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CHAPTER 1

CONSTRUCTION LAW AND THE LEGAL SYSTEM

The term "construction law" is now universally understood to cover the whole field of law which directly affects the construction industry and the legal instruments through which it operates. However, Construction law extends well beyond the law as such. Efficient and workable construction contracts require that the needs of the construction process should be taken into account by applying the principles of management. Construction contracts must also take account of disputes and their resolution. Construction law is, thus, an interactive subject in which both lawyers and construction professionals, including managers, have an essential part to play. This has been the approach of different bodies concerned with the promotion and development of construction law, principally the Society for Construction Law (founded in 1983) and the Centre of Construction Law and Management at King's College, London (founded in 1987). Both bodies have emphasised the essential interaction of lawyers and construction professionals in the development and practice of construction law and their lead has been followed by other institutions and teaching establishments in different parts of the world.

Construction law and construction contracts

The term "construction contract" now has a statutory definition[1] covering most but not all types of construction work, and including both building and engineering work. Construction law, however, embraces all construction contracts, whether or not within the statute. Construction law and construction contracts have, for many years, been the subject of an unusual amount of attention in various official and semi-official inquiries and reports. These have included the Simon Report of 1944[2] and the Banwell Report of 1964.[3] These, now classic reports, were

[1] Housing Grants, Construction and Regeneration Act 1996 ss.104, 105.
[2] The placing and management of building contracts: HMSO.
[3] The placing and management of contracts for building and civil engineering work: HMSO.

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concerned largely with public works undertaken by government and local authorities.

More recently, as private funding has grown in importance, inquiries and reports have concentrated on the efficiency of the construction industry. These have included the major study by a team lead by Sir Michael Latham, published in 1994.[4] This report in particular led to the setting up of a new tier of privately funded administration through the Construction Industry Board (CIB), which has been charged with implementation of the report through many new subsidiary bodies. These include the Construction Industry Council, the Construction Industry Employers' Council, the Construction Liaison Group, the Construction Clients' Forum and the Alliance of Construction Product Suppliers. Further reports have been produced under the direction of the CIB on a wide range of topics, including codes of practice for selection of sub-contractors and consultants and for education and training. The Latham Report led, via a further DOE consultation exercise, to the Housing Grants, etc. Act 1996 which contains new statutory rights and obligations in relation to construction contracts as defined in the Act. Many more references to this Act will appear later in this book. Other reports continue to appear, among which should be noted the report of Sir John Egan: "Re-thinking Construction".[5] Most recent is the *Government Construction Strategy*, launched in 2011 with the aim of securing a 15–20 per cent reduction in the cost of government construction projects. A *Construction Strategy Implementation Report* was issued in July 2012.[6] There have been a number of reviews of the working of the Housing Grants, etc., Act which led finally to the Local Democracy, Economic Development and Construction Act 2009,[7] which amends the mandatory payment measures and other provisions dealing with adjudication.[8]

Procurement and finance

At the root of all construction contract reform proposals lies procurement, that is, the methods by which construction projects are to be set up, financed and constructed. Procurement includes the separate or combined relationships between all or any of the participants, including promoters and financiers, designers and contractors. One aspect of procurement

[4] Constructing the Team: Joint review of procurement and contractual arrangements in the UK construction industry.
[5] Report of the Construction Task Force, 1998.
[6] *http://procurement.cabinetoffice.gov.uk/.*
[7] The 2009 Act came into force only on October 1, 2011.
[8] See Chs 2 (Adjudication) and 9 (Payment).

concerns the provision of design services, which are no longer to be assumed to emanate solely from separate consultants, but are increasingly combined with the construction process. Another aspect is the increasing insistence of financiers or funders on the minimisation of risk of cost or time over-runs, which had become a feature of construction projects. This aspect has been tackled in a number of ways, including the introduction of "partnering" arrangements, intended to exist alongside conventional legal obligations.[9] All procurement methods must now take account of the principles of project management, which is now to be seen as an addition to the traditional elements of design and construction.

Another generator of major change in construction contract practice during the last two decades has been the move from the financing of construction through capital investment to the new concept of "project finance". By this method an owner, instead of raising the capital and carrying out works on his own account, grants a "concession" to a project company, which then raises the finance and undertakes the project, taking the income over the concession period to repay the cost. Such projects thus include not just construction but the operation and management of facilities, which are notionally owned and operated by, but only later transferred to, the promoter (and thus known as Build-Own-Operate-Transfer or BOOT projects). Such schemes have proved popular in developing countries for the provision of major infrastrucure works. In the United Kingdom similar arrangements have been employed under the Private Finance Initiative (PFI) by which the user, generally a government department or public body, instead of paying the capital cost of the project, itself pays a fee for use of the facility over a defined concession period, usually including the provision of services which form part of the project. PFI is not free from controversy and concerns are now being raised as to the long-term cost compared to conventional funding based on government borrowing.[10]

A different approach, favoured by the United Kingdom government for maintenance and refurbishment work, is known as Prime Contracting, whereby a "contractor" undertakes single point responsibility, including management and design. All such new approaches, and more, must now be regarded as embraced within the term "construction contract", whether or not within the statutory definition. All of the aforementioned changes have resulted in much greater fluidity within the traditional parties to projects, with finance being provided sometimes by contractors and designers as well as the more conventional promoters, all of who then participate both in the risks and profits of a project. Those who provide

[9] See Ch.11.
[10] See Report of National Audit Office, *Lessons from PFI and other projects* (April 2011).

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only finance, usually referred to as "lenders" or "funders", recover a pre-determined return on their investment, usually postponed until the project is completed and starting to earn revenue. They have a particular interest in ensuring that the project succeeds both technically and financially. A new generation of both ad hoc and standard form contracts now provides standard rights for funders, which will include the power to "step in" to the project in the event of non-performance by one of the primary contracting parties. The new fluidity in construction projects is also reflected in developments in the practice of assignment of rights and duties, particularly those in relation to design services.

With this brief introduction to the highlights of the world of construction law, this chapter now returns to basic matters and gives an account of the background legal systems on which construction law is founded. Later chapters will deal with more particular branches of the law including the principles of construction law and the various forms of contract which are used to regulate the performance of construction activities.

Nature of law

Many people now involved in construction law have no formal legal qualifications. It is appropriate therefore to include some general remarks about the nature of law and its underlying rules. Law is highly stratified, although there is much overlapping and many common principles. Thus, the same facts may give rise to issues under both civil law and criminal law. Civil law itself may involve disputes between individuals and issues which concern the State, for example where planning or tax matters are concerned. Health and safety involves both civil and criminal law.

A comparison of ways in which law differs from technology will also reveal some of the essential qualities of law. First, while there are always some technical problems which, for the time being perhaps, cannot be solved, the law must always find an answer to a dispute. No matter how complex the facts of a case, or how uncertain or novel the law, the appointed Tribunal must always provide an answer. Secondly, in engineering and building practice approximation and simplification play a large part: small light structures may be safely designed using approximate methods, while on large structures many more factors have to be taken into account. In law there is no such scale effect. The law applied to a claim for £100 is the same as that applied to a claim for £100 million. Simplification of the facts of a case does not simplify the law involved, and one may need to know every factual detail before any view can be given as to the probable legal result. Sometimes, cases heard by the House of Lords involve very modest sums of money, but turn on important issues of law.

