can be defined as the rules guiding the parties to a contract clearly stating the obligations of the parties of the contract. There are basically two types of terms in a building contract, namely:

i. Express terms
ii. Implied terms

## 12.11.1 Express Terms

Express terms are the terms of the agreement which are expressly agreed between the parties. Ideally, they will be written down in a contract between the parties but where the contract is agreed verbally, they will be the terms discussed and agreed between the parties. A Contract is described as Express when the terms of the contract are clearly stated. This is the usual position. **X** invites tenders from

contractors for the building of a house and picks one out of several tenders. The contract is then awarded to the owner of the tender all the material terms will usually be clearly spelt out in such an agreement, and the contract comes into existence after much correspondence and negotiation on price, duration of construction, materials to be used, etc.

#### 12.11.1.1 Types of Express Terms

The types of express terms to be found in a contract are many and varied and will depend on the type of contract. Any term written into the contract is an express term and may refer to price, time scales, warranties and indemnities, limitations on liability, conditions precedent.

#### 12.11.1.2 Express Terms and Representation

Express terms and representations are not the same. As we have seen, express terms are those terms set out in the contract which the parties intend to have contractual force. Representations, on the other hand, are not intended to be contractually binding although they may be made in the hopes of encouraging the other party to enter into the contract. A breach of an express term in a contract may result in a claim by the non-breaching party for contractual damages and possibly repudiation of the contract; it is a contractual claim. A false representation cannot give rise to a contractual claim as it is not a contractual term; instead, liability in misrepresentation will arise. Whether the statement is considered a contractual term or a representation will depend on the parties' intentions. To determine these, the courts will consider:



i. how important the statement is
ii. the period of time between the making of the statement and entry into the contract
iii. whether the statement is set out in the contract
iv. the ability of each of the parties to determine whether the statement is true or not

### 12.11.2 Implied Terms

Implied terms are terms implied into the contract by the Courts. They are not expressly set out in the contract but are taken to be as effective as if they were and as if they had been included from day one of the contract. The express terms and any implied terms together create the legally binding obligations on the parties. For instance, a passenger usually enters a bus without any dialogue between him and the conductor or driver. Yet to all reasonable men, his action implies that he will pay his

fare, while the bus owner is obliged to carry him safely to his destination, provided it is on the route of that bus.

Whether a term should be implied into a contract or not will usually only be an issue if the relationship between the parties is breaking down. Generally, contracts are in place to assist when an issue arises and when everything is going well, there may not even be any need to refer to the contract itself. The courts are extremely reluctant to imply terms into a contract and will only do so in particular situations.

### 12.11.2.1 Types of Implied Terms

As mentioned above, an implied term is a term which the courts imply into a contract because it has not been expressly included by the parties. This may be because the parties did not consider it, did not think that any problem would arise in relation to it or simply omitted to include it. The Courts are very reluctant to imply terms into contracts and will only do so in the following circumstances:

i. terms implied under statue
ii. terms implied under common law
iii. terms implied because of custom or usage
iv. terms implied due to previous dealings
v. terms implied 'in fact' or to reflect the parties' intentions



### 12.11.2.2 Implied Terms: Custom or Usage

These implied terms are those which are standard for a certain trade or the place of the contract. The reasoning behind them is that the parties to the contract know that such terms should form part of their agreement and the courts are simply enforcing that. The custom or usage must be usual and generally known about in the industry or place of contract for these terms to be effective. The courts have stated that the usage has to be:

- notorious, certain, reasonable and not contrary to law
- more than a mere trade practice

It is difficult to second-guess whether the courts will determine that a custom or usage satisfies these tests. In addition, it is important to be aware that case law has shown that a party can be bound, even if they do not know about the custom.

#### 12.11.2.3 Implied Terms: Previous Dealings

If the parties have done similar business together previously and have consistently done so on the same terms, then these terms may be implied into the contract in the event they are not set out expressly and are not contradicted in the contract. A party should not rely on this argument in order to incorporate implied terms into the contract as the tests used by the courts are uncertain, and it is by no means clear-cut whether a term would be implied into the contract using this argument or not. To be successful in claiming that a term should be implied, the party must show regular and consistent trading with the other party. What is deemed to be 'regular' or 'consistent' is not straightforward. To minimise the chances of uncertainty in this area, ensure that the terms on which you deal with any long-term business venture are reflected in an up-to-date contract.

#### 12.11.2.4 Implied Terms 'In Fact or Parties' Intention

In this situation, the courts imply terms into a contract to fill a gap where the parties intended a term to apply but did not include it expressly in the contract. The courts are reluctant to do this and will not imply a term solely because it seems reasonable to do so or to change the meaning of the contract itself. Similarly, terms will not be implied into a contract if the court determines that there was no binding contract between the parties in the first place. In deciding whether a term should be implied into the contract, the court will therefore ask itself what a reasonable person (not the parties themselves) would have understood the parties' intentions to be, given the background knowledge reasonably available to the parties at the time they entered the contract.

# CHAPTER THIRTEEN

# TYPES OF CONSTRUCTION CONTRACTS

## 13.1 Overview of Construction Contracts

Most contracts entered into between constructors or contractors and their employers are of the type known as 'entire contracts'. These are contracts in which the agreement is for a definite job of work to be undertaken by the contractor and no payment is due until the work is complete. In an entire contract, where the employer agrees to pay a certain sum in return for construction work, which is to be executed by the contractor, the contractor is not entitled to any payment if he/she abandoned the work prior to completion, and will be liable in damages for breach of contract. Where the work is abandoned at the request of the employer, or results from circumstances which were clearly foreseen when the contract was entered into and provided for in its terms, the contractor will be entitled to payment on a quantum meruit basis – he/she will be paid as much as he has earned.



It is, accordingly, in the employer's interest that all contracts for construction work should be entire contracts, to avoid the possibility of work being abandoned prior to completion. Contractors are usually unwilling to enter into any contracts, other than the very smallest, unless provision is made for interim payment to them as the work proceeds. For this reason, the various standard forms of building (and construction) contracts provide for the issue of interim certificates at various stages of the works, with the provision of that payment, or the issue of a certificate as a preliminary to payment, shall not be taken as approval of the work performed up to the time of payment.

It is usual for the contract to further provide that only a proportion of the sum due on the issue of a certificate shall be paid to the contractor. In this way, the employer retains a sum, known as retention money, which will operate as an insurance against any defects that may arise in the work. The contract does, however, remain an entire contract, and the contractor is not entitled to demand payment in full until the work is satisfactorily completed, the defects liability period expired and the final certificate of completion issued.

The works must be completed to the satisfaction of the employer, or his/her representative, does not give to the employer the right to demand an unusually high

standard of quality throughout the works, in the absence of a prior express agreement. Otherwise, the employer might be able to postpone indefinitely his/her liability to pay for the works. The employer is normally only entitled to expect a standard of work that would be regarded as reasonable by competent men with considerable experience in the class of work covered by the particular contract. The detailed requirements of the specification will of course have a considerable bearing on these matters.

The employer normally decides the conditions of contract, which define the obligation and performances to which the contractor will be subject. He/she often selects the contractor for the job by some form of competitive tendering and any contractor who submits a successful tender and subsequently enters into a contract, is deemed in law to have voluntarily accepted the conditions of contract adopted by the promoter.

The obligations, which a contractor accepts when he/she submits a tender, are determined by the form of the invitation to tender. In most cases, the tender may be withdrawn at any time until it has been accepted and may, even then, be withdrawn if the acceptance is stated by the promoter to be 'subject to formal contract', as is often the case. The employer will not be bound to accept the lowest or any tender and this is often stated in the advertisement. A tender is, however, normally required to be a definite offer and acceptance of it gives rise legally to a binding contract.



## 13.2 Types of Construction Contracts

There are a variety of employer/contractor relationships and the choice will be influenced considerably by the particular circumstances. They range from 'cost reimbursement' or 'cost plus' at one end of the scale to truly lump sum, such as non-variable package deals, at the other end. The essential difference between the two extremes devolves upon which party is to carry the risk of making a loss (or profit) and the incentives, which are built into the contract to encourage the contractor to provide an efficient and economic service to the employer or client. An examination and comparison of the most commonly used contractual arrangements follows.

### 13.2.1 Cost Plus Contracts

These contracts are sometimes described as 'cost reimbursement' or 'prime cost' contracts. In practice, they can take any one of three quite different forms as thus:

(a) **Cost Plus Percentage Contracts:** These are those in which the contractor is paid actual cost of the work plus an agreed percentage of the actual or allowable cost to cover overheads and profit. They are useful in an emergency, when there is insufficient time available to prepare detailed scheme prior to commencement of the work, but it will be apparent that an unscrupulous contractor could increase his/her profit by delaying the completion of the works. No incentive exists for the contractor to complete the works as quickly as possible or to endeavour to reduce costs. They are quite commonly used in maintenance work.

(b) **Cost Plus Fixed Fee Contracts:** These are those in which the sum paid to the contractor will be the actual cost incurred in carrying out the work plus a fixed lump sum, which has been previously agreed upon and does not fluctuate with the final cost of the work. No real incentive exists for the contractor to secure efficient working, although it is to his/her advantage to earn the fixed fee as quickly as possible and so release his/her resources for other work. This type of contract is superior to the cost-plus percentage type of contract.

(c) **Cost Plus Fluctuating Fee Contracts:** These are those in which the contractor is paid the actual cost of the work plus a fee, the amount of the fee being determined by reference to the allowable cost by some form of sliding scale. Thus, the lower the actual cost of the works, the greater will be the value of the fee that the contractor receives. An incentive then exists for the contractor to carry out the work as quickly and as cheaply as possible, and it does constitute the best form of cost-plus contract from the employer's viewpoint.



### 13.2.2 Target Cost Contracts

Target cost contracts have been introduced in recent years to encourage contractors to execute the work as cheaply and efficiently as possible. A basic fee is generally quoted as a percentage of an agreed target estimate often obtained from a priced bill of quantities. The target estimate may be adjusted for variations in quantity and design and fluctuations in the cost of labour and materials. The actual fee paid to the contractor is obtained by increasing or reducing the basic fee by an agreed percentage of the saving or excess between the actual cost and the adjusted target estimate. In some cases, a bonus or penalty based on the time of completion may also be applied. Target cost contracts can be useful when dealing with unusual or

particularly difficult situations, but the real difficulty lies in the agreement of a realistic target.

### 13.2.3 Measure and Value Contracts

These contracts include those based on schedules of rates, approximate quantities and bills of quantities. Their great merit lies in the predetermined nature of the mechanism for financial control provided by the pre-contract agreed rates. The risk of making a profit or loss rests with the contractor. Another adaptation of the orthodox bill of quantities contract is serial tendering whereby a series of contracts are let to a single contractor.

(a) **Serial Contracting:** This is based on a standing offer, made by a contractor in competition, to enter into a number of lump sum contracts in accordance with the terms and conditions set out in a master or notional bill of quantities. This procedure is particularly well suited for a known programme of construction work over a period of time in a specific locality, and where there is high degree of standardization of construction. The advantages claimed for the system include improved relationships with the contractor, more effective cost control and faster and more economical planning and execution of jobs.

(b) **Schedule Contracts:** These may take one of two forms. The employer may supply a schedule of unit rates covering each item of work and ask the contractors, when tendering, to state a percentage above or below the given rates for which they would be prepared to execute the work. Alternatively, and as is more usual, the contractors mat be requested to insert prices against each item of work, and a comparison of the rates so entered will enable the most favourable offer to be ascertained. Approximate quantities are sometimes included to assist the contractors in pricing the schedules and the subsequent comparison of the tendered figures. This type of contract is very suitable for maintenance and repair contracts, where it is impossible to give realistic and accurate quantities of work to be undertaken. In this form of contract, it is extremely difficult to make a fair comparison between the figure submitted by the various contractors, particularly where approximate quantities are not inserted in the schedules, as there is no total figure available for comparison purposes and the unit rates may fluctuate extensively between

the various tenderers. Occasionally, schedules of rates are used as a basis for negotiated contracts.

(c) **Bill of Quantities Contracts:** These are still a very commonly used contractual arrangement for construction projects of all but the smallest in extent, where the quantities of bulk of the work can be ascertained with reasonable accuracy before the work is commenced. A bill of quantities gives, as accurately as possible, the quantities of work to be executed and the contractor enters a unit rate against each item of work. The extended totals are added up together to give the total cost of the job. In the absence of a bill of quantities, each contractor tendering will have to assess the amount of work involved and this will normally have to be undertaken in a very short period of time, in amongst other jobs. Under these circumstances, a contractor, unless he/she is extremely short of work, is almost bound to price high in order to allow him/herself a sufficient margin of cover for any items that he/she may have missed. Furthermore, there is really no satisfactory method of assessing the cost of variations and the contractor may feel obliged to make allowance for this factor also, when building up his/her contract price. Bills of quantities thus assist in keeping tender figures to a minimum.



### 13.2.4 Contracts Based on Drawings and Specification

These are often described as 'lump sum' contacts although they may be subject to adjustment in certain instances. They form a useful type of contract where the work is limited in extent and reasonably certain in its scope and are frequently used for works of alteration and conversion. They have, on occasions, been used where the works are uncertain in character and extent, and by entering into a lump sum contract, the employer hoped to place the onus on the contractor for deciding the full extent of the works and the responsibility for covering any additional costs which could not be foreseen before the works were commenced. The employer would then pay a fixed sum for the works, regardless of their actual cost, and this constitutes an undesirable practice from the contractor's point of view.

### 13.2.5 Package Deal Contracts

These constitute a specialised form of contractual relationship in which responsibility for design as well as construction is entrusted to the contractor. The less developed the design, the less detailed the specification and hence the less

precise must be the calculation of the price. Contingencies must be included to provide for the unknown. Package deal contract have been used for local authority housing, often incorporating heavy industrialized systems; hospitals; defence installations and factories.

With housing schemes, about six contractors may be invited by a local authority to submit a complete development scheme for a large site. The contractors may use their own design teams or private Architects to prepare schemes within the specified requirements of densities and costs, and the successful contractor will subsequently be required to collaborate with the authority's Architect. This form of approach is particularly favoured where special factors exist, such as, the use of building systems. Contractor-sponsored systems make it essential for the contractor to be brought into the design team. It has also become necessary to formulate procedures, which will allow competition between contractors offering different systems. This has involved two separate stages:

1. A competition to select the contractor who can best satisfy the functional, aesthetic and economic needs; and
2. A period of negotiation with the selected contractor using data, especially prices, derived from the first stage.

# CHAPTER FOURTEEN

# ALTERNATIVE DISPUTE RESOLUTION (ADR)

## 14.1 Overview of Alternative Dispute Resolution Mechanism

Alternative Dispute Resolution (ADR) refers to a broad range of mechanisms and processes designed to assist parties in resolving differences. These alternative mechanisms are not intended to supplant Court adjudication, but rather to supplement it. ADR provides an opportunity to resolve conflicts creatively and effectively, finding the process that best handles a particular dispute. The following is a brief overview of primary ADR mechanism.

## 14.2 Mini-Trial

To the extent that a mini trial involves each party's lawyer presenting his/her client's best case, the name "mini-trial" has a degree of relevance. In other respects, however, a mini-trial is very far from a trial in the real sense rather it provides a forum for an information exchange followed by settlement negotiation. It is a consensual process with the parties agreeing the ground rules in advance. The principal features of the mini-trial are as follows:



1. A panel is set up consisting of one executive from each party and a third neutral adviser. The executives are senior managers with authority to settle the case. The role of the neutral adviser, who may be either a lawyer or a specialist in some discipline appropriate to the dispute, is to advise the parties and to give his/her objective view on matters of fact and/or law, as appropriate.
2. Each party's lawyer will make a short presentation of his/her client's case, concentrating on the principal issues and omitting the less important claims except, to point out their tactical use in the event of full-scale proceedings. The information exchange provides the first opportunity for the executives to focus on the essential issues in the dispute.
3. Expert witness or other witness may be called, but the use of witness is usually restricted, or non-existent.
4. Following the presentation, the senior executives enter into negotiation in an attempt to settle the dispute, with or without assistance from the neutral adviser. It is not uncommon for the negotiation to go into number of sessions.

