



**THE SOUTH AFRICAN COUNCIL**  
for the  
**QUANTITY SURVEYING PROFESSION**

Established in terms of the Quantity Surveying Profession Act 2000 (Act 49 of 2000)

**PROFESSIONAL SKILLS MODULE NO. 15**

**UNDERSTAND THE BASIC PRINCIPLES OF CONSTRUCTION LAW  
IN THE BUILT ENVIRONMENT**

CPD VERSION - October 2014

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# DEMONSTRATE AN UNDERSTANDING OF THE BASIC PRINCIPLES OF CONSTRUCTION LAW IN THE BUILT ENVIRONMENT

## MODULE CONTENT

### 1. INTRODUCTION TO LEGAL THEORY

- 1.1 The South African legal system
- 1.2 The South African court structure and the doctrine of *stare decisis*
- 1.3 The nature of law
- 1.4 The law of tort

### 2. THE LAW OF CONTRACT

- 2.1 General principles
- 2.2 Agreement
- 2.3 Offer and Acceptance
- 2.4 Legal and physical performance
- 2.5 Capacity to enter into contracts
- 2.6 Formalities and requirements for a valid contract
- 2.7 Terms and conditions in contracts: General principles
- 2.8 Standard forms of contract
- 2.9 Uniformity in construction procurement
- 2.10 Construction contracts
  - a. The Joint Building Contracts Committee (JBCC)
  - b. The General Conditions of Contract of Construction Works 2010 (GCC 2010)
  - c. NEC3 Engineering and Construction Contract (NEC3)
  - d. FIDIC International Conditions
- 2.11 Questions on law of contract

### 3. SELECTED CONSTRUCTION DEFINITIONS AND TERMS

### 4. MECHANISMS COMMONLY ENCOUNTERED IN CONSTRUCTION CONTRACTS

- 4.1 Assignment
- 4.2 Breach provisions
- 4.3 Cession
- 4.4 Completion
- 4.5 Deeming provision
- 4.6 Defects liability obligations
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- 4.8 Estoppel
- 4.9 Exemptions
- 4.10 Force majeure / vis major
- 4.11 Indemnities
- 4.12 Instructions
- 4.13 Penalties
- 4.14 Performance security
- 4.15 Repudiation

### 5. REFERENCES

#### ADDENDUM A: SAMPLE QUESTIONS ON CONSTRUCTION LAW

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## ORGANISATIONAL COMPONENT

### GENERAL PREMISE AND EDUCATIONAL APPROACH

The general objective with this study module is to emphasise **understanding** rather than **memorising** and to develop the skill to apply the principles in a practical way. A problem-driven approach to learning is followed.

The module comprises four parts, each one contributing to an understanding of the aspects of the construction sector that are impacted by construction law, the legislative environment within which construction law is practised, and mechanisms that are commonly encountered in construction contracts. The breakdown of the module is as follows:

Part 1 – Introduction to legal theory.

Part 2 – The law of contract.

Part 3 – Selected construction definitions and terms.

Part 4 – Mechanisms commonly encountered in construction contracts.

Each of these sections has specific learning outcomes which are identified in the module outline.

### LEARNING ACTIVITIES

The delivery of this module is by an alternative approach to learning and teaching. Theoretical content within the primary reader is limited, rather you will be asked to work through a series of linked learning sources, predominantly extending your theoretical knowledge base through focussed readings, as well as being supported by experience gained in your work environment. Once you have undertaken the required readings indicated, the module requires you to answer the sample questions on law and construction law (Addendum A) as a 'self-study' exercise. Should you wish to engage with this subject for gaining CPD 'credits' only, you are required to undertake the readings and answer the sample questions on law and construction law (Addendum A) as a 'self-study' exercise at the end of the module. In this event, the study material is considered to be equivalent to approximately 60 hours of study time.

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## ASSESSMENT CRITERIA AND FEEDBACK

- CPD assessment is undertaken via an on-line multiple choice test comprising 25 questions that should take maximum of 1-hour to complete. The minimum pass mark for this module is 60%.
- The test may be taken one per annum and no supplementary assessment is granted.
- The results for the assessment mark will be communicated to users immediately and will be inputted into your CPD profile under Category 1.

## CREDITS

The CPD weighting of this module is 10 Category 1 hours.