Thirdly, while technology proceeds upon logical induction and deduction, the development of the common law is likely to be influenced by many other factors such as policy and practical considerations. Fourthly, while technical designs or construction will not always employ the latest theories and methods, legal rights and duties depend only upon what the law says at the relevant time. A change in statute law can mean that a man may do an act on one day with impunity but on the next at his peril. Common law, or case precedent, is rather different. In theory the judge states what the law is and has always been, so that a restatement applies retrospectively. The practical effect as to the future is, however, the same as a change in the law. Thus, when considering the law on some point, the very latest sources must be consulted and often likely future changes may need to be considered. It is by no means unknown for a court to come to a wrong decision because a recent change in statute law or recent case on the point was not brought to its attention.

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Stratification of Law

English law is divided or stratified in a number of ways. It may be divided into substantive law and procedure. Substantive law refers to all the branches of law which define a person's rights and duties, such as contract, tort and crime. The substantive law determines in a particular case what rights a party possesses to recover a monetary loss which they have sustained. This may depend, for example, upon showing that the proposed defendant owed a duty in relation to that particular type of loss and was in breach of that duty (see Ch.14).

Procedure deals with the often complex rules by which the process of law is set in motion to enforce some substantive right or remedy. Procedure properly arises only when there is resort to legal action, but nevertheless it can be as important in practice as the substantive law. In the context of construction disputes, procedure includes arbitration and other dispute resolution processes, particularly now adjudication. A further division of law is into common law and statute law; that is, into judge-made law and legislation. Then there is another type of division between common law (used in a rather different sense) and equity, which is a distinction based upon the two great independent roots of English law. These latter two divisions are discussed separately in the following sections because they are fundamentally concerned with the sources of English law. While considering each of the divisions it should be borne in mind that they are not mutually exclusive. Statute law deals with procedure and substantive law; judge-made law comprises equity as well as common law, and so on.

Another division is between private law and public law, sometimes called administrative law. Private law relates to rights exercisable between individuals (including corporations and other legal entities). Public law, however, relates to the powers and duties exercisable by public bodies, which may affect the rights or expectations of individuals. The way in which public law rights may be enforced is significantly different to private rights, and consists essentially of applying to the courts for orders to review the actions of the public body in question. The enforcement of public law rights is dealt with below. Yet another division exists between so-called domestic and international law. International law itself falls into two distinct categories: private international law, which applies to disputes having an international character but concerning individuals or other legal entities; and public international law, which applies primarily to States. Private international law comprises the rules applied in a particular country to resolve conflict between the domestic law of that country and of other countries whose laws may affect a dispute. International law is discussed below.

The common law

English law is based upon the common law system. The common law means literally the law which was applied in common over all parts of the realm. It was created in the twelfth and thirteenth centuries by the King's judges and has been developed and handed down to the present time. The essential feature of the common law which distinguishes it from other legal systems, is that it is based on evolving precedent, with no written principles from which the precedent stems. The common law has thus been found to be a wonderfully flexible instrument, capable of rapid adaptation to wholly new circumstances without obvious strain. This is in contrast to problems which frequently occur under statutes, which may be found inadequate to cover some new situation. Likewise under the Civil Codes which constitute the basic laws of many foreign countries, it may be found that the code cannot be made to cover a new case, and the judge is unable to do anything other than to apply the existing code. The common law is fundamentally different in that judges in England and in other common law jurisdictions create law whenever they give a judgment. Successive cases thus progressively develop a body of "case law" on a particular topic. Judges under the common law system play a more significant constitutional role than under the civil law of other countries.

One effect of the spread of the English-speaking peoples from the sixteenth century onwards, was that they took with them their laws. As a result, by the nineteenth century there was established literally throughout

the world, a greater common law, subject to the effect of local statute law in any particular state. Within the British Empire, and later the Commonwealth, this law was maintained as a common system by the establishment of the Privy Council (composed largely of members of the judicial committee of the House of Lords and Commonwealth judges) as the final court of appeal. This still applies in a limited number of countries although the major commonwealth countries have long since set up their own courts of final appeal, such as the High Court of Australia. This means that the law in such countries tends inevitably to diverge from English law with the passage of time. The United States, which has developed its own law for 200 years, has adopted some notable differences from English law, such as stricter liability under the law of tort. English courts will, however, take note of and draw guidance from decisions from other common law countries and, to an often greater extent, English decisions are regularly followed or adopted in many different countries. The common law can now be regarded as having many more sources than only English law.

In theory, the common law is not written down. It is stated each time a judgment is given at the end of a case, when the judge gives reasons for the legal principles embodied in his decision. In practice, the common law is found in the reports of judgments, and the law on any topic is to be discovered by reading those cases which turn on related facts. In some areas there will be only one or two cases, but in others there will be many dozens of cases, perhaps going back more than a century. There have been a number of attempts to "codify" the common law, that is, to write down in a statute the effect of the common law as it stands, with the object of making the law more accessible. This was done with considerable success at the end of the nineteenth century in a number of important commercial areas, including the of sale of goods (see Ch.7). In the twentieth century, codification and the general reform of areas of old and unsatisfactory law have generally been entrusted to the Law Commission. This is a statutory body which prepares reports, carries out consultations and makes proposals for amending legislation to codify and clarify the common law. It is then a matter for Parliament to accept their recommendations. One of the Law Commission Bills to be passed by Parliament in recent years is the Contracts (Rights of Third Parties) Act 1999.

Law reports

Not every case before the courts makes new law. Many cases depend simply upon conflicting versions of the facts. In the construction field, points of law are often involved, not least because the effect of complex conditions of contract is often uncertain. In addition to cases which turn

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CHAPTER 4

PARTIES AND STATUS

The principles of substantive law apply to an individual of full age and legal capacity. While most persons concerned with the construction industry will have attained the age of majority (now 18) they will usually be involved as employees or representatives of some larger body whose legal capacity and liability is limited. In this chapter the role and status of the different parties who may be involved with the construction industry is examined. Then the legal capacities and liabilities of those bodies most commonly encountered is discussed.