The length and timing will depend on the number of issues and the overall complexity of the problems.

5. If settlement is not reached immediately following the information exchange, the parties may ask the neutral adviser to give non-binding opinion as to the likely outcome of litigation. This can often trigger a settlement if it has not been achieved by the negotiations.
6. A mini-trial needs preparation, as does all good negotiations. However, proceedings are relatively short. Moreover, if settlement is not reached, the work would not be wasted since it is work which would otherwise have had to be done preparing the case for trial.
7. The interesting feature of some of the settlements is that they involve new contract based on future business relationship that would be beyond the power of a Judge or Arbitrator.

## 14.3 Mediation



Mediation is basically a facilitated negotiation. Negotiation implies that the parties to a contract bargain with one another to satisfy interests. Traditional negotiation is usually "positional" in nature and would involve incremental shifts in initial positions until an agreement is reached. Its process is adversarial and competitive with emphasis on: pressuring, intimidating or outlasting the opponent. Thus, it is basically an exercise in contest of wills which often leads to compromise of limited satisfaction.

A more modern approach is "collaborative" or interest-based negotiation, which searches for common interests as basis for relationships and agreements. The emphasis is usually on mutual understanding grounded on mutual education about one another's needs and concerns. Skillfully managed, it results to "mutual gain" solutions, thus building sustainable relationships. However, to develop the trust needed to draw out the actual needs of the other party as against interests and positions is Herculean and would require a dose of hard work.

Trust in this context is not some fuzzy kind of feeling that leaves a party vulnerable to the exploitation of the other party, but a solid conviction that the other party is dependable and vice versa. Such quality trust may usually be predicated on: organisational reputation, personal transparency, evidenced honesty, etc. When the

foregoing is articulated and administered by a disinterested third party, the name of the game is mediation – and it is disputant friendly.

Mediation is the most widely used of the ADRs by the commercial community. The parties in mediation appoint an independent neutral body to assist them in arriving at a settlement. The qualification of the mediator will depend upon the nature of the dispute. Sometimes the mediator may be a lawyer, or he/she may be an engineer or quantity surveyor or have a qualification particularly relevant to the nature of the claim. Mediation usually begins with a joint section at which an informal presentation is made by each party in the mediation. This is followed by a series of "cause" between the mediator and each of the parties in turn. His/her job is to persuade each party to focus on its underlying and trying to steer them away from emotive and positional bargaining. He/she can dismantle unrealistic expectations and test advisor on their theories with good results. He/she will elicit information during the private causes, which may unnecessarily be keeping the parties apart. A successful mediator will take a pro-active role in helping and encouraging the parties to find a creative solution to their disputes.



In mediation, it is important that the representatives of each party are of high calibre and have sufficient authority to negotiate on behalf of their companies. At the outset, there is likely to be a time limit placed on the preparation for and mediation process to avoid the process being used as a delaying tactic. The process is terminable at will and can be used before or within the context of on-going litigation.

## 14.4 Conciliation

Conciliation is a statutorily empowered evaluative procedure covered by Sections 37-42 of the Arbitration and Conciliation Act Cap 19 Laws of the Federation of Nigeria 1990.

### 14.4.1 Right to Settle Dispute by Conciliation

Section 37 provides that parties to any agreement may seek amicable settlement of any dispute by conciliation in accordance with the Act. Conciliation is therefore generally not mandatory but discretionary. Except by express incorporation into the Articles of Agreement, reinforced by express adoption of the conciliatory rules set out in the third schedule, parties are not bound to resort to conciliation prior to reference to Arbitration or judicial proceedings. Where, however, conciliation and

the applicable rules are thus incorporated and adopted, conclusion of proceedings therefore becomes a condition precedent to any reference to arbitration.

### 14.4.2 Request to Conciliate

A party who wishes to initiate conciliation is required to send to the other party, a written request to conciliate, which request must contain a statement setting out the subject of the dispute. The response to the request must be in writing and if orally made, should be confirmed in writing.

### 14.4.3 Commencement of Conciliation Proceedings

The conciliation proceedings shall commence on the date the request to conciliate is accepted by the other party. However, if the invitation is rejected, then no conciliation could be initiated. Except as otherwise specified in the invitation, if the party initiating the conciliation fails to receive a reply within 30 days from the date on which he/she sent the invitation, he/she is entitled to treat the failure as a rejection of the said invitation and should inform the other party accordingly. The operative import of failure to conciliate is that any of the parties could initiate arbitral proceedings (if provided for) or initiate an action in law.



### 14.4.4 Appointment of Conciliators

After the acceptance of the request to conciliate, the parties shall refer the dispute to a conciliation body, consisting of one or three conciliators to be appointed by the parties. In the case of one conciliator, he/she shall be appointed jointly by the parties, whilst in the case of three conciliators, each party is obliged to appoint one conciliator and then jointly appoint the third conciliator. Parties may equally enlist the assistance of any appropriate institution or person (e.g., Institute of Construction Industry Arbitrators) in connection with the appointment of conciliators. Where parties cannot jointly agree on a third conciliator, it is suggested that the two earlier appointed should jointly appoint the third conciliator.

### 14.4.5 Action by the Conciliation Body

Once a conciliation body has been constituted, the conciliator(s) shall take immediate steps to acquaint themselves with the details of the case and procure such other information they may require for the purpose of settling the dispute. They may request each party to submit to them additional written statement on his/her position and the facts and grounds in support thereof, supplemented by any documents and

other evidence that such party may deem appropriate. Whatever document is sent to the conciliator by any party must correspondingly be copied to the other party. The procedural arrangement for the practical conduct of the proceedings is entirely up to him/her, but he/she is required to take into account the circumstances of the case, the wishes the parties may express, including any request by any party that the conciliator hear oral statements and also in respect of the need for a speedy settlement of the dispute.

In order to facilitate the achievement of the foregoing objectives, he/she may at any stage during the proceedings make proposals for a settlement of the dispute that need not be in writing nor is he/she required to state the supporting reasons. In conducting the proceedings, he/she may invite the parties to meet with him/her, or may communicate with them orally or in writing and he/she may do so with the parties together or with each of them separately. Either party may at his/her own initiative or at the invitation of the conciliator submit to him/her suggestions for the settlement of the dispute. A brief outline of the procedure would involve the following:



1. Convene a preliminary joint meeting of the disputants at which they would separately present their cases.
2. Thereafter hold separate meetings (discussing) with each of the parties, where compromise on the issues would be attempted.
3. Communicate the emergent proposals to the parties for possible acceptance or rejection, probably along with his/her own evaluation of the dispute where necessary.
4. If proposals are accepted, convene a final joint meeting for drawing up a record of settlement and executing it. Failure to reach agreement would terminate the conciliation.

### 14.4.6 Terms of Settlement in Conciliation

After the conciliator(s) has examined the case and heard the parties, if necessary, he/she shall submit his/her terms of settlement to the parties. He/she is thus required to formulate the terms of possible settlement and submit them to the parties for their observation, only if it appears to him/her that there exist elements of settlement that would be acceptable to the parties. After receiving their observations, he/she may formulate the said terms in the light of such observations. If the parties agree to the terms of settlement, the conciliator shall draw up and sign a record of settlement.

The appending of their signatures to the agreement effectively terminates the dispute and renders the agreement legally enforceable under the general law of contract.

### 14.4.7 Termination of Conciliation Proceedings

Failure to agree to the terms of settlement as submitted leaves resort to arbitration or litigation as the only options thus effectively terminating the proceedings. The termination of proceedings could also be initiated by the following:

1. A written declaration of the conciliator after consultation with the parties to the effect that further efforts at conciliation are no longer justified on the date of the declaration, or
2. A written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated on the date of the declaration, or
3. A written declaration of a party to the other party and the conciliator to the effect that the conciliation proceedings are terminated on the date of the declaration.



### 14.4.8 Remuneration (Costs)

Upon termination of proceedings, the conciliator fixed the costs of the conciliation and gives the written notice thereof to the parties. The term costs have been construed to include a reasonable amount as fee, travel and other expenses of the conciliator and the witnesses request by the conciliator with the parties' consent and the cost of sundry assistance. The costs, as defined above, are borne equally by the parties unless otherwise provided by the settlement. Each party bears the expenses incurred by it.

Furthermore, the conciliator, upon his/her appointment, may request each party to deposit an equal amount as an advance for the costs. During the course of the proceedings, he/she may request supplementary deposits, in equal amount from each party, and the said requests are not honoured in full by both parties within 30 days, he/she may suspend the proceedings or terminate the same. Upon termination, he/she is required to render account to the parties for any deposit(s) received and returns any "unexpected" balance to the parties.

In respect of the foregoing, however, the Rules of Arbitration issued by the Institute of Construction Industry Arbitrators contain schedules for the assessment of fees due

and other sundry expenses, adoption of the rules renders the scale of fees applicable and thereof not subject to the whims of individual conciliator(s).

## 14.5 Mediative Conciliation

This is a novel procedure evolved by the Institute of Construction Industry Arbitrators to furnish mediation and conciliation services in one shop. The principle is based on the modality for mediation with the notable exception that the conciliator is empowered by the rules to submit his/her own settlement proposals to the parties where mediation fails. As an expert in the field of dispute, his/her proposal should be evaluative of the relative merit of each party's case. Failure to agree to the proposal would indicate a failed mediative conciliation and so open up the highway to arbitration. Acceptance of the proposal would lead to a record of settlement, which if subsequently executed by the parties, becomes enforceable in law.

## 14.6 Merits of ADR



ADR is particularly well suited to the resolution of claims in the commercial community. The commercial industry is one in which the parties frequently have an on-going relationship or the one with the same parties regularly having a working relationship. Litigation, especially if it attracts publicity, can sour working relationship and have a negative impact on future work between the parties. Successful use of ADR can produce a solution which satisfies all the parties. ADR is similarly suitable to the solution of claims as follows:

1. The oil industry where massive sums of money can be involved and confidentially as well as going commercial relationship are important. A wealth of technical detail is also likely to be involved in an oil dispute and this can be short-circuited by the concentration of key issues at ADR hearings.
2. Construction industry claims tend to be made up of numerous items, such as: time extensions, loss and expense, fluctuation, etc., all of which have to be detailed, documented and proved at proceeding. The real basis for a construction claim is usually surrounded by voluminous but not necessarily valuable peripheral details which a claimant can rarely afford to omit in the hope that his/her claim will be wholly successful. ADR, in contrast, allowed the parties to concentrate on the key issues, thus achieving substantial savings in time and cost.

3. In engineering disputes, this is often compounded by sophisticated technical details both in claims and counter-claims, which are likely to necessitate expert evidence discovery both adding to the duration and cost of the proceedings.
4. Another factor which makes ADR so suitable for construction, oil and other commercial disputes is that multi-party disputes can easily be coped with as the flexibility of the mediation or mini-trial process allow them to be written to suit the circumstance.
5. In major commercial agreement nowadays, there is a move towards having an agreement at the commencement of the contract signed by the parties, some of whom would not necessarily have any direct contractual relationship with each other, under which a procedure is set up for resolving all disputes. The trends in advanced economy as the commercial agreements incorporate new provision which imposes on the parties an obligation to attempt an amicable settlement before proceeding to arbitration.
6. Many commercial contracts and joint venture agreements nowadays contain provision for senior executives of the parties to meet, in event of a dispute, in an attempt to achieve an amicable settlement before proceeding to arbitration. As organisations promoting ADR techniques become established, so there will be more pressure for the introduction of clauses in contract promoting the use of ADR techniques, at least as a preliminary to adversarial dispute resolution.
7. The case of ADR is very strong when one considers the numerous advantages which it possesses over traditional adversarial proceedings – the parties' retention of control, the potential savings in cost and time and the avoidance of disruption in commercial relations which might otherwise continue to the benefit of both parties, and opportunity afforded to find a more efficient business solution.
8. ADR procedures have obvious appeal in trans-national disputes. The increasing prominent of US and Japan on the European industrial scene has heralded an increasing use of private dispute resolution method. This should be embraced and encouraged by their counterparts in this part of the world.

# CHAPTER FIFTEEN

# ARBITRATION

## 15.1 Introduction

Arbitration can be defined as a means of settling dispute between the parties involved in agreement employing some technical knowledge, e.g., professionals in the field. Also, one can confidently say that where Courts are means of providing justice to the plaintiff in the public sector, arbitration is the means of providing similar justice in the "private" sector. Before any parties are involved in an arbitration agreement, they should be familiar with what an arbitration is all about, how matters can be referred, the essentials of a valid agreement, amendments of arbitration agreement, enforcement of the arbitration agreement, revocation of the arbitration agreement and appointment of arbitrator(s) and also the evidence and proofs of evidence among others.



## 15.2 How Matters may be Referred in Arbitration

The following are the ways by which matters may be referred in arbitration:

1. The parties may voluntarily agree upon arbitration as the means of settling their dispute. This type of case is commonly known as "**Reference by Consent**".
2. They may be forced to go to arbitration because the matter is covered by an Act of Parliament which provides that such disputes shall be settled by arbitration, thus "**ousting the jurisdiction**" of the Court in the matter. This type of case is called "**Statutory Arbitration**".
3. In connection with an action in the Courts, the Court may order the parties to submit to a reference. This type of case is referred to as "**Reference by Order of the Court**".

## 15.3 What Matters may be Referred in Arbitration

In the case of reference by consent, broadly, all matters affecting the parties, even civil rights, may be referred to arbitration. It should be noted, however, that an arbitrator's award is not in itself sufficient to transfer real or personal property from one party to another. It can only direct such transfer to be made. It is generally contrary to the policy of the law to permit criminal matters to be referred to

arbitration, since crime should be punished for the common good. But, where the case is one in which the injured party has a civil remedy in damages as well as the right to institute criminal proceedings, the question of the damages he/she ought to receive from the offender can be referred by the parties to arbitration. No question arising out of an illegal contract can be referred to arbitration.

## 15.4 The Arbitration Agreement

An arbitration agreement is an agreement between two or more persons (who are parties to a contract) to settle actual disputes by referring them for discussion to a person appointed by the parties on their behalf. Usually, any person capable of being a party to a contract can enter into arbitration and arbitration agreements. These include the following:

1. A married woman may submit to arbitration as if she were "single-femesole", i.e., as if she is unmarried.
2. An infant can submit to arbitration if the matter arises out of contract to supply him/her with necessaries or to employ him/her in suitable terms or if it is for his/her benefits, otherwise, he/she cannot submit so as to be bound by the award. On attaining maturity, he/she may repudiate the agreement.
3. A relative or a friend of a person of unsound mind may consent to refer to arbitration on his/her behalf.
4. A bankrupt who agrees before bankruptcy that any differences arising out of the contract shall be referred to arbitration.



### 15.5.1 Terms of the Arbitration Agreement

No particular form of words is required to constitute a good arbitration agreement. The only essential point is that it should clearly express the intention of the parties to submit certain present or possible future disputes to arbitration. The terms of the agreement should be as clear as possible. Often, it is very short, amounting to nothing beyond an agreement to refer a particular dispute to arbitration. It might go much further and provide, for example, that the reference shall be to two arbitrators and an umpire and that the costs shall be paid by the loser, and so on. If, however, nothing is said as to these matters, the Arbitration Act supplies the deficiency by laying down a code of provisions which shall apply to all arbitrations under written arbitration agreements, unless any or all of such provisions are expressly excluded or varied by the agreement.

There must not be anything in an arbitration which tends to "**oust the jurisdiction of the Court**", i.e., to deprive the parties of their ordinary right, as subjects of the state to refer to the Court if they wish. But a clause in an arbitration agreement relating to future disputes that no right of action shall arise in respect of a particular matter until after the arbitrator's award has been given is valid. If a party who has agreed to go to arbitration in respect of a particular matter brings an action to the matter, the Court may "**stay**" the proceedings in the action on the application of the other party. The jurisdiction of the Court may always, in effect, be oust by Act of Parliament. Thus, if a particular Act provides that certain disputes arising under it shall be referred to arbitration, the parties cannot go to the Courts in respect of these matters.