## STUDY COMPONENT

The competencies, skills and range statement stated in this section are those as contained in the South African Qualifications Authority Unit Standard entitled: *Apply legal principles to the contractual management of Built Environment projects.*

## PERSONS WHO SUCCESSFULLY COMPLETE THIS MODULE WILL GAIN THE FOLLOWING COMPETENCIES:

The ability to:

- a) understand *Law and the Built Environment* as concept
- b) understand why basic competence in law is an essential ingredient for success in professional careers in construction
- c) communicate the core legal issues with counterparts in the legal profession
- d) understand the basic concepts of contracts and the rules of contract formation
- e) understand the basic rules of both contract law and tort
- f) describe the development of the various types of construction contracts in use in South Africa
- g) know the application of the various types of construction contracts endorsed by the cidb
- h) understand the need for uniformity in construction procurement
- i) know the typical contract interpretation rules that apply to construction contracts
- j) effectively use construction contracts as a management tool
- k) identify the important role of the JBCC documents in the South African building industry
- l) understand what the duties are of the Principal Agent / Project Manager / Engineer arising from the various construction contracts
- m) understand mechanisms commonly encountered in construction contracts

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- n) understand how risk is dealt with under construction contracts
  - o) demonstrate problem-solving skills

**TO DEMONSTRATE TO THE SCOPE OF PROFESSIONAL COMPETENCE GAINED BY STUDYING THIS MODULE, THE USER WILL BE REQUIRED TO :**

Illustrate that he/she is capable of:

- a) describing the South African legal history from the date Jan van Riebeeck arrived in the Cape in 1652
- b) knowing what the distinctions are between Roman law, Roman-Dutch law and common law
- c) describing how the South African court structure is made up
- d) identifying the main divisions of South African law
- e) demonstrating basic understanding of the law of tort
- f) demonstrating basic understanding of the general principles of contract law
- g) identifying the importance of standard forms of contract
- h) demonstrating basic understanding of the need for uniformity in construction procurement
- i) describing the development and application of the various types of building contracts in use in South Africa
- j) knowing selected construction definitions and terms
- k) demonstrating basic understanding of the important mechanisms commonly encountered in construction contracts

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## **RANGE STATEMENT**

Professionals are expected to demonstrate their acquired skills through their ability to perform the following in their place of employment :

- acquire knowledge of construction law relevant to the Built Environment
- acquire knowledge of the standard forms of building contracts endorsed by the cidb
- know the application of the Standard for Uniformity for Construction Procurement developed by the cidb to comply with all the acts impacting on construction procurement
- understand the legal principles adopted in construction contracts, together with appropriate common law and statutory considerations
- ensure compliance of project with legislative requirements including environmental and safety and health issues
- advise clients on legal obligations and responsibilities relating to appropriate contract law

Successful completion of this module will contribute towards the full development of a professional community of Quantity Surveyors. The skills, knowledge and understanding to be demonstrated by qualifying learners are essential for economic transformation and social upliftment within environments related to construction and property development. Construction contracts must also take account of disputes and their resolution. This aspect is dealt with in a separate module (Module no. 16) entitled: “Dispute resolution in the South African Construction Industry”.

## **THE SKILLS GAINED BY SUCCESSFUL COMPLETION OF THIS MODULE WILL EMPOWER A PERSON TO ACCESS A VARIETY OF EMPLOYMENT OPPORTUNITIES, FOR EXAMPLE IN:**

- construction economics
- education and training
- equipping / refurbishment / management e.g commercial / retail enterprises and hospitality / tourism industry
- housing
- project management
- construction management
- property development
- quantity surveying
- real estate management
- facilities management

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## AIMS AND OBJECTIVES

The primary objective of this module is to provide professionals with an understanding of the theoretical concepts of construction law in the built environment, and to contextualize this within the framework of professional activities undertaken within the built environment. The term “construction law” is now universally understood to cover the whole field of law which directly affects the construction industry, and the legal requirements through which it operates. Construction law is, thus, an interactive subject in which both lawyers and construction professionals have an essential part to play.

## RECOMMENDED READING

The reference sources listed below are intended to provide Professionals with details of texts which can contribute to an extension of the basic knowledge base provided by the study material provided. Some of these may be cited in the paper below. Whilst you will not be examined directly on the content of these sources, it is suggested that a study of their contents will enhance your ability to undertake the required professional activities in an effective manner.

- a) Adriaanse, J. 2010. *Construction contract law*. 3<sup>rd</sup> Ed. UK. Palgrave and MacMilan
- b) Finsen, E. 2005. *The Building Contract: A commentary on the JBCC Agreements*. 2<sup>nd</sup> Ed. RSA. Juta & Co, Ltd. (major revision undertaken by Segal S - expected publication date March 2014)
- c) Knowles, R. 2012. *200 Contractual problems and their solutions*. 3<sup>rd</sup> Ed. UK. Wiley-Blackwell
- d) Mckenzie, H S. 2009. *The law of building and engineering contracts and arbitration*. 6<sup>th</sup> Ed. RSA. Juta & Co, Ltd.
- e) Uff, J. 2009. *Construction Law*. 10<sup>th</sup> Ed. UK. Sweet and Maxwell
- f) Wood, D. Chynoweth, P. Adshead, J & Mason, J. 2011. *Law and the Built Environment*. UK. Wiley-Blackwell