PARTIES IN THE CONSTRUCTION INDUSTRY

The client

The most essential person is the client, who commissions the work. They may be referred to as the building owner or promoter, but the term "employer" is used in the JCT and ICE forms of contract. The employer may have practically any status. They may be a private individual, partnership, limited liability company, part of local or central government or any other incorporated or unincorporated body. Today many large projects are undertaken by two or more entities acting in "joint venture". In law this usually amounts to a partnership or a specially formed company, with the joint venturers acting as the partners or shareholders and management being undertaken through a board empowered to run the joint venture. Contractors will always need to be concerned with the status of the client since, in the absence of special provisions, the contractor has no security in the work once it becomes attached to land owned by another person (see Ch.14). Invariably a construction contract will contain provisions for stage payments (or payments on account) so that the contractor's exposure is limited. However, there will be no security in respect of a claim or the final account, beyond the financial worth of the employer. Often the "employer" will be a specially formed

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company, set up to run the project on behalf of other backers, but legally distinct from them. In PFI projects, the PFI contractor, who acts as employer under the construction contract, is usually a specially formed company or SPV (Special Purpose Vehicle), owned in whatever proportions the promoters (including contractors) may agree. The viability of any such scheme depends on the creation of a chain of appropriate security. Another recent trend in speculative development work is for the nominated "employer" to assign its interest in the project during the course of the work, sometimes more than once. Contractors must be alive to the consequences of such events.

Contractors and sub-contractors

A large proportion of building work in the United Kingdom and abroad is still carried out under the system referred to as traditional general contracting. Under this system, the person who carries out the works is the main contractor, also referred to as the builder, building contractor, civil engineering contractor, etc. The employer and the main contractor are the two parties to the main or head contract, which may also be called the construction contract, or the building or engineering contract according to the nature of the works. Professional services, including design, are provided by other persons who may be named in the main contract, but they are not parties to it. Their relationship is by separate contract with the employer.

The contractor, in all but the smallest jobs, sub-contracts (or sub-lets) parts of the work to one or more sub-contractors. Indeed, most of the larger contracting companies now see their role as being managers of the sub-contractors who will perform the physical work. Main contracts commonly provide for certain sub-contractors to be chosen by the employer to carry out particular work, usually identified as "prime cost" (PC) work. They are usually called "nominated" sub-contractors and their status gives rise to particular issues under the standard forms of contract.[1] Sub-contractors who are not nominated are sometimes called domestic sub-contractors. Both the contractor and the sub-contractor will usually be a limited liability company although small concerns may be partnerships or even sole traders. A practical problem often met is that the contracting "company" is a group consisting of a "holding" company and several "subsidiary" companies. The holding company owns the shares in the subsidiaries, and often has most of the assets of the group. This arrangement has taxation advantages, but means also that a subsidiary can be allowed to be wound-up to the detriment of creditors,

[1] See JCT, cll. 35, 36, ICE/ICC, cl. 59.

without financial harm to the group. In such circumstances the employer (in the case of a contractor) will normally require a parent company guarantee, and the same will apply to contractors in respect of their intended sub-contractors. In some civil law countries the courts recognise the "doctrine of groups of companies" under which a holding company may be automatically liable for the actions of its subsidiary companies. No such doctrine exists under English law and those dealing with subsidiaries must ensure that a chain of recognised legal liability is in existence.

The professional team

In traditional general contracting, the task of designing the works and supervising their construction is usually carried out by the same person or body. Under a building contract they are the architect, and under a civil engineering contract, the engineer. The title "architect" is, in England, reserved by statute for those professionally entitled to it.[2] The same is not true for engineers, although in some countries, such as Italy, Germany and USA, the title is protected. Statutory registration for engineers has been considered in the UK but not accepted by government. Instead a uniform system of qualification has been created for all professional engineers, by award of the title Chartered Engineer, abbreviated as "C.Eng." Chartered status for UK engineers is conferred by some 35 separate engineering institutions. Also, under European Community legislation, engineers throughout the community can register and use the title "Euro. Ing." Usually a specific person or firm is designated as the architect or the engineer under the main contract. The person so designated will be given certain powers and duties by the contract which they must exercise as the construction work proceeds.

The architect or engineer is not a party to the main contract nor to any sub-contract, but is engaged under their own contract with the employer. In building contracts where the employer engages an architect, a civil or structural engineer may be required to carry out part of the design work. They may be engaged either by the employer or by the architect. Similarly, an architect may be brought in to assist in the design of civil engineering works. Engineers and architects have traditionally practised as partnerships. Many firms of engineers and architects have, however, set up as limited liability companies, which is now permitted by the professional bodies. The result is that some former professional firms are now "owned" by the their shareholders; the shares can be bought and sold and they are subject to take-overs and mergers. The latest

[2] Architects Act 1997, re-enacting and amending earlier legislation.

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development, aimed at preserving professional status, is the creation of a "limited liability partnership" or LLP now made possible by the Limited Liability Partnership Act 2000.

A quantity surveyor (QS) is often found on larger contracts. Their traditional function has been to take off quantities from the drawings and other technical descriptions of the intended work, and to prepare from them bills of quantities; and subsequently to carry out measurements and valuations. In the JCT form a quantity surveyor is named and given certain duties. They do not appear in the ICE/ICC form. Their duties there are placed on the engineer, but are usually carried out by a QS. The quantity surveyor may be engaged by the employer, by the architect or by the engineer under a separate contract. Again, quantity surveyors have traditionally practised as individuals or partnerships; many have set up as limited companies and some may be expected to form limited liability partnerships. Quantity surveyors also provide advice pre-contract on matters such as costing and procurement; and post-contract on claims and contractual issues. In the latter role they are sometimes referred to as "claims consultants" or more politely as "construction cost consultants".

In their capacity under the main contract, the architect or engineer is required to carry out functions as the employer's agent, when they must represent the interest of their employer. In addition, the architect or engineer may be required to carry out particular duties, such as certification, on the basis of their professional opinion, sometimes loosely referred to as acting "independently". In such cases while they remain the employer's agent, they are under a duty to hold the scales fairly between the two parties (see Ch.9).

Project manager

In recent years new forms of procurement for construction works have emerged, involving new types of contract under which the roles of the parties differ from traditional general contracting. These are discussed in Ch.8. The new contract forms have given rise to a new professional known as the project manager. Although their position may be defined in a particular case, they do not fulfil a fixed role in the way that the designer or supervisor does. Project management can be a separate professional role, dedicated to the achievement of cost, time and performance requirements, using programming and monitoring techniques. This type of service will be performed under a separate contract of engagement with the employer. A project manager is also appointed by the contractor under a management contract; and the contractor's agent under a conventional construction contract is sometimes called the project manager.

There is, therefore, no single definition of the role and status of the project manager.

In addition to these major participants, there is a group of persons who appear in building and engineering contracts with particular functions and powers. These include the engineer's representative, the clerk of works, the agent and the foreman. All these persons are individuals who represent one or other of the major parties; thus, the engineer's representative and the agent represent on site the engineer and the contractor.