It is important that all parties whose interests are involved in a dispute should be made parties to the arbitration agreement. An arbitrator has no power to prejudice the interests of a person who is not a party to the agreement. It may be desirable to make some person a party, but in any ordinary case, he/she cannot be completed to become so, and any award prejudicially affecting him/her is invalid. Where an arbitration agreement relating to future disputes provides that any claim to which it applies shall be barred unless proceedings are commended within a given time limit, the Court has power, under Arbitration Act, to extend that time for such period and on such terms as the justice of the case may require.



## 15.5.2 Essentials of a Valid Arbitration Agreement

There are quite some very important issues involved for a valid and effective agreement in arbitration. These include the following:

1. The agreement must be in writing. Oral arbitration agreements are not invalid but in practical terms they are far less advantageous.
2. The parties must sign the agreement.
3. The parties to the agreement must be capable of going into a binding contract.
4. The agreement should be of legal matters.
5. It must clearly present the issue being submitted to arbitration.
6. If under seal, it must be stamped as a deed.

### 15.5.3 Amendment of Arbitration Agreement

Once the arbitration agreement has been made, it can only be altered or amended by mutual consent of all the parties. An arbitration agreement is always often in writing and, as such, any amendment must also be in writing. Any alteration must be by a document of the same legal value as the original agreement, e.g., if the original is by deed, the alteration must be under seal also.

### 15.5.4 Enforcement of Arbitration Agreement

There are no direct means of enforcing an arbitration agreement. However, there are other means of bringing about justice which include the following:

1. If one party is standing against the agreement, the other party can sue for damages although the dispute will still be left unresolved.
2. In the case where the arbitrator has been appointed, he/she could proceed with the case in the absence of the obstructive party and the award will be binding on him/her.
3. In case where the arbitrator is to be made by a person or body and they refuse, an application can be made to the Court to appoint the arbitrator after seven (7) days.
4. Where it is provided that there shall be two arbitrators, and one of the parties refuses to appoint, then the other party can give him/her seven (7) days' notice to appoint his/her arbitrators and if this expires, he/she can then instruct his/her arbitrator to proceed as sole arbitrator and the award shall be binding on the two parties.



### 15.5.5 Revocation of the Arbitration Agreement

The agreement to go to arbitration being a contract between the parties can never be revoked y one party alone. Like any other contract, however, it can be revoked by mutual consent of the parties. The death of an arbitrator does not revoke the arbitration agreement rather another person is appointed.

## 15.6 Appointments of Arbitrator(s)

Where there is no specification, a single arbitrator is usually appointed by either the parties or the Court or the President of a country or professional body. In the case of appointment of two arbitrators, each party appoints his/her own arbitrator. However, there are cases where the two arbitrators do not reach a common award. Hence, they

(the two arbitrators) appoint a third person called an umpire whose award is now binding. Where there is a third arbitrator, each party appoints its own arbitrator and they both appoint the third arbitrator and the award of any two of them will be binding on the parties.

It is usual for each of the two parties involved to appoint his/her own arbitrator independently of his/her opponent and then notify each other. However, the appointment of an arbitrator is not complete without communication to the other party. The greatest disadvantage of using two arbitrators as against one or three is that if they disagree among themselves, there may never be any award and the whole arbitration exercise will be a futile effort. It is therefore advisable to use one or three arbitrators so that decisions are reached easily. When the nominations are complete, letters of offer to the arbitrators are exchanged.

When an umpire is appointed to sit with the arbitrators, he/she is present throughout the proceedings. He/she takes no active part and does not participate in making the award. His/her appointment is at the instance of the disputants and is paid in "quantum merit" basis. The umpire is to advise the two arbitrators if they disagree among themselves in which case each arbitrator acts as 'advocate' of his/her client before the umpire. The usual practice in the appointment of arbitrators is for the claimant to suggest name(s) to the respondent preferably stating a time limit within which the respondent is to agree or to make a counter suggestion.



Appointment by a third party or by the Court often takes weeks if not months and during this time, the parties can continue their attempts to agree. It is, however, desirable before putting forward a name to ascertain whether the named person is willing to accept the appointment and to deal with the arbitration within a reasonable time since great delay may otherwise be caused. Where Court appoints the arbitrator, the appointment is complete when the order of the Court is drawn up. In practice, however, the Court will not make the order unless it is satisfied that the person appointed is willing to act.

### 15.6.1 Acceptance of Appointment

It is argued that the joint request by the parties to the arbitrator is an offer, and that the arbitrator's unconditional agreement to act is the acceptance of that offer, so, thereafter, it is too late for him/her to impose conditions, e.g., as the basis upon which

he/she will charge his/her fees. The arbitrator's first step, following his/her acceptance of appointment, is to call for the agreement and satisfy him/herself that his/her appointment is a valid one and ensure that he/she is properly qualified. He/she should also satisfy him/herself that the dispute referred to him/her is within the scope of the agreement.

### 15.6.2 Authority/Power of an Arbitrator

An arbitrator has the general control over the whole contract of arbitration. Among these powers are the following:

1. The control of the procedure including admissions of evidence, production of documents, attendance of witness upon oath.
2. Enlargement of the time for award.
3. Statement of a case for a point of law.
4. Re-opening of the arbitration.
5. Imposing the cost.
6. Correction of clerical errors in his/her award.



### 15.6.3 Duties of an Arbitrator

The following are the summary of the duties of an arbitrator:

1. To satisfy him/herself that his/her appointment is in order so as to avoid the possibility of exceeding his/her jurisdiction.
2. To notify the parties that he/she accepted the offer.
3. To perform any condition precedent to him/her, e.g., the appointment of an umpire.
4. To ensure that justice is done between the parties.
5. Not to delegate his/her authorities.

### 15.6.4 Disqualification of an Arbitrator

Interest, misconduct and bias of an arbitrator are principal grounds for disqualification. Once it is proved that the arbitrator has interest in the subject matter of the dispute or is biased against one of the parties, then the other party has the right to apply to the High Court for his/her removal since there is that possibility that his/her state of mind would not allow him/her to do justice.

### 15.6.5 Revocation of Appointment of an Arbitrator

The authority of an arbitrator or umpire appointed by virtue of an arbitration agreement shall, unless a contrary intention is expressed in the agreement, be irrevocable except by leave of the High Court or Judge. The two parties to the dispute can jointly revoke the arbitrator's appointment. However, if one party wishes to revoke the appointment, his/her has to apply to the Court for leave to do so. The Court will only grant leave to revoke the arbitrator's appointment on the application of one of the parties provided that the other party has had such reasonable notice of the intended application as to make it possible for them to attend and oppose if he/she so desire. The principal ground for revocation must be reasonable and they include bias, interest, misconduct or delay in dispatch of duty. An arbitrator's power to act is not revoked by the death of the party who appointed him/her.

### 15.6.6 Removal of Arbitrator

Instead of revoking the appointment of the Arbitrator, the High Court could remove him/her from office. The reasons for removal are as same as revocation of appointment.



## 15.7 Comparison between Arbitration and Litigation

Literarily, Arbitration can be defined as the act of settling disputes outside the four walls of a court room, i.e., settling disputes outside the court. *According to the Section (57) (1) of the Arbitration and Conciliation ACT, Laws of the Federal Republic of Nigeria 1990, Arbitration means a commercial arbitration whether or not administered by a permanent arbitral institution; "commercial" means all relationships of a commercial nature including any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, constructing, engineering licensing, investment, financing, banking, insurance, exploitation, agreement or concession, joint venture and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail, or road.*

### 15.7.1 Arbitral Award

An arbitration award also called arbitral award is a determination on the merits by an arbitral tribunal in an arbitration, and it is analogous to a judgment in the court of

law. It is referred to as an 'award' even where all the claimant's claims fail or the award is of a non-monetary nature.

### 15.7.2 Arbitral Tribunal

An arbitral tribunal is a panel of one or more adjudicators which is convened and sits to resolve a dispute by a way of arbitration. The tribunal may consist of a sole arbitrator, or there may be two or more arbitrators, which might include either a chairman or an umpire. Members selected to serve on the tribunal are typically professionals with expertise in law and mediation.

### 15.7.3 Appointment of an Arbitral Tribunal

The parties are generally free to determine their own procedure for appointing the arbitrator or arbitrators, including the procedure for the selection of an umpire or chairman. If the parties decline to specify the mode for selecting the arbitrators, then the relevant legal system will usually provide a default selection process. Characteristically, appointments will usually be made on the following basis:



1. If the tribunal is to consist of a sole arbitrator, the parties shall jointly appoint the arbitrator not later than (for example) 28 days after service of a request in writing by either party to do so.
2. If the tribunal is to consist of three arbitrators:

    a) Each party shall appoint one arbitrator not later than (for example) 14 days after service of a request in writing by either party to do so, and
    b) The two so appointed shall forthwith appoint a third arbitrator as the chairman of the tribunal.

3. If the tribunal is to consist of two arbitrators and an umpire-

    a) Each party shall appoint one arbitrator not later than (for example) 14 days after service of a request in writing by either party to do so, and
    b) The two so appointed may appoint an umpire at any time after they themselves are appointed and shall do so before any substantive hearing or forthwith if they cannot agree on a matter relating to the arbitration.

Most arbitration clauses will provide a nominated person or body to select a sole arbitrator if the parties are unable to agree (for example, the President of the relevant

jurisdiction's Bar association or a recognized professional arbitration organization such as the LCIA, or a relevant professional organization). In default of such a provision, where the parties are unable to agree, an application for an appointment is usually made to the court. Normally a well drafted arbitration clause will also make provision for where a party to the dispute seeks to cause delay by refusing to make or agree an appointment. Often this will allow the "non-defaulting" party to appoint a sole arbitrator and for the arbitration to proceed on that basis.

### 15.7.4 Recourse Against an Arbitral Award and Setting Aside an Arbitral Award

Subject to section (29), (30) and their subsections of the Arbitration and Conciliation ACT, (LFN 1990).

**(29)** (1) a party who is aggrieved by an arbitral award may within three months-
*(a)* From the date of the award; or
*(b)* In a case falling within section 28 of this Act, from the date of the request for additional award is disposed of by the arbitral tribunal, by way of an application for setting aside, request the court to set aside the award in accordance with subsection (2) of this section.



(2) The Court may set aside an arbitral award if the party making the application furnishes proof that the award contains decisions on maters which are beyond the scope of submission to arbitration so however that if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted may be set aside.

(3) The Court before which an application is brought under subsection (1) of this section may, at the request of a party where appropriate, suspend proceedings for such period as it may determine to afford the arbitral tribunal an opportunity to resume the arbitral proceedings or take such other action to eliminate the grounds for setting aside of the award.

**(30)**. (1) where an arbitrator has misconduct himself, or where the arbitral proceedings, or award, has been improperly procured, the court may on application of a party set aside the award.

(2) An arbitrator who has misconducted himself may on the application of any party be removed by the court.

### 15.7.5 Litigation

Litigation is perhaps the direct opposite of Arbitration. It is basically the process of settling disputes within the four walls of a court and decision of the court is called judgment, as in award in arbitration. Litigation is also known as lawsuit or judicial proceedings.

# CHAPTER SIXTEEN

# STANDARD CONDITIONS OF CONTRACT

## 16.1 Introduction

There are several but different types of standard conditions of contract being used all over the world for different types of construction works ranging from building, civil engineering and industrial engineering, to heavy engineering works including sub-contracts and supply.

## 16.2 Home Contracts – Civil Engineering

These include the following:

(a) Conditions of Contract and Forms of Tender, Agreement and Bond for use in connection with works for Civil Engineering (5th Ed.) – London: Jointly issued by Institution of Civil Engineers, Association of Consulting Engineers and Federation of Civil Engineering Contractors (1973). This document is generally applicable to all works of Civil Engineering construction but is particularly relevant to ad-measurement types of contracts. It is also sometimes used for building work and with adaptation for mechanical and electrical works. It is not very relevant to supply contracts.

(b) General Conditions of Government Contracts for Building and Civil Engineering works (2nd Ed.) – Form GC/Works/1. London H.M.S.O., September 1997. This document is used by some central government departments, e.g., the Property Services Agency for Civil Engineering Works.



## 16.3 Home Contracts – Civil Engineering Sub-contracts

Printed form of sub-contract designed for use in conjunction with the main conditions of contract in 16.2a above, where the main contract is subject to those conditions. London: Federation of Civil Engineering Contractors, March 1973. This is commonly known as 'blue book', whose clauses generally fit in with the clauses of conditions of contract in 16.2a above.

## 16.4 Home Contracts – Mechanical and Electrical Engineering

(a) Model Form 'A' of General Conditions of Contract recommended by the Institution of Mechanical and Electrical Engineers and the Association of

Consulting Engineers for use in conjunction with Home Contracts with Erection – London 1976, (amended in September 1978).

(b) Model Form 'C' of General Conditions of Contract recommended by the Institution of Mechanical and Electrical Engineers for the supply of Electrical and Mechanical Goods, other than electric cables – London 1975 Edition.

(c) Model Form 'E' of General Conditions of Contract recommended by the Institution of Mechanical and Electrical Engineers for use in conjunction with Home Cable Contracts with Installation. 2nd Edition London 1973.

## 16.5 Home Contracts – Building

Standard Form of Building Contract issued by the Joint Contract Tribunal comprising representatives from the Royal Institution of British Architects, National Federation of Building Trades Employers, Royal Institution of Chartered Surveyors and six other associations, London, JCT, 1980 Edition. There are six variations as follows:



(a) Local Authority Edition with Quantities.
(b) Local Authority Edition with Approximate Quantities.
(c) Local Authority Edition without Quantities.
(d) Private Edition with Quantities.
(e) Private Edition with Approximate Quantities.
(f) Private Edition without Quantities.

It should be noted 'with Quantities' editions are not suitable for contracts involving re-measurement for which 'approximate' Quantities editions are more appropriate. Supporting documents include the following:

(a) Part 3: Fluctuations (CI 37 refers) for use with local authority editions, 1980.
(b) Part 3: Fluctuations (CI 37 refers) for use with private editions, 1980.
(c) Agreement for minor building works. October 1981.
(d) Agreement for minor building works: Supplementary memorandum. January 1980.
(e) Agreement for minor building works: Practice Note M1. January 1980.
(f) Agreement for minor building works: Practice Note M2. January 1981.
(g) Contractor's Designed portion supplement. 1981.
(h) 'With Contractor's Design' – Formula Rules. September 1980.

(i) Contractor's Designed portion supplement – Practice Note CD/2. 1981.

## 16.6 Home Contracts – Building Sub-contracts

(a) Form for use where sub-contractor is not nominated by the Architect. June 1976.
(b) Nominated sub-contract NSC/4. 1980.
(c) Nominated sub-contract NSC/4a. 1980.
(d) Nominated sub-contracts NSC/4 and NSC/4a Fluctuations. 1980.
(e) Standard Forms of nominated sub-contract (NSC/4 and NSC/4a) – Formula Rules. September 1980.
(f) Labour only sub-contract. 1973.

## 16.7 Overseas Contracts – Civil Engineering

(a) Conditions of Contract (International) for works of civil engineering construction (3rd Ed.). Issued by Federation Internationale des ingenieurs – counseils (FIDIC) in association with certain other bodies and subscribed to by 56 countries. The Hague, March 1977.
(b) Conditions of Contract for overseas works mainly of civil engineering construction (1st Ed.) issued by the Institution of Civil Engineers. London, August 1956.



## 16.8 Overseas Contracts – Mechanical & Electrical Engineering

(a) Conditions of Contract (International) for Electrical and Mechanical works including Erection on site (1st Ed.). Issued by FIDIC. The Hague, May 1963.
(b) Model Form of General Conditions of Contract for export contracts for supply of plant and machinery B1 (5th Ed.) recommended by the Institutions of Mechanical and Electrical Engineers and the Association of Consulting Engineers. London 1981.
(c) Model Form of General Conditions of Contract for export contracts for delivery with supervision of erection B2 (4th Ed.) recommended by the Institutions of Mechanical and Electrical Engineers and the Association of Consulting Engineers. London 1972.
(d) Model Form of General Conditions of Contract for export contracts (including delivery to and erection on site) B3 (3rd Ed.) recommended by the Institutions of Mechanical and Electrical Engineers and the Association of Consulting Engineers. London 1980.

In Nigeria, almost all the standard conditions of contracts mentioned above is in use depending on the type of client, consultant and most especially the contractor that is involved in the construction contract. But there are some specific standard conditions of contract made in Nigeria, among which are the following:

1. Standard Form of Building Contract in Nigeria with quantities known as **SFBCN '90** (popularly referred to as Green Book). The committee for revising conditions of contract for building and housing projects in Nigeria, May 1990.
2. Am amended version of Standard Form of Contract in Nigeria with quantities known as **SFBCN '90** (popularly referred to as Blue Book).
3. Standard Form of Contract for use in connection with Building, Civil, Electrical, Mechanical and other Engineering works in Local Government Councils in the Federal Republic of Nigeria, Nigerian Institute of Quantity Surveyors, First Edition, 1996.
4. Amended version of the ICE Form (1973) for Civil Engineering Contracts.
5. Amended version of Model Form 'A' (Electrical/Mechanical Plant Installation) for Industrial Engineering Contracts.
6. Amended version of Institute of Chemical Engineers Form for process industrial installations.

# CHAPTER SEVENTEEN

# PROFESSIONAL NEGLIGENCE

## 17.1 Introduction

Professional negligence can be defined as such a neglect of professional duty of care as to render the professional person committing the act, error or omission of neglect, liable in law to a client or some other third party who sustains loss by reason of that neglect. A professional person holds him/herself out as being qualified to do the work entrusted to him/her. If he/she fails to possess that amount of skill or experience, which is usual in the profession or if he/she neglects to use the skill, which he in fact possesses, he/she will be guilty of negligence. To succeed in an action for negligence, the plaintiff must establish:

1. That the defendant owed a duty to him/her.
2. That the defendant's error was carelessly made, e.g., that he/she omitted to check what by the general practice of the profession he/she should have checked, or that, making a check, he/she did so carelessly.
3. That the plaintiff suffered damage.



The duty in (1) above may be contractual, but it may also be imposed by the general law of tort. In ***Donoghue Vs. Stevenson (1932)***, where the appellant's friend purchased a bottle of ginger beer from a retailer in paisley and gave it to her. The respondents were the manufacturers of the ginger beer. The appellant consumed some of the ginger beer and her friend was replenishing the glass, when according to the appellant, the decomposed remains of a snail come out of the bottle. The bottle was made of dark glass so that the snail could not be seen until most of the contents had been consumed. The appellant became ill and served a writ on the manufacturers claiming damages. The question before the House of Lords was whether the facts outlined above constituted a cause of action in negligence. The House of Lord **held** that they did. It was stated that a manufacturer of products which were sold in such a form that they are likely to reach the ultimate consumer in the form in which they left the manufacturer with no possibility of intermediate examination, owes a duty to the consumer to take reasonable care to prevent injury.

The facts of this case are plainly of no direct relevance to construction professionals. However, the principle that a person owes a duty, regardless of contract, to take care

not to cause damages to persons whom he/she could foresee might be harmed by his/her actions, is of very importance. It is upon this foundation that other decisions of the Courts, of more significance to construction professionals have been based. It is clear that if a construction professional should by his/her negligence cause physical injury to person or property, he/she will be liable. In 1963, the House of Lords decided that a negligent though honest statement, or negligent advice might give rise to an action for damage for financial loss.

Also, in ***Hedley Bryne and Co Ltd Vs. Heller and Partners Ltd (1964)***, where Heller and Partners as bankers gave a favourable reference to the plaintiffs in respect of one of their customers who subsequently went into liquidation. The plaintiffs claimed damages for negligent misrepresentation. In fact, the plaintiffs failed on appeal because the reference was specifically given "without responsibility on the part of the bank or its officials". Apart from this qualification, all five Lords of appeal agreed on the defendant's liability in tort.



Lord **Reid** in his judgement said: "where it was plain that the party seeking information or advice trusted the party supplying it to exercise such a degree of care as circumstances required, and it was reasonable so to trust the person supplying information, and the latter knew or ought to have known that the enquirer was relying on him, the law imposed a duty of care on the party making the statement or giving advice".

Lord **Morrit** added: "If a professional man such as a doctor or banker voluntarily undertook a service by giving deliberate service, he was under a duty to exercise reasonable care".

Lord **Devlin** put it this way: "A promise given without consideration could not be enforced as a contract, but if the service promised was performed and performed negligently, the promise could recover in tort".

The case is of great importance to construction professional for, taken in conjunction with ***Donoghue Vs. Stevenson*** referred to above. It means that when advice is given voluntarily, or to a third party with whom the professional person has no contract, the professional person may be liable for any resulting damage either through personal injury or financial loss, if his/her advice was negligent, or if he/she made a negligent misstatement.

The case of ***Hedley Bryne and Co Ltd Vs. Heller and Partners Ltd (1964)*** established the possibility of a duty of care in relation to a negligent misstatement resulting in economic loss and opened the way for the law of tort to provide remedies for professional negligence concurrent with, and at times, extending far beyond contractual remedies. This can have serious implications for construction professionals as illustrated in the following examples.

Following the doctrine in ***Hedley Bryne***, a construction professional is someone possessed of a special skill who undertakes, irrespective of the contract, to apply that skill for the assistance, inter alia, of the prime consultant/project manager. The construction professional cannot only reasonably foresee but probably expects that the prime consultant/project manager will rely upon his/her judgement and skill (and it is reasonable for the prime consultant/project manager to so rely).

## 17.2 Death of the Professional Consultant

Whether the liability to carry out a contract passes to the representatives of a deceased person depends on whether the contract is a personal one, i.e., one in which the other party relied on the "individual skill, competency or other personal qualification" of the deceased. This is a matter to be decided in each particular case. In the case of a professional consultant with no partner, the appointment must be regarded as personal, and the executors could not nominate an assistant to carry on the business, except in so far as the respective clients agreed.



With a firm of two or more partners, the appointment may be that of the firm, in which case the death of one partner would not affect existing contracts. But the appointment may be of one individual partner, e.g., as an arbitrator, where another partner in the firm could not take over, even though he/she may be entitled to share of the profits earned by his/her partner in the arbitration.

The fact that a contract between a professional consultant and his/her client is a personal contract, if such be the case, does not mean that the professional consultant must personally carry out all the work under the contract. For example, a contract to act as arbitrator, that the professional consultant must act personally in all matters. In other cases, such as the drawing of a bill of quantities, the professional consultant may make use of the skill and labour of others, but he/she takes ultimate responsibility for the accuracy of the work.

## 17.3 Death of the Client

The rule referred to in the previous paragraph as to a contract being personal applies equally in the case of the death of the project owner. Here, the contract is unlikely to be a personal one, and the executors of the project owner must discharge his/her liabilities under the project contract and for the fees of the professionals employed. The fact that the appointment of the professional consultant was a personal one will not be material in the case of the death of the project owner.

# CHAPTER EIGHTEEN

# RIGHT OF PAYMENT AND TIME OF COMPLETION

## 18.1 Right of Payment

Almost all transactions give rise to rights to payment.

Example: I buy a car from you, but we agree I will pay you later. You now own a right to be paid by me. Rights to payment are either PROCEEDS of secured collateral, or can be COLLATERAL in their own right. The housing Grants, construction and Regeneration ACT 1996 also known as the construction Act include provisions to ensure that payments are made promptly throughout the construction chain. These provisions include:

1. The right to be paid in interim, periodic or stage payments.
2. The right to suspend performance for non-payment and to claim costs and expenses incurred and extension of time resulting from the suspension.
3. Pay when certified clauses are not allowed, and the release of retention cannot be prevented by conditions within another contract.



In addition, there are specific provisions in relation to the procedures for making payments.

1. The client must issue a payment notice within five days of the due date for payment, even if no amount is due. Alternatively, if the contract allows, the contractor may make an application for payment, which is treated as if it is the payment notice.
2. The client must issue a pay less notice if they intend to pay less than the amount set out in the payment notice, setting out the basis for its calculation.
3. The notified sum is payable by the final date for payment.
4. If the client (or specified person) fails to issue a payment notice, the contractor may issue a default payment notice. The final date for payment is extended by the period between when the client should have issued a payment notice and when the contractor issued the default payment notice. If the client does not issue a pay less notice, they must pay the amount in the default payment notice.

## 18.2 Completion Time

Most construction contracts set a date by which the works described in the contract must be completed (the completion date or contract completion date). This is not the date by which all obligations under the contract have to be discharged, but the date by which 'practical completion' must be certified. That is, the date by which the works have been completed and the client can take possession of the site, albeit there may be very minor items outstanding that do not affect beneficial occupancy by the client. Construction contracts usually provide for completion by a certain date or within a certain period of time. Some construction contracts may even provide that construction work is to be completed within a specified number of working days or in accordance with a construction schedule, critical path method or otherwise.

There can be many legal problems associated with construction completion times. This is a fertile field for lawyers involved in construction-related practices. Therefore, astute construction people should make every effort to protect themselves and thus avoid problems, attorney's fees and related expenses. It is extremely rare to find a construction contract that provides for a fixed or a determinable completion time without a companion clause excusing the contractor from delays occasioned through circumstances beyond his control. The contractor should insist upon such an excuse clause. The contract clauses which excuse contractor's delays because of circumstances beyond his control are called "force majeure" clauses; force majeure meaning a superior or irresistible force.



Typical delay excuse clauses provide that the contractor is excused for periods of delay occasioned because of delaying activities of the owner or his representative, strikes, shortages or unavailability of workers or materials, fires, floods, tornadoes, unforeseen casualties, unanticipated adverse weather conditions, other acts of God, riots, civil unrest, wars, transportation delays and other conditions beyond the reasonable control of the contractor. In negotiating construction contracts, the contractor should use care to assure that delays will be excused and time for completion extended for any period of delay occasioned because of circumstances over which the contractor would have no control.

On the other hand, the owner will wish to assure that the contractor's completion time will not be extended where the contractor has failed to fix a realistic completion time or diligently proceed with construction. Also, the owner will wish to assure that

the contractor's completion time will not be extended because of circumstances caused by the contractor - for example his failure to timely order long-lead equipment and material items or to properly schedule and coordinate the work.

Naturally, the contractor should endeavor to agree only to a completion time which he has carefully considered in light of his peculiar knowledge and experience. If he lacks the knowledge or experience necessary to make a realistic completion time estimate, the contractor should consult others who have the required expertise. The owner should have a realistic completion time schedule so that he may plan his contemplated occupancy, financing and other considerations in light of reasonable completion projections.

In circumstances where no completion time is fixed in the contract, the law generally presumes that construction will be completed within a reasonable time calculated with respect to comparable construction work completed in the same general locality and under similar construction circumstances. Because of the uncertainty involved, it is frequently advisable and beneficial to both parties to include a fixed or ascertainable completion time in the construction contract.



One of the main areas of dispute over completion time is the definition of "completion" itself. Contract language frequently contains terms such as final completion, substantial completion or simply completion but without defining any of those terms. Is completion or final completion that stage of progress when absolutely everything required under the construction contract has been fully done?

Substantial completion is often defined as that stage of completion when the project can be used by the owner for its intended purpose. Surely an owner could use a hotel facility for its intended purpose long before any landscaping work has been done. But is that the time intended by the owner who had expected not only finished rooms, lobby and amenities, but also an aesthetically complete project which would entice business?

In negotiating construction contracts, the parties should pay careful attention to the definition of terms relating to completion times. Terms left undefined could cause later problems. Many construction contracts provide that a contractor will not be entitled to a time extension unless within a certain period of time following a

construction delay, he gives written notice to the owner and requests a time extension.

Some courts are stringent in their interpretation of these notice provisions, ruling that if notice has not been timely given the contractor's completion time cannot be extended no matter what. Other courts are more liberal, ruling that if the delay was caused by the owner or if he knew or should have known of its existence, the requirement for written notice is not essential. Since a legal result may not be easily predictable, contractors should use great care in following the contract provisions relating to time extensions. They should also use the same degree of care in documenting the amount of delay experienced.

Simply because there may have been a five-day excusable delay in obtaining certain materials does not necessarily mean that the contractor is entitled to a five-day extension. Instead, the contractor may be entitled to no extension or to an extension of time in excess of five days. The length of extension (delay) would depend upon how critical those materials were to construction completion and the impact resulting from the procurement delay.



The impact may result in a longer period of excused delay because of the so-called domino effect. For example, the delay in obtaining materials may, in turn, delay several other crafts whose work is to follow, magnified by each different craft involved. Construction scheduling experts, including those employing the critical path method, are frequently able to determine the cause and effect of delays encountered in construction. Their use may assist the contractor in obtaining reasonable time extensions or even additional compensation for experienced delays.

Owners always seem to complain that construction work is never completed on time. Whether this is completely true is certainly debatable. In any event, contractors should build in protections against having to bear the risk and losses attributable to delays experienced without fault on their part. The time to fashion these protections is during contract negotiations and before the construction contract is signed. On bid work, the contractor must simply analyze the owner's completion time provisions and assess his risks accordingly.

# CHAPTER NINETEEN

# THE CONCEPTS OF VARIATION, EMPLOYER'S APPROVAL AND CERTIFICATES

## 19.1 An Overview of Variation in Construction

Variation (sometimes referred to as a variation instruction, variation order (VO) or change order), is an alteration to the scope of works in a construction contract in the form of an addition, substitution or omission from the original scope of works. Almost all construction projects vary from the original design, scope and definition. Whether small or large, construction projects will inevitably depart from the original tender design, specifications and drawings prepared by the design team. This can be because of technological advancement, statutory changes or enforcement, change in conditions, geological anomalies, non-availability of specified materials, or simply because of the continued development of the design after the contract has been awarded. In large civil engineering projects variations can be very significant, whereas on small building contracts they may be relatively minor. Variations may include the following:



i. Alterations to the design.
ii. Alterations to quantities.
iii. Alterations to quality.
iv. Alterations to working conditions.
v. Alterations to the sequence of work

Variation may also be deemed to occur if the contract documents do not properly describe the works actually required. Variations may not (without the contractor's consent):

- Change the fundamental nature of the works.
- Omit work so that it can be carried out by another contractor.
- Be instructed after practical completion.
- Require the contractor to carry out work that was the subject of a prime cost sum.

In legal terms, a variation is an agreement supported by consideration to alter some terms of the contract. No power to order variation is implied, and so there must be express terms in contracts which give the power instruct variations. In the absence of such express terms the contractor may reject instructions for variations without any legal consequences. Variation instructions must be clear as to what is and is not included, and may propose the method of valuation.

## 19.2 Employer's Approval

### 19.2.1 Use of Approval/Satisfaction Clauses

Much of construction involves the use of professional skill and judgment in deciding whether work has achieved a particular standard or in valuing the quantity of properly constructed work. This difficulty is resolved in many standard forms by adopting the opinion, satisfaction or approval of the Employer or the Architect/Engineer as the appropriate standard. Such statements of opinion, satisfaction or approval will not usually be final or binding on the parties without express and clear provisions in the contract, and are usually simply intended to be administrative.



In some standard forms a decision on a dispute may become final and binding by the operation of a time bar if steps are not taken to resolve the dispute by legal proceedings. Similarly, some standard forms make the Final Certificate conclusive in legal proceedings as evidence of the acceptability of the quality and standard of the work and to entitlements to extension of time under the contract, subject to objection and commencement of legal proceedings within a specified period. The question remains then to what extent opinions, approvals and statements of satisfaction are binding on the parties and the standard to be adopted.

It is suggested that if the contract does not contain an objective standard to be applied, it may be that the parties intended that the standard of satisfaction is that of an objective Architect/Engineer in which case the decision has to be reasonable. If instead the intention was that the Architect/Engineer should adopt his own standard, then the requirement is likely to be that the decision must be made in good faith.

Reasonableness may not be the appropriate standard where the contract expressly states that the Employers own particular view is intended to be satisfied, as for

instance on matters of decoration or finish in a residential property. In such a case any decision will need to be made in good faith and not dishonestly.