Joint ventures

Joint ventures between promoters are mentioned above. With new forms of procurement and the ever larger construction projects, it is increasingly common for two or more parties to combine as a joint venture to act as contractor or to fulfil any other role in a construction project. The simplest form of joint venture involves two companies who contract on the basis that each of them takes on full, joint and several liability, so that one of them could drop out and the other complete the project. The two joint venturers themselves will enter into a contract regulating their internal rights and liabilities. In the simplest case this may involve equal pooling of resources and sharing of costs and profits. However, there may be a much more elaborate division of responsibility and sharing of profit or loss. For example, two contractors may divide up the project, each taking on a defined area of the work, with each company being jointly and severally liable to the employer. In either case there will be a need to set up a joint management structure, for making decisions which affect both parties. Such joint ventures operate as a partnership, limited to a specific project. Joint venture partners need not make the same type of contribution to a project. A joint venture can be set up to perform a design and build contract between a design company and a construction company. An alternative to joint venturers entering into contracts in their individual names is to set up a jointly owned company (or Special Purpose Vehicle), whose shares and assets are held in agreed proportions. In this event, the employer will invariably require guarantees from the owners of the SPV.

Effect of status

The differing legal capacities and liabilities of those bodies most often encountered in the construction industry are discussed below. The most common is the limited company, while some professional bodies still operate as partnerships. There is a significant difference in the ability to

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enforce debts. For example, where a building owner has a claim against the contractor (a limited company) for bad workmanship, and against the architect (a partnership) for bad supervision, if the contractor is without assets, pursuit of the claim will lead to winding-up the company with no benefit to the building owner, even though the shareholders and directors may have personal assets. Conversely, the architect's firm will have no such protection. Even if the firm as such is insolvent, the partners will be liable to the limit of their personal possessions. A limited liability partnership shares some of the characteristics of partnership and some of a company.

Many of the potential liabilities incurred in relation to construction projects will be covered by insurance. Professional firms must maintain professional indemnity insurance, ostensibly for the protection of the partners but in practice also representing a further "asset" available, should a loss occur either during or after completion of the project. Insurances provided by a contractor are for the most part maintained in force only during the course of the work, so that claims for latent defects will usually be dependent on the contractor's own assets (see Ch.10). While the great majority of claims will be against the company or partnership which enters the relevant contract, the possibility exists that a claim involving professional negligence may be brought against the individual employee where the company or partnership is without funds.[3]

LIMITED COMPANIES

The word "company" can embrace any body of persons combined for a common object, whether incorporated or not. However, its commercial use is narrower and refers to an incorporated company, as opposed to a partnership. While a partnership is the product of an agreement between partners, an incorporated company is entirely the product of statute, which provides for the essential ingredient of limited liability. In the case of most commercial companies, limitation of liability relates to the issued shareholding. Incorporated companies may, as an alternative, be limited by guarantee, which is often a convenient device for non-profit making companies.

The essential feature of a limited company is that it exists as a separate legal entity, distinct from its shareholders (members). The assets and debts belong to the company, which has perpetual existence until it is

[3] See *Merrett v Babb* [2001] 3 W.L.R. 1.

dissolved. Changes of the directors or the members (shareholders) do not change the company. When a company contracts only the company can sue or be sued on the contract. If a wrong is done by or to a company, the proper party in any action is the company itself. A shareholder is not entitled to conduct an action on behalf of the company, even if they hold a majority or all of the shares. Reference to companies being taken over or bought and sold means only that the purchaser has acquired a majority of the shares in the company. Companies are taken over because of their assets, including their business. But they also take with them all debts and liabilities.

Ownership of companies

The assets of a new company are contributed by the members, who subscribe to purchase the shares or "equity" of the company. The main advantage of a limited company, as opposed to a partnership lies in the ability to acquire a financial interest in the success of a commercial venture while limiting the risks of failure. The liability of shareholders is ordinarily limited to the money invested.

The operation of companies is closely regulated by statute. Most of the law is found in the Companies Acts 1985 and 1989, now amended and consolidated by the Companies Act 2006.

There are two types of company limited by shares: public and private. Private companies are usually small, often family businesses and they comprise by far the greater number of registered companies. In a private company the number of members is limited and the shares cannot be freely transferred. However, a private company enjoys certain privileges which make its operation simpler. A public company must be identified by the letters "plc" after its name. Its membership is unlimited; shares are quoted on the stock exchange and are freely transferable. Successful private companies often seek to capitalise their assets by "floating", or transferring themselves into public companies. Both private and public companies must file annual accounts which are open to public inspection. The Companies Act 1989 introduced extensive new provisions relating to company accounts.

Any legal person, including another company, can buy shares. Subject to certain restrictions, a company may purchase its own shares, thereby reducing the issued capital. The capital of a company has a nominal or authorised limit, which in a small private company is often £100. Shareholders are paid dividends out of the company's profits. Additional capital can be raised by selling unissued shares, or by a fresh issue of shares. The re-financing of companies by public share issues often attracts publicity in the financial press, where there will be interest in the

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CHAPTER 9

CONSTRUCTION CONTRACTS

The essence of a construction contract is that a contractor agrees to supply work and materials for the erection of defined building or other works for the benefit of the employer. The detailed design of the work to be carried out is often supplied by or on behalf of the employer, but may also be supplied in whole or in part by the contractor. In legal terms there is no difference between a building and an engineering contract, and the term Construction Contract is adopted to cover both. For the first time under English law, the Housing Grants, Construction and Regeneration Act 1996 Pt II includes a definition of "construction contract" (see below). This is solely for the purpose of identifying types of contract to which the Act applies and does not apply. Many of the excluded activities fall within what is ordinarily understood as a construction contract, and will be subject to the general principles discussed in this chapter.

Almost invariably there will be other parties involved with a construction contract in addition to the contractor and the employer. There may be an architect or engineer who provides the design and supervises the work; and there are likely to be sub-contractors employed to carry out parts of the work. The status and capacity of these parties is considered in Ch.4. This chapter deals with those particular areas of the common law which help to define the rights and duties of the parties and which regulate the performance of construction contracts.

The number of statutory provisions which directly affect construction contracts, as opposed to construction operations, is not great. The number of decided cases which apply to construction contracts has grown very considerably on the past two decades. Since the advent of systematic reporting of construction cases (in the *Building Law Reports, Construction Law Reports* and elsewhere) there has accumulated a large number of decisions on the standard forms and on other principles of construction law. But there remain areas in which there is no direct authority. In such situations assistance may be obtained from the standard textbooks, which are often consulted by, and sometimes expressly approved by the courts in deciding new legal points. Reference is also made frequently to foreign decisions, from the Commonwealth and the United States of

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America, where direct authority may be found on areas not yet decided under English law.

In Ch.7 a number of special types of contracts are considered. Each of these contracts has its own particular features; for example, a sale of goods is governed by extensive codified statutory provisions. The special nature of construction contracts arises from the form which most contracts take and from features such as the role assigned to the architect or engineer and the provisions for payment as the work proceeds. These matters are dealt with in this chapter. The following chapter covers factors outside the contract itself which affect the parties' rights. The particular provisions of common forms of building and engineering contracts are considered in Chs 11, 12 and 13.