## 19.2.2 The Standard of Satisfaction/Approval

If the work satisfies the Architect/Engineer, but is below the standard specified in the Contract, then whether or not the contractor is liable for defective work will depend upon the interpretation of the contract as a whole. This depends on whether the obligation to satisfy the Architect/Engineer is interpreted as an overriding obligation or simply cumulative or complementary to the specified standards. The importance of establishing the nature of the obligation to satisfy the Architect/Engineer and how the nature of the obligation may differ depending upon the particular clause under examination.

## 19.2.3 Types of Approval/Satisfaction Clauses

Modern contracts not only require the Architect/Engineer to approve construction work carried out, but also to approve drawings prepared by the Contractor, possible suppliers of materials and possible subcontractors. In addition, the assessment of the amounts due in Interim Payment Certificates requires the Architect/Engineer to decide whether work has been satisfactorily carried out, and this implied approval will trigger payments to subcontractors. In addition, the issue of the Final Certificate under the Contract will normally demonstrate acceptance of the Works. In each of these cases the legal effect of approval depends upon the particular clause and the terms of the contract.



### 19.2.3.1 Defects

It is unusual for contracts for construction only, to state that work is to be carried to the satisfaction of the Employer as opposed to an independent third party such as an Architect/Engineer. In Subcontract forms it is usual to find that work is to be to the satisfaction not only of the Architect/Engineer under the Main Contract, but also of the contractor. In design & build contracts and Architect/Engineer is not usually appointed and the contractor's responsibility is specified by reference to the satisfaction of the Employer, or not at all instead relying only on a fitness for purpose obligation. If material samples of the standard specified are required to be submitted for approval before work has been carried out, then compliance with the approved sample may override any other description in the contract, subject to express terms to the contrary.

**19.2.3.2 Suppliers**

In some cases, the specification of the material may be in the form of a named supplier. In that case, whether or not the Architect/Engineer is required to approve a supplier requested by the contractor depends upon the terms of the Contract.

**19.2.3.3 Drawings and Design**

Most standard forms provide that approval does not relieve the contractor from his responsibilities. If an Architect/Engineer is involved in checking or approving drawings and designs, by doing so he may incur liability to the Employer for any defective design. The extent of any such liability depends upon the facts and the terms of the contract between Employer and Architect/Engineer.

**19.2.3.4 Interim Payment Certificates as Approval**

Many standard forms of contract provide a certification system for payments. The amount stated in the Certificate for payment by the Employer normally involves a degree of assessment by the Certifier based on his personal opinion. The parties have agreed that he will be the particular expert to carry out this function.



Two types of certificates need to be differentiated, namely interim and final certificates. Most standard forms of contract state an entitlement on the part of the contractor to interim payment. These payments assist in the contractor`s cash flow, but the actual determination of the contractor`s entitlement is not made until the final certificate. The interim payments are therefore sums paid on-account of whatever the contractor might eventually be entitled to recover from the Employer. Most standard forms make the issue of a certificate a condition precedent to the contractor`s right to payment.

It is a matter of fact whether payment for work carried out is a statement of acceptance or approval. Most contract provisions for interim certification and payment are based on cumulative valuation of work done, and are only for payments on account. They are neither binding nor conclusive of acceptance of the work.

**19.2.3.5 Final Certificates as Approval**

Some standard forms of contract include clauses which make conclusive the Final Certificate in relation to the fulfillment of specified obligations under the Contract. The Courts have upheld such clauses and given effect precisely to the terms of the

clause, sometimes to the surprise of the construction industry. In all cases it is a matter of construction of the particular contract.

Most standard forms of contract identify the Final Certificate as conclusive evidence of the completion of a specified obligation. This is not the same as discharging the Contractor from liability to the Employer for breach of the obligation. In practice the Final Certificate will prevent the Employer from establishing the Contractors liability, even if it is subsequently found that the Final Certificate should not have been issued. In that case the Employer may seek to recover from the Architect. The issue which then arises is whether the Architect has a right of contribution and indemnity from the contractor pursuant to the Civil Liability (Contribution) Act 1978, and whether the conclusive effect of the Final Certificate is a complete defense.

#### 19.2.3.6 Standard Forms

The modern trend is to rely on Quality Assurance Systems for checking of drawings and designs, and to adopt objective testing standards instead of the subjective opinion of a third party. Nonetheless the Architect/Engineers approval is still adopted in some standard forms, particularly in the building industry. The device of the conclusive effect of the Final Certificate is used to achieve finality particularly in processing and mechanical/electrical works, but less so in building works.



## 19.3 Architect's Certificate

An Architect's certificate can be defined as the document that an architect will use to confirm that a property has been constructed to its original specification. There are a number of different kinds of Architects Certificate. An Interim Certificate will be issued by an architect during the course of construction to confirm that work has been done to their satisfaction and that the client should make a stage-payment to the contractor. A Practical Completion Certificate will mark the conclusion of the construction (notwithstanding latent defects) and transfer the possession of the building to the client; and a Final Completion Certificate will be issued by the architect when the contract has been fully and properly completed. A Professional Consultant's Certificate is provided by a professional consultant (including architects), confirming its conformity with Building Regulations and the contractual instructions for the purposes of securing a mortgage on the property.

# CHAPTER TWENTY

# THE CONCEEPTS OF LIQUIDATED DAMAGES, ASSIGNMENT AND NOVATION IN CONSTRUCTION CONTRACTS

## 20.1 Liquidated Damages

Liquidated damages are a monetary compensation for a loss, detriment, or injury to a person or a person's rights or property, awarded by a court judgment or by a contract stipulation regarding breach of contract. Generally, contracts that involve the exchange of money or the promise of performance have a liquidated damages stipulation. The purpose of this stipulation is to establish a predetermined sum that must be paid if a party fails to perform as promised.

Damages can be liquidated in a contract only if (1) the injury is either "uncertain" or "difficult to quantify"; (2) the amount is reasonable and considers the actual or anticipated harm caused by the contract breach, the difficulty of proving the loss, and the difficulty of finding another, adequate remedy; and (3) the damages are structured to function as damages, not as a penalty. If these criteria are not met, a liquidated damages clause will be void.



The American Law Reports annotation on liquidated damages states, "Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in light of the anticipated or actual harm caused by the breach. … A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty"

A penalty is a sum that is disproportionate to the actual harm. It serves as a punishment or as a deterrent against the breach of a contract. Penalties are granted when it is found that the stipulations of a contract have not been met. For example, a builder who does not meet his or her schedule may have to pay a penalty. Liquidated damages, on the other hand, are an amount estimated to equal the extent of injury that may occur if the contract is breached. These damages are determined when a contract is drawn up, and serve as protection for both parties that have entered the contract, whether they are a buyer and a seller, an employer and an employee or other similar parties. The principle of requiring payments to represent

damages rather than penalties goes back to the Equity courts, where its purpose was to protect parties from making unconscionable bargains or overreaching their boundaries. Today section 2-718(1) of the Uniform Commercial Code deals with the difference between a valid liquidated damages clause and an invalid penalty clause.

Liquidated damages clauses possess several contractual advantages. First, they establish some predictability involving costs, so that parties can balance the cost of anticipated performance against the cost of a breach. In this way liquidated damages serve as a source of limited insurance for both parties. Another contractual advantage of liquidated damages clauses is that the parties each have the opportunity to settle on a sum that is mutually agreeable, rather than leaving that decision up to the courts and adding the costs of time and legal fees.

Liquidated damages clauses are commonly used in real estate contracts. For buyers, liquidated damage clauses limit their loss if they default. For sellers, they provide a preset amount, usually the buyer's deposit money, in a timely manner if the buyer defaults.



## 20.2 Assignment and Novation

Transferring an interest in a construction contract from one party to another can be done by either assignment or novation. The differences are minimal but important to understand, as the assignment of an interest when it could be novated might render one party liable for the contract if the other party is unable to perform their obligations.

Assignment is the right to transfer ' choses in action ' defined as 'all personal rights of property which can only be claimed or enforced by action and not by taking physical possession'. This definition includes benefits arising under a construction contract such as right to payment, but not burdens such as the obligation to pay. The definition also includes claims for breach of contract.

A common error is to assume that the right to assign must be agreed as part of a contract, like a novation. Assignment is a unilateral right created by statute, Section 136 of The Law of Property Act 1925 or by the law of equity (law developed by the Chancery Division of the High Court of England and Wales). However, the right to assign can be excluded, or restricted, by contract, for example, it is common in collateral warranties to restrict to one assignment without the written permission of

the warrantor. By comparison, novation is a process in which the contractual rights and obligations are transferred to a third party. The benefits and the burdens can be transferred by a novation agreement, rather than just the benefits as with assignment. In building design and construction, novation normally refers to the process by which design consultants are initially contracted to the client, but are then 'novated' to the contractor.

# CHAPTER TWENTY-ONE

# THE CONCEPT OF BANKRUPTCY

## 21.1 Introduction

If a person is insolvent that he/she cannot settle his/her debts and it seems unlikely that he would be able to settle it in the nearest future, the proceedings by which the court appoints an officer to take over his assets, realised and distribute them among the creditors is called bankruptcy. The person whose asset are taken over, realised and distributed is called a bankrupt. Generally, the distribution of bankrupt's asset discharges him from further liabilities.

## 21.2 Capacity of a Bankrupt

This is governed by the ordinary law of contract. In this light, we would be looking at capacity in the following context:

1. **Minors:** A minor can be declared bankrupt over any enforceable contract but not all contracts made by minors are enforceable against him as a result of the protection afforded by the infants Relief Act 1874.
2. **Person of unsound mind:** Such persons may be declared bankrupt where the debts are enforceable against him by the general law relating to contract.
3. **Corporate bodies:** Corporate bodies, including registered companies cannot be declared bankrupt but it can be wound upon by statutory procedures.

# PART IV

# BASICS OF SPECIFICATION WRITING IN CONSTRUCTION PROJECTS

**CONTENTS**

# CHAPTER TWENTY-TWO

# BASIC DEFINITIONS

## 22.1 Specification

"Specification" is used interchangeably with "Preambles" especially in the Commonwealth. Specifications are clauses inserted in a Bill of Quantities or assembled as a separate document describing the quality of materials and workmanship required for a work. Specification clauses cover matters relating to specific work sections that should be brought to the attention of the Estimator. Such matters will affect rates for measured works or items.

Specifications are by their very nature a device for organizing the information depicted on drawings. The specifications break down the interrelated information shown on the drawings into separate, organized, orderly units of work which can be referred to as technical sections of the specifications. Specifications would generally describe the following:



i. Type of quality of material equipment and fixtures.
ii. Quality of workmanship.
iii. Methods of fabrication, installation and erection.
iv. Tests and requirements of British Standards and Codes of Procedure.
v. Catalogue references for manufacturers equipment.

In spite of the different methods of transmitting information that the documents should complement one another. Specifications should not overlap or duplicate information contained on drawings. Generally, each practicing office invariably establishes its own policy and in practice, this is the basis used for carrying out project specification.

## 22.2 Contract Documents

Contract documents are the **written** or **electronic** documents that relate to the concept, design, execution and possibly the maintenance of the use of construction projects. Contract documents are exclusive to particular projects, and carry legal implications, being legally binding. Examples of contract documents are Conditions of Contract, Articles of Agreement, Form of Tender, Performance Bond and Contract Drawings among others.

## 22.3 Conditions of Contract

Conditions of Contract is a framework of legally binding clauses that provide for the treatment of most of the common occurrences on construction projects. It is customary to simplify construction contracts by adopting the Standard Form of Contracts.

## 22.4 Articles of Agreement

Articles of Agreement are a set of articles, sometimes up to seven (7) or more, that the parties to the contract assent to. Such parties cover the **personalities** involved, settlement of disputes, definition of terms, contract duration, contract sum, etc.

## 22.5 Form of Tender

The Form of Tender is an official record of a contractor's offer to execute the job. It contains the Contractor's tender sum, time for completion of the work, and any **promises** required by the client (e.g., keeping offer open for certain period of time).

## 22.6 Instruction to Tenderers

The Instruction to Tenderers is not part of contract documents but it is a part of tender documents. It provides guidance to tenderers to enable them tender on a uniform basis.



## 22.7 Performance Bond

Performance Bond is an undertaking by a financial institution (bank or insurance house) to reimburse the Client in the event of the Contractor reneging on the contract. Tender bonds bind the Contractor to his offer for a stated period of time.

## 22.8 Contract Drawings

Contract Drawings are working drawings providing graphical illustrations of how the building will be constructed. Contract Drawings may be Architectural, Engineering, Structural, Services, etc. in nature.

# CHAPTER TWENTY-THREE

# FUNCTIONS AND PROCEDURES OF SPECIFICATION WRITING

## 23.1 Functions of Specification

Specifications serve the following functions in construction related contracts:

i. Specification clauses prepared by the Architect are used by the Quantity Surveyor in preparing Bill of Quantities.
ii. Specification clauses of materials and workmanship prepared by the Quantity Surveyor are used in conjunction with bill items and the drawings by the Contractor to prepare a tender bid.
iii. Specification clauses in accepted tender documents are used by the clerk of works, site agents and foremen during the execution of the contract as part of Architect's instructions for carrying out the work.
iv. In exceptional cases of maintenance and repair contracts, Contractors would normally prepare their tender bids from drawings and specification clauses.



## 23.2 Procedures for Specifying Items

The procedures for specifying items can be broken down into four classes namely: General principles; Techniques and Language; Use of Capitals; and Words and Phrases Used in Specification Writing.

### 23.2.1 General Principles

The following principles should be of great help to the Quantity Surveyor is establishing a procedure for writing specification clauses:

i. Review the preliminary or outline specifications to obtain a better understanding of the project.
ii. Review the preliminary drawings to visualize the project and obtain a better insight.
iii. Identify the various consultants for the specialized aspect of the work as the specification write is the focus of the different inputs.
iv. Review the working drawings of all the items and list them on worksheet under the appropriate section titles.

v. Discuss questions relating to these items with the Architect and determine what will be shown on the drawings and what will be specified.
vi. Commence the actual writing of the specifications.

### 23.2.2 Techniques and Language Used in Specification Writing

Generally, the first requirement in writing a specification is a complete knowledge of the subject matter, such details of the constructional techniques, the values and properties of materials to be used, site conditions and local and legal requirements. The following basic rules are worth noting:

i. Do not write anything down until you have a clear mental picture of the work to be carried out.
ii. Avoid ambiguity.
iii. Avoid loose phrasing and phraseology.
iv. Do not accept that old style documents must always be correct, learn to simplify and clarify. Try to produce a document that can be read and assimilated quickly.
v. Avoid repetition and unduly long clauses.



Although the specification may be one of the contract documents that becomes a legal document, legal phraseology is not necessary or desirable. A statement in good clear English may be more definite and understandable to the Estimator of Foreman than legal wording.

Old fashioned phraseology should be avoided and clear technical language substituted. Sentences should be concise and short, written with simple words. It is more important to present facts clearly than to develop an elegant style of writing.

### 23.2.3 The Use of Capitals in Specification Writing

In specification writing, follow the general rules regarding the use of capitals for the first letter in words beginning a sentence and in addition capitalize the following:

a) Parties to the contract including Client, Contractor, Architect, Engineer, Quantity Surveyor, etc.
b) Areas of the building such as Bedroom, Living Room, Office, Toilet, etc.
c) The contract documents such as Working Drawing, Specification, Conditions of Contract, Bills of Quantities, etc.

d) Grades of materials such as 'Quality B', 'Engineering Bricks', 'Dangote Portland Cement', Sapele Timber', etc.

### 23.2.4 Words and Phrases Used in Specification Writing

The following are the examples of the standard words and phrases required for use in the writing of specifications:

a) **Shall:** Use "shall" with acts of the contractor or with labour, materials and equipment to be furnished by the contractor.

**Example**

**Poor:** Contractor will install air-conditioning units.

**Better:** Contractor shall install air-conditioning units.

**Poor:** Concrete will be laid on undisturbed soil.

**Better:** Concrete shall be laid on undisturbed soil.



b) **Will:** Use "will" in connection with the acts of the Client or the Architect.

**Example**

**Poor:** Lighting fittings shall be supplied by the Client.

**Better:** Lighting fittings will be supplied by the Client.

c) **Must:** Avoid the use of "must" and "is to" and substitute the word "shall" or "will" to prevent the interference of different degrees of obligation.
d) **Any:** For the reason that "any" implies choice, it should not be used when a choice is not intended.

**Example**

**Poor:** Any materials condemned or rejected shall be removed.

**Better:** Materials condemned or rejected shall be removed.

e) **Either:** The word "both" should be substituted for "either" when no choice is intended.

**Example**

**Poor:** Glass panels shall be installed on either side of the Main Entrance.

**Better:** Glass panels shall be installed on both sides of the Main Entrance.

f) **All:** The use of this word is frequently unnecessary.

**Example**

**Poor:** Store all sanitary fittings.

**Better:** Store sanitary fittings.

g) **Same:** Do not use "same" as a pronoun.

**Example**

**Poor:** If materials are rejected, Contractor shall replace same at no additional cost.

**Better:** Contractor shall replace rejected materials at no additional cost.

h) **Said:** Do not use "said" as an adjective.
i) **And/Or:** The words "or" and "both" should be used in place of "and/or".



**Example**

**Poor:** Bricks shall be made of clay and/or shale.

**Better:** Bricks shall be made of clay, shale or a combination of both.

j) **Etc.:** The use of "etc." is vague and throws unnecessary responsibility on the Contractor. It often means that the specification writer is not sure or does not know the complete fact.
k) **To the satisfaction of the Architect:** This and other variations of the phrase should be avoided. Rather specify what the Architect's requirements are or definitely what will be satisfactory or acceptable to the Architect. Do not leave the Contractor guessing and at the mercy of the Architect's decision.
l) **Equal and Approved:** This phrase and others of a similar nature are too often seen in a specification. They can be meaningless and dangerous as the Contractor has no way of knowing what an individual Architect would consider equal to the brand specified.

**Example**

**Poor:** Iron mongery shall be Union or other equal and approved types.

**Better:** Iron mongery shall ……. as manufactured by Messrs. …… Limited.

m) **A work manlike Job:** A high class job, a first-class job and other similar phrases should not be employed. The type of workmanship should be described in detail.

n) **Numerals:** The practice of using numerals when writing out a specification is advised.

**Example**

**Poor:** The storey height is three and half metres.

**Better:** The storey height is 3.50 metres.

o) **Contractor:** It is usually a better practice in specification writing not to use "Contractor" as the subject of a sentence. Instead, make material or method the subject matter.



**Example**

**Poor:** Contractor shall lay bricks in stretcher bond.

**Better:** Bricks shall be laid in stretcher bond.

p) **Comply with:** When reference is made in a specification to a standard, it is better to say that the material "shall meet the requirements of" or "shall be in accordance with" rather than "it shall comply with" the standard.

# CHAPTER TWENTY-FOUR

# TYPES OF SPECIFICATIONS

## 24.1 Introduction

Specifications may be separated into categories based upon three (3) different criteria – Wording, Purpose and Stereotypicality. Wording of the specification might provide specifications that refer to particular products, or that are extendable or alterable. Purpose of specifications produces specification that might be traditional or statutory. Stereotypicality refers to originality of specifications.

## 24.2 Types of Specifications (According to Wording)

The following are the examples of specification types according to wording:

### 24.2.1 Performance Specifications

Performance specification details the end product rather than the process. A good example is specifying a roof that admits sunlight rather than the process of adding roof-lights to the roof.



### 24.2.2 Brandname Specification

Brandname specification is a type of specification that names the product or products that conform to the required standard, e.g., "Ashaka Cement", "Dangote Cement", etc. rather than just cement.

### 24.2.3 Descriptive Specification

The Descriptive specification incorporates the description of a product. It provides more than a minimum performance. E.g., "Hollow, machine-made, vibrated sandcrete blocks" rather than "Sandcrete blocks of cement/sand".

### 24.2.4 Open Specification

Open specification allows products from all approved manufacturers. Where the quality has been verified by independent or statutory bodies, this specification type is ideal (e.g., SON approved materials, ISO 9002, NAFDAC, etc.).

### 24.2.5 Closed Specification

Closed specification is a limiting specification. Only the stated manufacturer can provide the product. In case of patented products, this is an ideal specification type.

### 24.2.6 Reference Specification

Reference specification incorporates a reference standard or code of practice in it. It is used to reduce lengths of specifications while still ensuring sound quality (e.g., ISO 9002, BS 5559, etc.).

### 24.2.7 Combination Specification

Any number of arrangements of the six (6) types of specifications above are referred to as combination specifications when they are integrated into one.

## 24.3 Types of Specifications (According to Purpose)

The following are the examples of specification types according to purpose:

### 24.3.1 Specifications for New Works

Specifications for new works are generally written in trade form, broken down into traditional work sections. This specification follows the Standard Methods of Measurement (SMM) format, and is most popular.

### 24.3.2 Specifications for Maintenance or Alteration Works

These are specifications that owing to the detail required, the work is usually taken room by room or compartment by compartment. Specific work sections can be taken under each room or compartment.



### 24.3.3 Specifications for Statutory Financial Grant

Where an application is being made for statutory financial grants, then the specification must separate “improvements” from “repairs”. Cash columns are provided for the entering of amounts against specified items of work. Table 24.1 gives an illustrated example.

Table 24.1: Sample of Specification for Statutory Financial Grant

| ITEM | DESCRIPTION | AMOUNT (=N=) |
|---|---|---|
| | **WALL** | |
| A | Scrape off painted and rendered surface of existing 225mm hollow sandcrete block work measuring 75m$^2$. | 276,000.00 |
| B | Apply 6mm thick Cement and Sand (1:6) rendering on existing hollow sandcrete block work. | 1,350,000.00 |
| C | Prepare and apply two 3 coats of Fine Gauge emulsion paint on rendered hollow sandcrete block work. | 1,107,000.00 |
| | **TOTAL** | **2,484,600.00** |

## 24.4 Types of Specification (According to Stereotypicality)

Where specifications are original and purpose-made for a particular project, they are referred to as Purpose-made Specifications or Standard Specifications.

### 24.4.1 Purpose-made Specifications

These refer to works of original and exclusive nature that is not common. Jobs utilizing patented processes fall under this class.



### 24.4.2 Standard Specifications

Standard Clauses for specifications are available (e.g., National Building Specifications). These do not provide in-depth information but just general descriptions.

## 24.5 Relationship between the Three Types of Specifications

The three types of specifications (i.e., according to wording, purpose and stereotypicality) are very much interrelated. Both specification types according to purpose and stereotypicality are directly related with specification type according to wording. This relationship is illustrated in Figure 24.1:

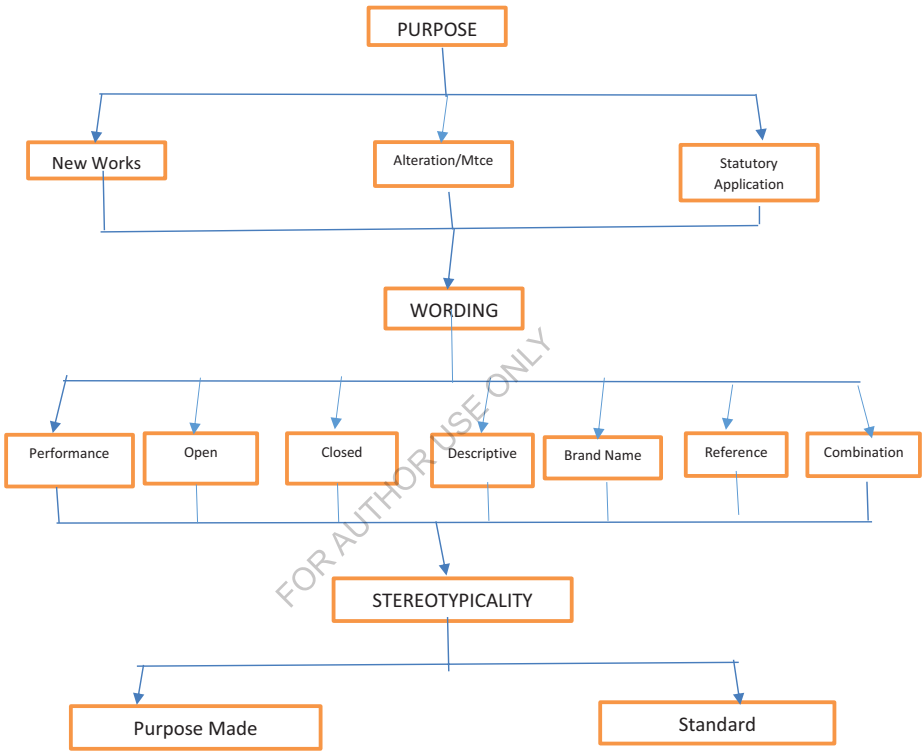



Fig. 24.1: Relationship between Specification Types

# CHAPTER TWENTY-FIVE

# CONTEXT AND CONTENT OF SPECIFICATIONS

## 25.1 Overview of the Context of Specifications

This is the area of coverage of specification. In view of this, specifications exist in a context that includes other contract documents. The interrelationships that arise as a result of such a context are important. These interrelationships are illustrated in Figure 25.1.

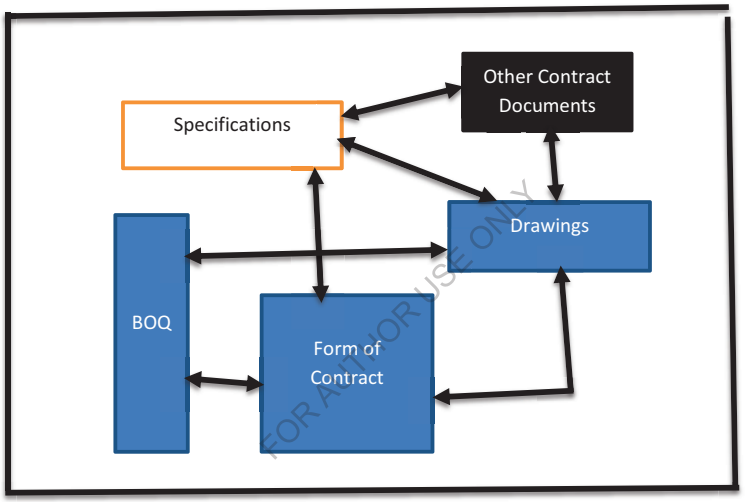


Fig. 25.1: The Context of Specifications

**KEY:**

**Legal Boundary of Contact Documents**

**Legal Relationships between Documents**

As shown in Figure 25.1, the relationships of the specification to three (3) contract documents are especially important. These relationships are discussed below.

### 25.1.2 Specifications and Contract Drawings

Contract drawings prepared by the Architect/Engineer are diagrammatic representations of the works as it is to be constructed. Specifications are written levels of quality that both the materials and the method of construction shown on the drawings must reach. Specifications thus amplify the drawings, may name acceptable sources of the drawn materials, and must, in ideal situations, be read in conjunction with the drawings. At times, specifications make up the whole of the contract documents. This is usually for very small repair/extension jobs, but it shows that specifications can replace the working drawings, under certain circumstances.

### 25.1.3 Specification and the Contract Bill

The contract bills of quantities are a form of specification incorporating quantities and prices. Specifications generally do not incorporate quantities (BOQ). However, where no BOQ exists, the specification is supreme. Therefore, both the BOQ and the Specifications have legal effect, being capable of enforcement. They are both used as legal contract documents, and negligence in their preparation can have serious legal consequences.



### 25.1.4 Specifications and the Form of Contract

It is most customary in Nigeria to use the JCT Standard Form of Building Contracts for legal underpinning of contracts. Other forms include that of the FMWH, NIA, etc. No matter the Form of Contract employed. It will always feature Provisional Sums and Prime Cost Sums. It is essential that adequate specifications are included to cover the costs of any incidental expenses.

## 25.2 Overview of the Content of Specifications

Specifications are usually designed in the same format as the Building and Engineering Standard Method of Measurement. This format is as given below:

### 25.2.1 General Clauses

This conforms to Section A of the SMM but in the BESMM it conforms to Parts 1 – 3. This includes items for general rules for measurements, prime cost sums (PC sums), contract drawings, specifications, method related charges, construction risks, etc.

### 25.2.2 Preliminary Clauses

This conforms to Section B of the SMM but in the BESMM it conforms to Parts 2 – 3. This clause covers items required for site set up. Both clauses are usually combined, and the number of such clauses might be well over a hundred for a medium sized/priced project.

### 25.2.3 Material and Workmanship Clauses

These clauses cover the characteristics of materials required, as well as the procedure for constructing the works, in so far as it affects the quality of the works. Ideally, these clauses should be separated into general (referring to all of the work item as a whole), material (referring to only the material requirements of the work) and workmanship (referring to the human labour aspect of the job). Material and Workmanship clauses extend from SMM Section C through X but Material and Workmanship Clauses cover Part 4.1 (Building Works) and Part 4.2 (Civil/Industrial Engineering Works and the likes) of the BESMM. See the Appendix Section for some list of Headings usually covered in specifications and for specimen clauses.

# CHAPTER TWENTY-SIX

# THE PRACTICES GUIDING SPECIFICATION WRITING

## 26.1 Qualities of a Good Specification

A good specification is a reference manual for all parties involved in the construction of a project. It must possess the following qualities, in order to be effective.

**a) It must aid quick referencing**

It must be possible for site workers who are pressed for time to refer to the specification in quick time. It must be possible to locate subject matter easily. To make this possible, consecutive numbering is encouraged, the use of short paragraphs and the leaving of spaces between paragraphs. Important headings.

**b) It must be concise and straight-to-the-point**

Good specifications use short words to get information across. Conciseness means that only one meaning can be given to a sentence. Ambiguity or doubts and the need for extensive double-checking are thus avoided.



**c) Politeness is essential**

A good specification must be politely written. It must be patronizing, nor should it aim at teaching the contractor his own trade.

**d) Duplication should be avoided**

A good specification should not repeat information already provided elsewhere (e.g., on the drawings or in schedules).

**e) Link to legality should be provided**

Statutory material standards and workmanship standards (such as BS codes, NIS symbols, ISO 9002 standards, NAFDAC numbers, etc.) when included in specifications are good ways to add legality to the specification.

**f) Technical and mechanical accuracy**

Specifications should be technically correct and attainable. The language of the specification must be mechanically accurate. Punctuation must be correct.

**g) Relevant to existing environment and context**

Specifications must be relevant to their context. It is of no use importing foreign specifications because of their impressiveness, where substantial differences exist in types of materials, workmanship, procurement methods, pricing systems, etc. Specifications must reflect local conditions and aspirations.

## 26.2 The Practice of Writing Specifications

Specification writing is both an art and a science. It involves lots of writings but in a logical sequence. Figure 26.1 illustrates the steps which are an aid to systematic writing involved in Specification Writing.

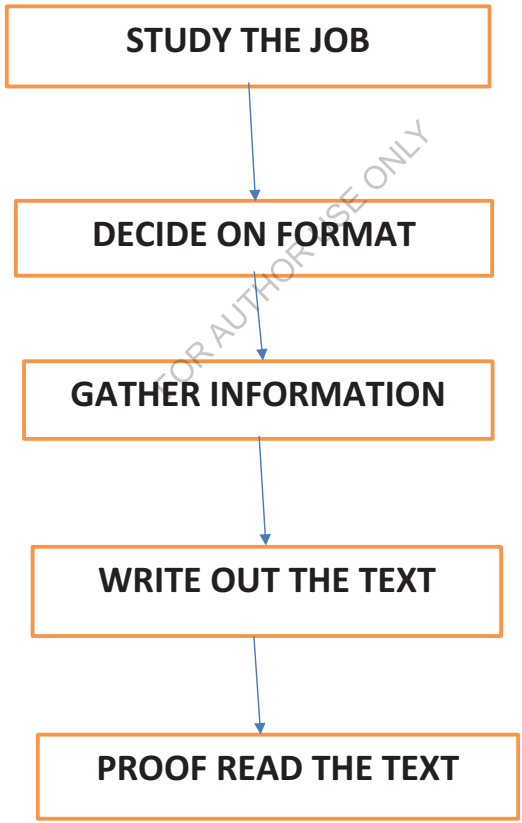




Fig. 26.1: The Practice of Writing Specifications

### 26.2.1 Study the Job

Every specifier must take time to study the documents that define the job. Visits to site must be undertaken. These enable the specifier to see practical requirements of the job, e.g., restrictedness of sites, terrain constraints, etc. This knowledge enriches the specification, and makes it more attainable by contractors.