New statutory definition

As noted above, the Housing Grants, etc., Act provides in ss.104 and 105 an extensive but far from comprehensive definition of "construction contract". Thus, drilling for oil or gas, tunnelling generally, plant or steelwork for nuclear processing, power generation, water or effluent treatment, or chemical, oil, gas, steel or food and drink production are excluded; as are the supply (excluding installation) of components, materials, plant and machinery generally. A contract with a residential occupier is also excluded. The Act does, however, include matters not ordinarily considered subject to construction contracts, such an agreement to do architectural, design or surveying work, or an agreement to provide advice on building, engineering, interior or exterior decoration or the laying-out of landscape in relation to construction operations. Further, by additional regulations, particular types of contract are excluded, such as PFI contracts and highway and sewerage works for adoption. Thus, it is necessary to consider carefully whether particular operations are within the Act. The subject matter of some contracts will be partly within the Act. In this case s.104(5) provides "*where agreement relates to construction operations and other matters, this part applies to it only so far as relates to construction operations*". This provision may create difficulty in relation to the resolution of disputes by adjudication (see Ch.2) or in regard to the right of suspension.[1]

New forms of contract

While the majority of construction work in the United Kingdom and abroad is carried out under conventional arrangements, with a main

[1] s.112 and see below.

contractor, sub-contractors and a professional team, a number of alternatives have emerged in recent years. One of the first alternative forms was the "prime cost" contract under which the traditional "contract sum" was replaced by an accounting procedure by which the contractor's actual costs were to be paid, calculated according to fixed rules and usually subject to a guaranteed maximum price, with additional provision for sharing of savings. Such contracts are sometimes called "cost reimbursable" or "target cost" contracts. Next are management contracts, in which the main contractor, while being ostensibly responsible for the whole of the work, undertakes only management. The contractor's legal liability is substantially restricted in regard to the performance of sub-contractors, who normally perform the entirety of the physical work. A feature of both prime cost contracts and management contracts is that the design can be evolved as the work proceeds, with the main contractor participating in or advising on design decisions. A further development from management contracting is "construction management" (sometimes called a project management) in which the work is carried out under a series of direct or trade contracts. The work of the construction manager is limited to managing and co-ordinating these individual direct contracts.

While these arrangements are referred to as "new" forms of contract, they replicate processes well known in the past. Another form of contracting which has been re-cycled in recent years is "design-and-build", sometimes called "turnkey" contracting, whereby the contractor takes responsibility for the detailed design. Many projects today use bespoke forms of contract which make use of several of these new facets of procurement. Thus a particular project may use a target cost arrangement, with the contractor taking full responsibility for the design, with the traditional role of the engineer or architect being replaced by a project manager, designated as the Employer's Representative. The advent of PFI contracting and the many layers of sub-contracting typically involved, has added to the general climate of change. However, despite such changes, the legal principles by which such contracts are governed remain the same as those which apply to conventional contracts. There are a number of initiatives aimed at producing suites of contract documents capable of covering all the different alternative forms of procurement. Notable among these is the New Engineering Contract (now renamed the New Construction Contract) which claims to promote good management and thereby to avoid confrontation and dispute. Use of the new forms, since their first appearance in 1991, has been somewhat limited. They have been employed on a number of high profile projects but have not yet featured in any reported case before the courts.

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Performance and Payment

In a construction contract, the contractor undertakes to carry out and complete the defined works, and to provide all things necessary for completion, which may include outstanding design details. The employer's part of the bargain is usually the payment of money. Problems may arise in deciding when the contractor's obligation is discharged, what amount of money is payable and at what date. In each case the answer depends primarily on construction of the contract, since the parties may make whatever contractual arrangements they choose. There are, however, some general principles which may amplify the parties' intentions and it must be remembered that contracts falling within the Housing Grants, etc., Act are subject to a number of significant statutory terms.

Where the contract is to carry out and complete a specific item of work, the general rule is that only complete performance can discharge the contractor's obligation and no payment is due until the work is substantially complete. In *Sumpter v Hedges*[2] a builder contracted to erect two houses and stables on the defendant's land for a lump sum, but abandoned the contract part-completed. It was held that in the absence of entitlement under the contract, the builder was not entitled to further payment for the unfinished work, despite the fact that the employer retained the benefit: A.L. Smith L.J. giving judgment said:

> "The learned Judge had found as a fact that he abandoned the contract. Under such circumstances, what is the building owner to do? He cannot keep the buildings on his land in an unfinished state forever. The law is that, where there is a contract to do work for a lump sum, until the work is completed the price of it cannot be recovered. Therefore the plaintiff could not recover on the original contract. It is suggested, however, that the plaintiff was entitled to recover for the work he did on a quantum meruit but, in order that that may be so, there must be evidence of a fresh contract to pay for the work already done."

The contractor in such a situation is not, however, always without a remedy. They may recover if they can show that completion was prevented by the employer, or that a fresh agreement to pay for the partially completed work is to be implied. In the above case, the builder did succeed in recovering payment for his materials which had been used by the employer, these not being attached and having remained his property (see also Ch.5).

[2] [1898] 1 Q.B. 673.

The contract price

Construction contracts usually state a price for which the work is to be completed. This is invariably subject to modification as the work proceeds on account of ordered variations, allowable price fluctuations, re-valuation of prime cost or provisional sums, claims, and other matters. Where the price of the original contract work remains fixed, the contract may be called a "lump sum" contract. But if the original contract work is based on quantities which are to be recalculated when the work is done, the contract is called a "re-measurement" contract. This is so when there is an express right to have the work re-measured; or where the bills are stated to be provisional or approximate. The JCT form of contract is a lump sum contract, whether or not it is based on quantities (see Ch.12). The ICE/ICC form creates a re-measurement contract; this is emphasised by the fact that the stated price of the work is referred to as the "tender total" (see Ch.11). A further term sometimes used is "fixed price." This is generally taken to mean a contract where the sum payable is not adjustable by reason of price increases (fluctuations). The price may, however, be adjustable on many other grounds. Where the employer wishes to know the exact price of the work in advance, none of the common forms of contract are appropriate. While it is possible, an "invariable price" contract would be uneconomic and difficult to draft.

Stage payments

In most construction contracts of any substance there are express provisions for interim or stage payments to be made as the work proceeds. In more traditional contracts the contractor is to be paid the value of the estimated quantities of work done and materials supplied less a retention which the employer holds as security for completion of the works. In such cases the rule of payment on substantial completion (see above) may still apply to each payment, but subject also to the provisions as to certificates. Even where there is no provision for interim payments there may be, in the absence of express provision to the contrary, an implied term for reasonable interim payments as the work proceeds.

Contracts within the Housing Grants Construction and Regeneration Act 1996[3] must provide for stage or other periodic payments, unless the duration of the work is to be less than 45 days.[4] The contract must also provide a mechanism for determining what payments become due and

[3] As now amended by the Local Democracy, Economic Development and Construction Act 2009.
[4] s.109(1).