### 26.2.2 Decide on Format of Presentation

Specifications might be presented in a variety of ways, as detailed in Section 2.1. The factors that determine the format have been stated already. When the specifier knows which format he will use, he can gather information specific to that format.

### 26.2.3 Gather Required Information

Information required to construct a specification may be found in several sources. Some of these are:

i. Past Specifications for Similar Projects.
ii. Manufacturer's Quotations and Catalogues.
iii. Trade Journals.
iv. Published Standards.
v. Contract Drawings.
vi. Employer's Requirements.
vii. Site Investigations.



### 26.2.4 Write-out the Text of the Specification

The specifier now has to write out the specification. If written in English, the tense is usually imperative, of the nature of a command, e.g., "Lay roofing felt", "Cover up works", etc. Short paragraphs are essential and neater. Consecutive numbering simplifies referencing, and a table of contents is necessary. An index is not compulsory, but helpful. Underlining draws attention to important items.

### 26.2.5 Proof Reading the Finished Text

When the specification has been written (and/or typed), it should be proof-read to make as error-free as possible. Effort should be made to allow room for extendibility, usually achieved by the use of a decimal system of numbering. Proof reading should ideally be carried out by more than one person.

# CHAPTER TWENTY-SEVEN

# INTRODUCTION TO COMPUTER-AIDED SPECIFICATION WRITING

## 27.1 Introduction

The computer has permeated all aspects of human endeavour. Specification writing is a repetitive activity for most projects; this is where the computer's strength is most apparent. The growth of computer usage in other fields related to specification writing (taking-off, billing, material & labour scheduling, project programming, etc.), meant that it was only a matter of time before specification writing became fully computer based. Another factor that led to the computerization of specification writing has been the development of manual but computer adaptable specifications e.g., the National Building Specifications (NBS). Some important concepts and activities in the computerization of specification writing are as follows:



## 27.2 Standard Phraseology

Construction work is by nature repetitive. Mostly what varies is in the shape of structures, type of finishing and orientation. Site locations vary. However, the materials used (e.g., concrete) and the methods of using them (mixing, application, etc.) are mainly fixed and unchanging. This realisation led to the production of the NBS.

The NBS provides tersely worded and very concise specifications developed to be skeletal in nature, the specifier adds the particular characteristics of his project to build up the specification. The use of the NBS means that the phrasing of specifications has become standard, with very little difference. This standardization was further enhanced with the development of the SMM7 and BESMM.

## 27.3 Coding

Coding is the process of appending unique identifiers to objects, description or persons, etc. (the matriculation number is a code to identify students in a university, being unique in nature). The strength of the SMM7 and BESMM lies in their coding system, which allows users to pick from several categories, the description that best suits the work at hand. Up to six (6) levels or categories are available. Figure 27.1 shows the stepped referencing system of the SMM7 and BESMM.

| Level 1 | Level 2 | Level 3 | Level 4 | Level 5 | Level 6 |
|---|---|---|---|---|---|
| | 2(i) | 3(i) | 4(i) | 5(i) | 6(i) |
| | | 3(ii) | 4(ii) | 5(ii) | 6(ii) |
| | | | 4(iii) | 5(iii) | 6(iii) |
| | | | | 5(iv) | 6(iv) |
| | | | | | 6(v) |

Fig. 27.1: Stepped Referencing System of the SMM& and BESMM

Although, the categories of the SMM7 and BESMM provide descriptions for Bills of Quantities, with a little modification such descriptions may also be used for specifications. All categories of work that are similar in nature, no matter their location, are brought together.

Each level in the SMM7 is identified by a number, while the sections are identified by letters. Combinations of levels produce combination codes that are unique. The computer can store these codes in its memory, and produce the full text on demand.



## 27.4 Skeletal Phrases

Computer-aided specification writing results in combinations of phrases that are capable of being extended, or which may be used as an independent specification. The computer has in its memory store a large number of specifications that relate to each material or workmanship items. The specifier supplies additional information that aids the computer in the selection of the right specification.

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# APPENDIX

## Appendix A. EXAMPLES OF SPECIFICATION CLAUSES

### A. Materials to B.S. or S.O.N.

Materials shall, be so far as obtainable, be of Nigerian manufacture and all materials used in the Works shall comply with the requirements of the latest British Standard issued by the British Standards Institution, or the standards organisation of Nigeria, and the Contractor shall produce all necessary certificates to substantiate this fact if so requested by the Architect. Materials shall be of the best quality unless other wise described.

### B. Workmanship

Workmanship generally is to be the highest standard obtainable and in all cases where a British Standard Code of Practice exists and is applicable to any portion of the works, the Contractor shall allow for complying with the recommended practice unless such procedure would conflict with requirement stated elsewhere in the contract documents.

### C. New Materials

The whole of the materials used in the works shall be new unless otherwise described. Proprietary manufacture may be substituted by materials of a different manufacture provided that such substitutes are in all respect equal to the original specification and that the Architect's prior written approval is obtained to all substitutions effected. All proprietary materials are to applied in accordance with the manufacturer's instructions.

### D Conflicting Description or Specifications

In the event of the detailed description of any measured item or group of items in the Bills of Quantities conflicting with the general specification clauses contained in the Trade Preambles the detailed description of the measured work shall take precedence.

# EXCAVATION AND EARTHWORK

## A. Generally

The Contractor shall be responsible for setting up and maintaining a site datum level accurately ascertained for this work. Immediately following the issue of the Order to Commence, the Contractor shall carry out and record a check level grid of the site which shall be agreed between the Architect and the Contractor within one week of the above Order being given. No alteration of levels shall be undertaken unless agreement has been reached and the Architect's Instructions have been received.

## B. Trial holes, bore holes and nature of the soil

Details of trial holes sunk may be obtained from Foundation Engineering Limited. These show details and levels of the subsoil and water encountered in these holes. This information is supplied as an indication only and gives no assurance that there may not be considerable variation of subsoil conditions over the site as a whole.

## C. Use of explosives for removal of obstruction

Should the Contractor wish to use explosives or similar means of breaking up mass concrete or other obstructions he shall first inform the Architect of his intention. The Contractor shall be responsible for informing all other interested parties of his intention and shall take all precautions to prevent damage to any services of statutory, undertakings or local authorities or to adjacent property. The Contractor shall indemnify the Employer against any claim, loss or expense arising from any damage arising or resulting from the use of explosive or similar means of breaking of mass concrete or other obstructions.



## D. Re-use of excavated materials on site

Good quality medium loam top spoil soil, free from subsoil clay, chemical or other pollution, obnoxious weeds, roots, turf, couch grass, rubbish, large stones or an excessive proportion of sand, gravel, chalk or lime, when approved by the Architect as suitable, may be used as top soil for private gardens and tree pits.

**A. Top Soil Removal**
Remove all top soil under slabs.

**B. Hardcore and filling**
Hardcore shall consist of rock laterite broken concrete, brick, sandcrete block clean hard and dry material evenly graded from 75mm down to 19mm ring. A sample of the hardcore must be approved by the Architect.

## CONCRETE WORK

General

A. No cement, sand or coarse aggregate is to be used until approved, and the approved source of supply shall not be changed without permission in writing from the Engineers.

Cement

B. The cement is to be of the best quality ordinary Portland cement Nigeria manufacture or other equal and approved and complying in all respects with B.S. 12.

C. The cement shall be supplied from an approved works and shall be delivered to the site in bulk or in paper bags each containing 50.0kg and sealed with the manufacturer's seal. Only such consignments as are required to keep the job suplied shall be despatched to the site.

D. Cement is to be stored on the site in perfectly dry and well ventilated sheds to the approval of the Engineers. They shall be of sufficient size to ensure adequate supply being made available for the work. The floor for such sheds shall be at least 450mm above the ground level.

Sand

E. The sand to be used for mortar and concrete shall be clean and sharp natural pit or river sand. It shall be washed screened and graded as necessary to comply with B.S. 882: 1965 for Fine Aggregate, Zone 2 or 3. The quality of the sand as regards impurities and mechanical properties shall also comply in all respects with the above British Standards Specification.

F. The sand shall be tested by the Contractor before commencement of delivery and at frequent intervals thereafter, as required by the Engineers, to check cleanliness, organic impurities, grading, fineness modulus, bulking and other necessary qualities. Any sand which does not comply with the requirements of this Specification shall immediately be removed from the site. The Contractor shall include for the costs in providing the apparatus required for testing and for all expenses incurred by the test.

G. The sand shall be stored at the site in bins or in dumps with concrete or timber floors and walls so as to avoid contamination or risk of shovelling up earth or clay.

### Aggregate

H. Coarse aggregate for concrete shall be hard, durable stone or screened ballast or gravel to the approval of the Engineers. It shall be washed and screened to the required categories to comply in all respects with B.S. 882: 1965.

A. When tested in accordance with the requirements of B.S. 1881: 1952 the dry shrinkage of concrete specimens made with coarse aggregate to be used shall not exceed 0.06% for the general concrete work. In the case of thin concrete slabs and exposed in-situ concrete the drying shrinkage of concrete specimens shall not exceed 0.04 per cent.

B. All coarse aggregate shall be tested by the Contractor before commencement of delivery to the site and at frequent intervals thereinafter, as required by the Engineers, to check cleanliness, hardness, grading, fineness modulus, voids and other necessary qualities. If the samples are approved, all coarse aggregate for the various classes of concrete must be of a quality and grading in accordance with the accepted samples and the Engineers shall have the power to reject any materials which do not conform to these requirements. The Contractor shall include for the costs in providing the apparatus required for testing and for all expenses incurred by the tests.



**Water**

C. Only pure, fresh water from an approved source shall be free from oil, acids, vegetables matter and alkaline substances in solution or suspension in appreciable quantities and shall be approved by the Engineers.

**Consistency**

D. The consistency of all concrete shall be determined by means of the slump test in accordance with B.S. 1881: 1952 Part 2. Consistency tests shall be made at frequent intervals as ordered by the Engineers. Two slump tests shall be taken at a time and the average adopted. The allowable slump shall be varied to suit the mixture being used as the purpose for which the concrete is required. In no case shall the slump for 1:3:6 concrete exceed 63mm or 1:2:4 concrete exceed 100mm.

**Mixing**

A. The concrete shall be thoroughly mixed in an approved mechanical mixer for a duration of not less than one minute whilst dry and not less than two minutes after water has been added. Only sufficient water hall be added. Only sufficient water shall be added to ensure a workable mix so as not to cause the slurry to flow away from aggregate.

B. Concrete shall be of the following proportions when dry.

**Concrete 1:2:4 – 20mm aggregate**

| | |
|---|---|
| Cement | 50kg |
| Sand | $0.2m^3$ |
| Coarse aggregate | $0.05m^3$ |

**Concrete 1:3:6 – 40mm aggregate**

| | |
|---|---|
| Cement | 50kg |
| Sand | $0.37m^3$ |
| Coarse aggregate | $0.75m^3$ |



**Transporting Concrete**

C. Concrete shall be moved from the place of mixing as rapidly as possible and in any case within thirty minutes of water having been added to the mix, by methods which will prevent segregation or loss of materials. Chutes or pumps are not to be used without the prior consent of the Engineers.

**Placing Concrete**

D. Concrete shall not be tipped or dropped from a height but poured gently so as not to cause segregation of the mix. The concrete shall then be thoroughly rammed and in the case of reinforced work mechanically vibrated by an approved method and machine to fill the forms and surround the reinforcement without causing displacement and to ensure that pockets, voids, cavities or honey combing do not occur.

**Testing**

A. The Contractor shall provide the necessary equipment for making slump tests in accordance with the British Standard Specifications. In no case shall the slump for concrete 1:3:6 exceed 63mm or concrete 1:2:4 exceed 100mm. The Contractor shall allow for making specimen tests cubes for any batch of concrete in accordance with British Standard, for paying all fees and charges incurred. The cubes when tested shall have minimum crushing strengths as follows:-

| Concrete | After 7 days | After 28 days |
|---|---|---|
| 1:1½:3 | 21 N/sq.mm | 31 N/sq.mm |
| 1:2:4 | 17 N/sq.mm | 25 N/sq.mm |
| 1:3:6 | 12 N/sq.mm | 16 N/sp.mm |

**Formwork**

B. The Contractor is responsible for the supply, stability, striking and removal of formwork. The formwork shall be of timber or steel forms approved by the Engineers, free from all defects, true to line and sufficient strutted or braced to be free from appreciable deflection under any live, superimposed or dead load.
The joints between boards or forms shall be sufficiently tight to prevent loss of liquid from the concrete.

C. The design of the formwork is to be such that the soffit of slabs and sides of beams, columns and walls may be struck first leaving the soffit to beams and their supports in position. All vertical braces and struts shall be wedged to plates so that the formwork may be struck without shock to the structure.

**Reinforcement**

D. Steel bar reinforcement is to comply with B.S. 785. Steel fabric reinforcement and expanded metal reinforcement is to comply with B.S. 1221. Where a fabric not described in the B.S. is required reference is made to B.R.C. i.e. the fabric produced by the B.R.C. Engineering Co. Ltd.

**A.** All mill scale, loose or scaly rust is to be cleaned off before reinforcement is placed in position.
This internal radius of bends shall be not less than four times the diameter of the bars, except for stirrups and column binders which shall be bent to fit closely round the main bars. The bars must be securely wired together with No. 17 Gauge soft iron wire to prevent any displacement during concreting.

## BLOCKWORK

**Generally**

**B.** The cement, sand and water are to be as described in concretework.

**Hollow Clay Blocks**

**C.** The hollow clay blocks shall be as manufactured by Clay Industry (Nigeria) Limited, or equal and approved obtained from an approved supplier.

**Sandcrete Blocks**

**D.** Sandcrete blocks shall be made on the site in an approved machine to be provided by the Contractor or an approved supplier and shall have a minimum crushing strength of 273.4 tonnes per square metre of gross areas at 28 days in the case of hollow blocks and 382.8 tonnes per square metre in the case of solid blocks.

**E.** The blocks shall be composed of 1:6 cement and sand measured by volume unless otherwise specified or directed on the site, turned three times dry until an even colour and consistency throughout. Water shall then be added gently from a watering can through a rose, the quantity of water added being just sufficient to secure adhesion. After wetting, the mixture shall be turned over three times and well rammed into moulds and smoothed of with a steel faced tool.

**F.** After removal from the machine on pallets, the blocks shall mature under shade in separate rows, one block high, with a space between each block, and for at least 24 hours. They shall then be removed from the pallets, but shall not be stacked up or removed from shade for at least a further seven days, then stacked not more than five blocks high in shade for a minimum of fourteen days.

A. No blocks shall be built into any part of the building until they have been cured for at least fourteen days. The faces of blocks except where otherwise described shall be left rough for plastering. The concrete blocks generally shall be 450mm long, 225mm deep and of the thickness stated, hollow cast in an approved machine.

B. Blocks in load-bearing walls and foundations, blocks of special size and shapes and blocks 100mm or less in thickness shall be sold unless otherwise described. All shall be cast true to shape, even in size, square and free from flaws or blow holes clean and sharp arises and equal to the sample deposited with the Architect. All blocks shall be carefully handled. Blocks with broken arrises are not to be used.

**Mortar**

C. Sand for mortar shall comply wit B.S1200. Cement mortar for blockwork shall be one part cement to six parts sand measured by volume.

D. A proper stage shall be provided to receive the mortar when made. The mortar shall be used within one hour of mixing. Such mortar shall not be used or mixed with any other mortar after it has begun to set nor shall any mortar of any kind of a previous days mixing be used.



**Workmanship**

E. The blockwork shall be carried up a uniform manner. No one portion shall be raised more than 950mm above another at any time. The work shall be carried up course by course and the height of all courses when laid shall be 950mm. All perpends and quoins shall be kept strickly true and square and all work properly bound together and carefully levelled through every second course. All corner cross wall junctions and reveals shall be properly bound. Special care shall be taken that all vertical joints are filled with mortar.

F. All blocks and dry walling shall be well wetted before being laid or built on. Any defective blocks found in the work shall be cut and replaced by sound ones at the Contractor's expenses.

Generally

A. The prices of blockwork are to include for all templates, work at all heights and the following:–

1. Raking out joints to both faces to provide a key for plaster, unless otherwise specified.
2. Cutting of any description.
3. Cutting or forming groove, chases and mortices.
4. Building in or cutting and pinning ends of all lintels.
5. Raking out for an pointing flashings.
6. Protection.

## ROOFING

### Corrugated Roofing Sheet

B. All corrugated sheet roof is to be fixed in accordance with the recommendations of the manufacturer. Unless otherwise stated the sheets are to be fixed with, and the prices to include for, the recommended side laps and 225mm end laps between the sheets. Sheet sizes are to be drilled in the top of the corrugations.

C. The prices for all roof sheeting are to include for cutting of any description, bedding and pointing at eaves, verges and the like and forming perforations for pipes etc. The prices for ridging are to include for bedding in approved mastic and fixing and lapping in accordance with the manufacturer's instructions.

D. The prices for all flashing, gutters and the like in aluminium, iron, copper or lead are to include for all labours, nailing in approved materials, wedging, tacks passings, overlaps, angles and ends.

E. Built up roofing shall comprise three layers of fibrous base rendered impervious to water by treatment with bituminous materials. The layers shall be laid with 50mm end laps, straggered and bonded together with bitumen compound.

## WOODWORK AND JOINERY

### Woodwork

**A.** The whole of the timber for woodwork shall be well seasoned, of the best quality obtainable free from all defects and approved by the Engineers as suitable for the purpose for which it is to be used. Timber for structural work shall be selected "OPEPE" or other equal and approved complying in all respects with B.S. 940 and delivered to the site, sawn to the required scantlings as soon as the work commences and shall be properly stacked in such a manner that air will circulate freely throughout the stack until required for use.

**B.** Structural timbers shall be treated with Tanalith "C" or other equal and approved preservative applied by means of the vacuum pressured impregnation and must be free from all shakes, dead knots, bores and other defects.

**C.** Unwrought timber shall be sawn straight and square and shall be to the full scantlings shown on the drawings. Members shall be accurately framed and fixed and all joints properly made. Rafters, pulins and ceiling joists shall, as far as is possible, be in single lengths and scarf joints, if required, shall be arranged at points of support and staggered.



### Joinnery

**D.** Timber for joinery shall be best quality "IROKO" or "OPEPE" well seasoned, cut square and free from insect attack, excess of wane, sapwood, dead knots and other defects and complying in all respects with B.S. 1186. Unless described as "finished" size, the sizes of wrought timber stated in the Bills of Quantities are those before planning and 3.2mm will be allowed from the sizes given for each wrought face.

**E.** 'Formica' work is to be 1.6mm Veneer matt finish standard grade fixed with "Domestic Adhesive" in accordance with the manufacturer's instructions.

**Fabrication**

A. All joinery work is to be accurately set out, framed and executed in accordance with the detail drawings and finished in a proper and workmanlike manner. All work shall be wrought and finished with a clear, smooth and even surface and all exposed external angles to framed etc. shall be "arris rounded". Allow for keeping the whole or joinery clean for polishing or decorating.

B. Adhesives shall be in accordance with B.S. 1204 for both internal and external use.

**Ironmongery**

C. Ironmongery is to be fixed with screws of the same metal and finish as the fitting. Screws damaged when driving are to be withdrawn and replaced with undamaged ones.

D. The prices for ironmongery fixed, or for "fixing" shall include for all fitting, cutting, sinking, boring, morticing and the supply of matching screws. The prices shall also include for the temporary removal of all ironmongery whilst painting and afterwards refixing. Unless otherwise described all interior Locks are to be provided with three keys. No two lock shall be capable of being operated by the same key.

E. Prior to the handing over of the works, or any section of the works, the Contractor shall fit wooden tabs to each set of keys clearly showing the lock to which they belong and all the sets of keys shall be delivered to the Architect mounted on a suitable plywood keyboard.



## CEILING, WALLS AND FLOOR FINISHING

### In-situ Finishing

**Cement**

F. The cement is to be as previously described under concrete work.

**Sand**

**A.** Sand for rendering is to be river or pit sand complying with BS 1199, Table 1 naturally occurring sand and is to be washed free from all organic matter, clay or other deleterious materials.

**Rendering**

**B.** Immediately before applying the renderings the walls surfaces shall be thoroughly wetted with clean water. All arrises and angles in wall renderings are to be finished straight and true and all arrises to reveals of openings are to be slightly rounded. Renderings shall be kept damp for at least seven days after being applied.

**C.** The mixes for renderings shall be used within two hours after mixing. No re-tempering will be allowed. Internal and external renderings shall be of one coat not less than 12mm thick or as described and shall consist of one part of cement to four parts of sand by volume and shall be finished fair and smooth with a wood float.

**Generally**

**D.** Decorations shall not be applied to rendered surfaces for at least a month or until the Contractor has satisfied the Architect that the walls and rendering are thoroughly dry.

The prices for rendering of any description shall include for the followings:—

1. Thoroughly backing the surface to which it is applied and any necessary dubbing out.
2. Work in isolated areas not exceeding one square metre and work is panels.
3. Labour to all edges, angles, arrises and the like.
4. Work at all heights.
5. Extra labour working up to window and door frames and the like.
6. Making good around pipes and the like.

**Special Wall Finish**

A. Arrises and angles must be finished straight and true. Immediately prior to rendering all surfaces shall be thoroughly wetted and the rendering shall be kept for two days after being applied.

**Cement and sand paving**

B. Cement and sand paving shall consist of one part cement to three parts of sand by volume, the mix shall be treated with an approved floor hardner in accordance with the manufacturer's instruction and shall be finished with a steel trowel.

**Tile, Slab or Block Finishing**

C. Where room dimensions are not on exact multiple of the tile, slab or block dimensions used for the ceiling, walls or floors, they shall be so cut that equal margins occur at both or all side of the rooms as the case may be.

**Tile paving**

D. Thermoplastic, cork and other tile pavings shall be laid and bedded strickly in accordance with the manufacturer's instructions.

**Wall Tiling**

E. Glazed wall tiling shall be obtained from an approved source and fixed strictly in accordance with the manufacturer's written instructions. The prices for tiling shall include for the following:—

1. Bedding and jointing in cement mortar (1:3) or in an approved adhesive.
2. Grouting or pointing in white cement.
3. Thoroughly cleaning down on completion to remove all traces of cement or mortar droppings.
4. Cutting and fitting around pipes and the like and pointing up in white cement.
5. Work in isolated areas not exceeding one square meter.

APPENDIX B

## TRADE PREAMBLES (cont'd)

### All Other Joinery Work

All other items of joinery work are to be constructed and fixed in the best workmanlike manner to the sizes and positions as shown in the various Drawings and details and to the approval of the Architect.

### Arrises

All arrises tio be pencil rounded.

### Ironmongery

Ironmongery is to be fixed with screws of the same metal and finished as the fitting. All screws damaged when driving are to be withdrawn and replaced.

The prices for ironmongery fixed, or for 'fix only' shall include for all fitting cutting, sinking, boring, morticing and the supply of matching screws. The prices shall also include for temporary removal of all ironmongery whilst painting and after-wards re-fixing.

All locks and other fittings are to be oiled and adjusted and left in perfect working order.

Unless otherwise described, all interior locks are to be provided with two keys and exterior locks with three keys. No two locks shall be capable of being operated by the same key.

Prior to the handing over of the works, or any any section of the works, the Contractor shall fit wooden tabs at each set of keys clearly showing to which lock they belong and all the sets of keys shall be delivered to the Architect mounted on a suitable plywond keyboard.

Descriptive specif
for ironmonger
Showing what
is to be achi
Items covered
— locks
— hinges
— kicking plat
— bolts
— screws, etc



### Deviations from the Standard Methods of Measurement

The prices for Carpentry's work are to include for the following:-

(a) Treatment with preservative as previously described.
(b) All fixing including plugging and tying purlins, plates and the like to the structure with steel ties as previously described.
(c) All nails, pins, brass and screws required . Screws shall be brass.
(d) Timber in any lengths up to 6.00 metres.

Carried to Collection

## TRADE PREAMBLES (cont'd)

### Carpentry and Joinery Generally (cont'd)

A Any timber that warps, winds or develops shakes or other defects shall be replaced at the Contractors expense.

### Timber

B All structural timber shall be in opepe, Iroko or Agba and all frames and external joinery shall be in Mahogany prepared to take preservatives. Joinery generally shall be of the timber specified or approved best quality timber suitable for the individual use. All plywood shall be the best external quality to B.S. 1455 bonded with adhesive to B.S. 1203 (WBP) faced on both sides with mahogany, without joints in the external faces where the plywood is in exposed positions. Sapele triped or other special veneered plywood shall be used where specified.

Descriptive Specification of Timber.

### Preservative Treatment

C (a) Structural timber
All structural timber to be treated by immersion in G.P Green Solignum for, at least, 24 hours before use, and brushed two coats after cutting or boring.

(b) Joinery
All timber to be treated by immersion in Universal Solignum for, at least, 24 hours before use. All joints and cutting to be brushed two coats before fitting together.



### Framing

D The whole of the carpentry's work is to be framed and trussed where required in the best possible manner, and fitted with all bolts, screws, etc to be sawn square, truly fitted together and securely strapped as specified.

### Plugs and Fillets

E Provide all hardwood plugs, fillets, grounds, backings, blocks, cradlings and the like necessary for the proper execution of the works.

### Time of Preparation

F The preparation of the timber is to commence immediately after the contract is signed and scantlings must be sawn out at once to allow for any shrinkage to take place.

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## TRADE PREAMBLES (cont'd)

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Blockwork and Stonework (cont'd)

Sizes

The norminal sizes of blocks are to be as follows:-

450 x 225mm norminal by 100mm thick

450 x 225mm norminal by 150mm thick

450 x 225mm norminal by 225mm thick

Norminal sizes include a 10mm minimum to 12mm maximum joint both vertically and horizontally.

Laying

(a) Mortar:
The mortar used shall be composed of cement sharp sand in proportion of 1 part cement to 6 parts of sand guaged with "Rendaplas" or similar mortar plasticiser used strictly in accordance with manufacturer's instructions. All mortars shall be properly mixed upon a clean platform or in a mechanical mixer. Mixing shall continue until there is a uniform distribution of materials throughout the mix and it is uniform in colour and consistency. Mortar shall be used as mixer. No mortar which has been allowed to set for more than 2 hours shall be used in the work.

(b) Suction:
Adjustments of suction by wetting of the blocks on their bedding faces is to be avoided. The mortar consistently should be adjusted to suit the suction of the blocks.

(c) Laying:
All blockwork is to be in hollow blocks and is to be laid in stretcher bond properly bedded, jointed and flushed up in cement mortar as previoulsy described. Walls are to be carried up regularly, not leaving any part 900mm lower than another at any one time. Walls left at different levels are to be raked back. Courses are to be level; perbends kept and quoins, jambs and other angles plumbed as work proceeds. To effect a proper bond fractional length , blocks are to be used or formed in-situ. Work executed overhand will not be permitted. Walls and partititions of different thicknesses are to be properly bonded to one another at junctions and intersections.

Descriptive Specification of Blockwork.

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## TRADE PREAMBLES (cont'd)

### Defective work (Cont'd)

A Where, for any reason the casting of a part of the work is interrupted before the design position of a construction joint is reached and the intended appearance of the concrete is thereby spoilt, that part of the work will be treated as defective work.

B Any surface which is marred by rubbish left in the mould and (when using smooth-surfaced formwork) any surfaces which is dis-coloured by leakage of water or grout will be treated as defective work.

### Precast Concrete

C All precast concrete work including lintels, purlins, etc shall in addition to complying with the fore-going, also comply with the following:-

### Mounds

D The precast concrete work is to be cast in properly constructed moulds or boxes lined, if necessary, to give smooth and even finish to all exposed faces in the finish work, to be true to detail, regular in shape and with good clean arrises, stoolings etc.

### Finish

E Where fair-face is required to precast concrete work (i.e. wherever the concrete is otherwise unfinished and exposed to view after completion) the surfaces shall be free of 'lean' and 'hungry' particles, cement slurry and excess laitance, etc, the surface when formwork is remoed is not to receive any treatment (e.g cement grout wash) other than rubbing down and filling of minor holes, etc.

Descriptive Specification of finishes to Precast Units.

### Protect Arrises

F Allow for protecting exposed arrises and boxing-in precast stair treads, etc and remove protective materials from site on completion of work.

### Casting

G All mounds shall be inspected and approved by the Structural Engineer and Architect before use. A sample casting including reinforcement shall be made from all sections and this sample shall be kept on site at all times, after it has been approved. It is the Contractor's responsibility to determine from the number of castings required whether steel, timber or lined timber moulds shall be used but the Structural Engineer and Architects may at their discretion reject any timber mould that has warped or become mis-sharpened through excessive use.

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## TRADE PREAMBLES (cont'd)

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### All Other Joinery Work

All other items of joinery work are to be constructed and fixed in the best workmanlike manner to the sizes and positions as shown in the various Drawings and details and to the approval of the Architect.

### Arrises

All arrises tio be pencil rounded.

### Ironmongery

Ironmongery is to be fixed with screws of the same metal and finished as the fitting. All screws damaged when driving are to be withdrawn and replaced.

The prices for ironmongery fixed, or for 'fix only' shall include for all fitting cutting, sinking, boring, morticing and the supply of matching screws. The prices shall also include for temporary removal of all ironmongery whilst painting and after-wards re-fixing.

All locks and other fittings are to be oiled and adjusted and left in perfect working order.

Unless otherwise described, all interior locks are to be provided with two keys and exterior locks with three keys. No two locks shall be capable of being operated by the same key.

Prior to the handing over of the works, or any any section of the works, the Contractor shall fit wooden tabs at each set of keys clearly showing to which lock they belong and all the sets of keys shall be delivered to the Architect mounted on a suitable plywond keyboard.

Descriptive specification for ironmongery showing what is to be achieved.
Items covered include:
— locks
— hinges
— kicking plates
— bolts
— screws, etc.



### Deviations from the Standard Methods of Measurement

The prices for Carpentry's work are to include for the following:-

(a) Treatment with preservative as previously described.
(b) All fixing including plugging and tying purlins, plates and the like to the structure with steel ties as previously described.
(c) All nails, pins, brass and screws required . Screws shall be brass.
(d) Timber in any lengths up to 6.00 metres.

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## TRADE PREAMBLES (cont'd)

Concrete Proportions (Cont'd)

Required Performance

| Nominal size of Aggregate | Aggregate Cement Ratio | Water Cement Ratio | Minimum Cube Strength at 28 Days N/sq.m | | Slump (mm) |
|---|---|---|---|---|---|
| | | | Prelimi-nary Test | Works Test | |
| 40mm | 9 to 1 | .65 to .70 | 15.00 | 11.50 | 40-75 |
| 20mm | 6 to 1 | .50 to .60 | 27.00 | 21.00 | 25-75 |
| 20mm | 4.5 to 1 | .40 to .50 | 30.00 | 25.50 | 25-75 |
| 10mm | 4.5 to 1 | .40 to .50 | 30.00 | 25.50 | 25-75 |

Performance Specifications of concrete.

Slump shall be measured in accordance with B.S. 1881.

A Additives shall not be used unless approval is given by the Structural Engineer and Architect in writing.

Trial Mixes

B After approval of the samples of aggregate by the Structural Engineer and Architect, the Contractor shall prepare a trial mix for each class of concrete. Each Trial mix shall comprise not less than a cubic of concrete and shall be mixed in a mechanical mixer.

Preliminary Test Cubes

C Six 150mm compression test cubes shall be made from each trial mix. The cubes shall be made, cured, stored and tested at 28 days after manufacture all in accordance with the method described in B.S. 1881.

Preliminary Test Cubes - Standard of Acceptance

D The mixer shall be deemed to be satisfactory if the average cube strength is greater than the strength required for preliminary tests and if the difference between the greatest and the least is not more than 15% of average cube strength of the six cubes.



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