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when, and provide a final date for payment. The contract must provide for the giving of notice not later that five days after the payment due date, specifying the sum considered to be due and the basis on which that sum is calculated. Amendments introduced by the Local Democracy, Economic Development and Construction Act 2009[5] (the 2009 Act) now permit the payee to give such notice, if not given by the payer. If the contract does not comply with any of the statutory requirements, the Scheme for Construction Contracts Pt II is to apply[6]. This provides for calculation of instalments by reference to the value of work done and materials supplied, less previous payments. Section 111 of the original Act dealt with the problem of set-off against sums otherwise due to a contractor (or sub-contractor) by requiring the timely service of a "withholding notice" by the payer, in the absence of which the full sum would be payable on the final date for payment. The 2009 Act replaces this provision with new requirements (contained in the re-drafted s.111) by which the payer must pay the sum which is notified by either the payer or the payee, or, subject to giving notice seven days before the final date for payment, the payer may pay a lesser sum. The objective is to facilitate cash-flow and to achieve timely payment.[7] Where the sum payable in accordance with s.111 is not paid by the final date for payment, s.112 (as amended) provides for the right to suspend performance[8] of all or any of his obligations under the contract until payment is made, the party in of all or any of his obligations under the contract until payment is made, the party in default being liable to pay the costs of suspension. Section 113 prohibits "pay when paid" clauses except where the person from whom the payer is receiving payment is insolvent (see Ch.10).[9]

Stage payments based on measurement can be regarded as unnecessarily complex, requiring more or less detailed measurement, usually on a monthly basis. There is usually nothing to prevent the contractor artificially adjusting the rates and prices under the bill to achieve inflated early payments, which also has the effect of reducing the contractor's incentive to complete. It has been suggested (by Latham and others) that a fairer and more efficient system is to agree lump sum instalments in advance, dependent only upon the contractor's rate of progress. Such sums are referred to as "milestone" payments. They are found routinely in construction contracts in the United States of America and elsewhere, where bills of quantities are rarely incorporated into the contract and are

[5] Now comprising ss.110, 110A and 110B.
[6] As also amended by the 2009 Act.
[7] For set-off generally, see Ch.2.
[8] See below under "extension of time".
[9] And refer to case of *William Hare v Shepherd Construction* [2010] B.L.R. 358.

becoming increasingly common in large-scale projects, particularly where measurement would be costly and inconvenient.

No price agreed

In most substantial contracts, the sums to become payable are provided for in detail. There are, however, many situations in which sums are to be paid where the contract terms are inapplicable. In an extreme case this may arise from the absence of a contract, or from a contract making no provision for payment. In such case, the contractor is entitled to a reasonable sum (see Ch.5). However, it is frequent to find provisions under the standard forms, where the pricing mechanisms provided, after eliminating various provisions which do not apply (for example, application of contract rates or analogous rates) lead to the conclusion that the contractor is entitled to payment of a sum based on "a fair valuation"[10] or a sum which is "reasonable and proper".[11] There are many similar provisions in the forms. In each such case it is for the court, or arbitrator or adjudicator, to decide a reasonable sum based on: (1) any materials which the contract may require to be taken into account, and (2) such other material as is placed before the tribunal. There are no rules as to what is admissible and what is not. A fair or reasonable price may be based on rates quoted by other contractors for similar work; or on time and materials plus other allowances. A reasonable sum must include both profit and overheads. A claim limited to "cost" will generally include overheads but not profit.[12]

Contract Documents

A common feature of most construction contracts is the incorporation of a variety of different types of document. These are not limited to documents expressed in words: drawings appear in most contracts and have to be interpreted and given legal meaning and significance. Typically, a construction contract of any importance will contain a set of conditions of contract, a specification, a bill of quantities, a set of drawings, and other documents of varying sorts. There may also be a separate "agreement" in which the parties formally bind themselves to perform the terms of the contract. The question necessarily arises, how these

[10] ICE/ICC, cl.52(1).
[11] ICE/ICC, cl.52(2).
[12] ICE/ICC, cl.1(5).

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CHAPTER 12

THE STANDARD BUILDING CONTRACT

The Standard Building Contract, formerly known as the RIBA form, is now issued by the Joint Contracts Tribunal (JCT) comprising the RIBA, RICS, the Association of Consulting Engineers, and bodies representing employers, local authorities contractors and sub-contractors. It is commonly referred to as the JCT form and is intended for use in all types of building work. The form originated early in the twentieth century and has gone through a number of editions most notably those of 1939, 1963, 1980, 1998 and 2005. Formal amendments are issued from time to time with periodic reprints incorporating accumulated amendments. A new edition was issued in 2011, retaining the same format as the 2005 edition, which had departed radically from the 1998 edition, which extended to 42 clauses. The latest edition of 2011 reviewed in this chapter is divided into nine sections (although still referred to as clauses), and is accompanied by seven schedules, articles of agreement and contract particulars (previously known as appendix).

The JCT form has for many years existed in alternative versions including forms with or without quantities and with approximate quantities. Other versions exist and, since the 1980s the JCT has progressively issued other contract forms, sub-contract forms and other documents which now comprise a full suite of procurement documentation. Some of the other JCT documents are covered in Ch.11. The JCT forms traditionally place specific duties on the architect who, given the statutory restrictions upon use of the designation, is referred to in the form as the Architect/Contract Administrator. The term "Architect" is used here for brevity.

The Form is published together with the following schedules: Contractor's Design Submission Procedure (Schedule 1). Procedure for Quotation and Agreement of Instructions (Schedule 2). Insurance Options (Schedule 3), Code of Practice for Opening Up (Schedule 4), Provisions as to Third Party Rights (Schedule 5), Forms of Bonds (Schedule 6), and Fluctuations Options (Schedule 7).

The commentary which follows is intended as an introduction to the basic working of the contract. The most important clauses or sub-clauses

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are printed with notes as to their effect. Other clauses are referred to where appropriate. Some clauses are omitted as being not essential to the basic scheme of the form. These clauses may, of course, be vital to any particular issue or dispute.

The Contract

The form contemplates that the contract will be made by executing the Articles of Agreement, which may be either under hand or executed as a deed. The latter method will extend the period of limitation from six to 12 years. But neither method is essential and the Conditions of Contract may be incorporated by reference in any other document of agreement provided the essential terms which are identified in the Articles of Agreement are recorded in some other manner.

The Articles themselves state as follows:

"Now it is hereby agreed as follows

Article 1: Contractor's obligations

> The Contractor shall carry out and complete the Works in accordance with the Contract Documents.

Article 2: Contract Sum

> The Employer shall pay the Contractor at the times and in the manner specified in the Conditions the VAT–exclusive sum of (£) ('the Contract Sum') or such other sum as shall become payable under this Contract."

In Articles 3 and 4 the architect and quantity surveyor are to be named. Article 5 identifies the planning supervisor for the purposes of the CDM Regulations (if other than the Architect) and Article 6 names the principal contractor under the CDM Regulations (if other than the contractor). Article 7 provides for adjudication of any dispute or difference (whether or not subject to the Housing Grants, etc., Act. Articles 8 and 9 provide alternatively for arbitration or litigation. The choice of arbitration is required to be noted in the contract particulars with litigation taking effect as the default provision. Detailed procedures for adjudication or arbitration are contained respectively in cll.9.2 and 9.3–9.8. Adjudication is to be conducted in accordance with the Scheme for Construction Contracts and arbitration in accordance with the CIMAR Rules.

By cl.2.1 of the conditions the contractor is required to "carry out and complete the works in a proper and workmanlike manner and in

compliance with the contract documents . . .". Clause 1.1 contains an extensive list of definitions including "Contract Documents" which includes the Contract Drawings, the Contract Bills, the Agreement, the Conditions and, where the Contractor takes on part of the design, the Employer's Requirements and the Contractor's Proposals. The relationship between these documents and their function is provided for as follows:

"Work included in Contract sum

> 4.1 The quality and quantity of the work included in the Contract Sum shall be deemed to be that set out in the Contract Bills and, where there is a Contractor's Designed Portion, in the CDP Documents."

"Agreement, etc. to be read as a whole

> 1.3 The Agreement and these Conditions are to be read as a whole but nothing contained in the Contract Bills or the CDP Documents shall override or modify the Agreement or these Conditions."

"Preparation of Contract Bills and Employer's Requirements

> 2.13.1 Unless in respect of any specified item or items it is otherwise specifically stated in the Contract Bills, the Contract Bills are to have been prepared in accordance with the Standard Method of Measurement and any addendum bills to be issued for the purposes of obtaining a Schedule 2 Quotation shall be prepared on the same basis."

"Contract Bills and CDP Documents—errors and inadequacy

> 2.14.1 If in the Contract Bills, or any such addendum bill as is referred to in clause 2.13.1, there is any unstated departure from the method of preparation referred to in that clause or any error in description or in quantity or any omission of items (including any error in or omission of information in any item which is the subject of a Provisional Sum for defined work), the departure, error or omission shall not vitiate this Contract but shall be corrected. Where the description of a Provisional Sum for defined work does not provide the information required by the Standard Method of Measurement, the description shall be corrected so that it does provide that information."

Clause 2.14.3 provides that, subject to the contractor's obligation to comply with statutory requirements, any such error or omission is to be treated as a variation.

Where the works include a Contractor's Designed Portion the Contractor is required, in accordance with the Contract Drawings and Contract Bills where relevant, to "complete the design for the Contractor's Designed Portion, including the selection of any specifications . . . to be used in the CDP works . . ." so far as not otherwise described (cl.2.2.1).

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The effect of the above clauses is that, save for questions of quality or quantity of the work, the conditions override the Contract Bill. A provision intended to amend the conditions (such as one for Sectional Completion) may therefore be ineffective if placed in the Bills. The Contract Bills are, however, permitted to include a limitation on the contractor's access to or use of parts of the site, limitation of working hours or the execution or completion of the work in any specific order (cl.5.1.2). The Bills will also override the Contract Drawings in that, while the contractor must perform all the work shown on the drawings, any part which is not included in the Bills is an extra to be paid for. In addition to the Contract Documents as defined, in contracts of any size there are likely to be extensive documents described as "specifications" or other descriptive schedules. These are conventionally incorporated within the Contract Bills as they contribute to the description of the quality of the work. As stated in cl.1.3, the agreement and the conditions are to be read as a whole and afforded equal status.

The contract provides for the mutual provision of necessary information as between the contractor and the architect as follows.

"Construction information and Contractor's master programme

2.9 .1 As soon as possible after the execution of this Contract, if not previously provided:

.1 the Architect/Contract Administrator, without charge to the Contractor, shall provide him with 2 copies of any descriptive schedules or similar documents necessary for use in carrying out the Works (excluding any CDP Works); and

.2 the Contractor shall without charge provide the Architect/Contract Administrator with 2 copies of his master programme for the execution of the Works and, within 14 days of any decision by the Architect/Contract Administrator under clause 2.28.1 or of agreement of any Pre-agreed Adjustment, with 2 copies of an amendment or revision of that programme to take account of that decision or agreement,

but nothing in the descriptive schedules or similar documents (or in that master programme or any amendment or revision of it) shall impose any obligation beyond those imposed by the Contract Documents.

Information Release Schedule

2.11 Except to the extent that the Architect/Contract Administrator is prevented by an act or default of the Contractor or of any of the Contractor's Persons, the Architect/Contract Administrator shall ensure that 2 copies of the information referred to in the Information Release Schedule are released at the time stated in that Schedule. The Employer and the Contractor may agree to vary any such time, such agreement not to be unreasonably withheld.

Further drawings, details and instructions

2.12 .1 Where not included in the Information Release Schedule, the Architect/Contract Administrator shall from time to time, without charge to the Contractor, provide him with 2 copies of such further drawings or details as are reasonably necessary to explain and amplify the Contract Drawings and shall issue such instructions (including those for or in regard to the expenditure of Provisional Sums) as are necessary to enable the Contractor to carry out and complete the Works in accordance with this Contract.

.2 Such further drawings, details and instructions shall be provided or given at the time it is reasonably necessary for the Contractor to receive them, having regard to the progress of the Works, or, if in the Architect/Contract Administrator's opinion practical completion of the Works or relevant Section is likely to be achieved before the relevant Completion Date, having regard to that Completion Date.

.3 Where the Contractor has reason to believe that the Architect/Contract Administrator is not aware of the time by which the Contractor needs to receive such further drawings, details or instructions, he shall, so far as reasonably practicable, advise the Architect/Contract Administrator sufficiently in advance as to enable the Architect/Contract Administrator to comply with this clause 2.12."

In addition, cl.2.10 requires the architect to provide accurately dimensional drawings to enable the contractor to set out the works.

Control of the Work

The Conditions envisage that the work will be under the joint control of the parties. The RIBA Conditions of Engagement provide for periodic but not constant supervision. Day to day supervision is therefore left to the contractor and, to the extent necessary, the employer:

"Access for Architect/Contract Administrator

3.1 The Architect/Contract Administrator and any person authorised by him shall at all reasonable times have access to the Works and to the workshops or other premises of the Contractor where work is being prepared for this Contract. When work is to be prepared in workshops or other premises of a sub-contractor the Contractor shall by a term in the sub-contract secure so far as possible a similar right of access to those workshops or premises for the Architect/Contract Administrator and any person authorised by him and shall do all things reasonably

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necessary to make that right effective. Access under this clause 3.1 may be subject to such reasonable restrictions as are necessary to protect proprietary rights.

Person-in-charge

3.2 The Contractor shall ensure that at all times he has on the site a competent person-in-charge and any instructions given to that person by the Architect/Contract Administrator or directions given to him by the clerk of works in accordance with clause 3.4 shall be deemed to have been issued to the Contractor.

Employer's representative

3.3 The Employer may appoint an individual to act as his representative by giving written notice to the Contractor that from the date stated the individual identified in the notice will exercise all the functions ascribed to the Employer in these Conditions, subject to any exceptions stated in the notice. The Employer may by written notice to the Contractor terminate any such appointment and/or appoint a replacement.

Clerk of works

3.4 The Employer shall be entitled to appoint a clerk of works whose duty shall be to act solely as inspector on behalf of the Employer under the directions of the Architect/Contract Administrator and the Contractor shall afford every reasonable facility for the performance of that duty. If any direction is given to the Contractor by the clerk of works, it shall be of no effect unless given in regard to a matter in respect of which the Architect/ Contract Administrator is expressly empowered by these Conditions to issue instructions and unless confirmed in writing by the Architect/Contract Administrator within 2 working days of the direction being given. Any direction so given and confirmed shall, as from the date of issue of that confirmation, be deemed an instruction of the Architect/Contract Administrator."

On larger projects the architect and employer may agree to employment of a resident architect on the work. They will have no specific power or duty such as those of the engineer's representative under the ICE Conditions.

General Obligations of the Contractor

The contractor's obligations are to comply with the Contract Documents which define the work and the time within which it is to be carried out, to complete any CDP works included in the contract and to comply with proper instruction of the architect:

"General obligations

2.1 The Contractor shall carry out and complete the Works in a proper and workmanlike manner and in compliance with the Contract Documents, the Health and Safety Plan and the Statutory Requirements, and shall give all notices required by the Statutory Requirements.

Contractor's Designed Portion

2.2 Where the Works include a Contractor's Designed Portion, the Contractor shall:

.1 in accordance with the Contract Drawings and the Contract Bills (to the extent they are relevant), complete the design for the Contractor's Designed Portion, including the selection of any specifications for the kinds and standards of the materials, goods and workmanship to be used in the CDP Works, so far as not described or stated in the Employer's Requirements or the Contractor's Proposals;

.2 comply with the directions of the Architect/Contract Administrator for the integration of the design of the Contractor's Designed Portion with the design of the Works as a whole, subject to the provisions of clause 3.10.3;"

"The Works" are defined by cl.1.1 as "the works briefly described in the First Recital (including where applicable the CDP works) as more particularly shown, described or referred to in the Contract Documents, including any changes made to those works in accordance with the Contract". The contractor's obligation to carry out the works in accordance with the prescribed standards is absolute in general. In regard to CDP Works, however, Contractors obligation is limited under cl.2.19 to that of a "professional designer", i.e. a duty of reasonable skill and care. In respect of dwellings, duty includes that laid down by the Defective Premises Act 1972.

Clause 2.15 requires the contractor to give notice should he find any discrepancy or divergence between the Drawings, the Bills, any Architect's Instructions or further drawings or documents or any CPD documents, and for the architect to issue instructions in that regard. Clause 2.3 requires that materials and goods for the works and their workmanship are to be of the standards described in the Contract Bills or, in the case of CPD works, to the standard described in the Employer's Requirements or the Contractor's Proposal. Where materials or workmanship are matters for the opinion of the architect, they are to be to his reasonable satisfaction. To the extent that no standards are prescribed, materials or workmanship are to be to a standard appropriate to the works.

The architect is vested with a series of specific powers, the widest of which is to require or sanction a variation which, by cl.5.1, may include

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the addition, omission or substitution of any work or a change to the standards of materials or goods or the removal of work which complies with the contract. The architect's general power to give instructions is contained in cll.3.10–3.21 as follows:

"Compliance with instructions

3.10 The Contractor shall forthwith comply with all instructions issued to him by the Architect/Contract Administrator in regard to any matter in respect of which the Architect/Contract Administrator is expressly empowered by these Conditions to issue instructions, save that:

.1 where an instruction requires a Variation of the type referred to in clause 5.1.2 the Contractor need not comply to the extent that he makes reasonable objection to it in writing to the Architect/Contract Administrator.

.2 where an instruction for a V ariation is given which pursuant to clause 5.3.1 requires the Contractor to provide a Schedule 2 Quotation, the Variation shall not be carried out until the Architect/Contract Administrator has in relation to it issued either a Confirmed Acceptance or a further instruction under clause 5.3.2;

.3 if in the Contractor's opinion compliance with any direction under clause 2.2.2 or any instruction issued by the Architect/Contract Administrator injuriously affects the efficacy of the design of the Contractor's Designed Portion (including the obligations of the Contractor to comply with regulation 13 of the CDM Regulations), he shall within 7 days of receipt of the direction or instruction by notice in writing to the Architect/Contract Administrator specify the injurious effect, and the direction or instruction shall not take effect unless confirmed by the Architect/Contract Administrator.

Non-compliance with instructions

3.11 If within 7 days after receipt of a written notice from the Architect/Contract Administrator requiring compliance with an instruction the Contractor does not comply, the Employer may employ and pay other persons to execute any work whatsoever which may be necessary to give effect to that instruction. The Contractor shall be liable for all additional costs incurred by the Employer in connection with such employment and an appropriate deduction shall be made from the Contract Sum.

Instructions requiring Variations

3.14 .1 The Architect/Contract Administrator may issue instructions requiring a Variation.

.2 Any instruction of the type referred to in clause 5.1.2 shall be subject to the Contractor's right of reasonable objection set out in clause 3.10.1.

.3 In respect of the Contractor's Designed Portion, any instruction requiring a Variation shall be an alteration to or modification of the Employer's Requirements.

.4 The Architect/Contract Administrator may sanction in writing any Variation made by the Contractor otherwise than pursuant to an instruction.

.5 No Variation required by the Architect/Contract Administrator or subsequently sanctioned by him shall vitiate this Contract."

Clauses 3.12 and 3.13 require instructions to be in writing and for the architect to specify the power under which any instruction is given, upon request. Clauses 3.15 and 3.16 empower the architect to order a postponement of any work and to order work to be done under a Provisional Sum. Clause 3.18 allows the architect to order the removal of work or material not in accordance with the contract and to open up further work for inspection or test in accordance with the Code of Practice set out in Schedule 4. Under cl.3.19 the architect is empowered to retain work which is not in accordance with the contract, but the contractor in such a case acquires no right to payment or extension of time.

Liability and Insurance

Clause 6 deals with various types of potential liability in connection with the work and insurance in respect of such liability.

"Liability of Contractor—personal injury or death

6.1 The Contractor shall be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings whatsoever in respect of personal injury to or the death of any person arising out of or in the course of or caused by the carrying out of the Works, except to the extent that the same is due to any act or neglect of the Employer or of any of the Employer's Persons.

Liability of Contractor—injury or damage to property

6.2 The Contractor shall be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings in respect of any loss, injury or damage whatsoever to any property real or personal in so far as such loss, injury or damage arises out of or in the course of or by reason of the carrying out of the Works and to the extent that the same is due to any negligence, breach of statutory duty, omission or default of the Contractor or of any of the Contractor's Persons. This liability and indemnity is subject to clause 6.3 and, where Insurance Option C (Schedule 3, paragraph C.1) applies, excludes loss or damage to any property required to be insured thereunder caused by a Specified Peril."

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