## ABBREVIATIONS

FIDIC	FIDIC International Conditions
GCC	General Conditions of Contract of Construction Works
JBCC	Joint Building Contracts Committee Incorporated
NEC	New Engineering Contract

## DIAGRAM

Main Divisions of the South African Law (p. 13)

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# CONSTRUCTION LAW – AN OVERVIEW

*The term “construction law” is 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 (Uff, 2009: 1)*

*On completion of this part you should be able to:*

- have an understanding of the legal history from a historical perspective, looking in particular at the structure of the South African legal system and of our courts*
- distinguish between Roman law, Roman-Dutch law and Common law*
- explain the divisions of South African law*
- have an understanding of the law of tort*

## 1. INTRODUCTION TO LEGAL THEORY

The following section includes a short historical overview of the development of the South African legal system. The section also distinguishes between the law of contract and the law of tort and concludes with a discussion on standard forms of contract being used in the South African construction industry. This section is founded on the course notes of Alusani (2009), but the author has added a substantial part from his own course notes at the University of Pretoria and from other sources as duly referenced in the text.

### 1.1 The South African legal system

The South African legal system has undergone major changes in the past two decades. The constitution, which is based on the Canadian Charter of Rights and Freedoms, is dramatically different from the system of parliamentary sovereignty, which applied in the country for a number of years. However, despite these recent changes, the legal system still remains squarely founded on Roman law, common law and Roman-Dutch law.

#### 1.1.1 What is Roman law and common law?

Roman law evolved with the development of the Roman Empire and was ultimately codified into a legal system that applied throughout the Roman Empire. This codification took place initially in approximately 287 BC when the law was codified into twelve tablets which were placed in the *forum* of Rome.

After the fall of the Roman Empire, the codified Roman legal system was side-lined and co-existed with the various customary legal systems which were applied by the various European tribes.

In medieval times (from about the 11<sup>th</sup> century onward) there was a renewed academic interest in the codified Roman legal system<sup>1</sup>

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<sup>1</sup> **What is the difference between a common law system and a codified legal system?** A common law system is based on tradition, precedent, and custom and usage, and the courts fulfill an important role in interpreting the law according to those characteristics. A codified legal system is based on a very detailed set of laws that are organized into a code. The two legal systems differ primarily in that common law is based on the courts' interpretation of events, whereas civil law is based on how the law is applied to the facts.



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Initially, Roman law was only studied by scholars and taught at universities. Inevitably Roman law came to be applied in legal practice, especially in the area of civil law. This process of adoption/reception of Roman law occurred over different periods and to various extents across all of Europe.

During the 16<sup>th</sup> century Roman law became the dominant legal system throughout Europe. Through the process of adoption/reception many Roman legal principles were amalgamated with, or amended to suit, the legal norms and requirements of the various European nations. The Roman legal system generally applied across Europe at this time and was (in consequence of the adoption/reception process) by no means identical to the codified Roman law of antiquity. Since the Roman legal system that had evolved through the adoption/reception process was applied in most European countries, it became known as the *Ius Commune* or common law.

### 1.1.2 What is Roman-Dutch law?

In the form of the *Ius Commune*, Roman law applied in most European countries until a nationalization drive among European countries during the 18<sup>th</sup> and 19<sup>th</sup> centuries replaced the *Ius Commune* with national legal systems. In many regions of the German Reich, Roman law remained the primary source for the national legal system until the German Civil Code was introduced. Similarly the *Ius Commune* became the primary source for the Dutch legal system, which evolved into Roman-Dutch law, which in turn became the foundation of the South African legal system.

The Roman-Dutch law consists of a hybrid of the Roman and *Ius Commune* legal processes and principles, interpretations of these legal processes and principles as commonly applied in the Netherlands and interpretations thereof by various Dutch academics. This hybrid legal system was introduced into South Africa particularly through the Dutch occupation and ultimately formed the foundations of the present day South African legal system.

There were a number of prominent jurists from Holland during this time whose writings are still followed in present-day South Africa. Some of the more famous jurists are listed below:

Hugo de Groot (Grotius) (1583-1645);  
Simon van Groenewegen (1613-1652);  
Simon van Leeuwen (1652-1682); and  
Johannes Voet (1647-1713).

Roman-Dutch law is no longer the law to the Netherlands because that country's law was codified, as was the law in most other European countries. It is really only in countries, which the Dutch colonised that Roman-Dutch law remains, for example Surinam, Sri Lanka (formerly Ceylon) and South Africa.

### 1.1.3 What is common law?

Common law is that element of a legal system that does not originate from legislation. It is loosely defined as the traditions, principles, decisions and processes that have been introduced and accepted by our Courts as being legally correct and binding on all citizens. Common law contains all the elementary, basic rules that govern the relationships between people. Communities developed the rules over centuries and continue to add new rules as they become necessary.

Common law is determined through decisions made by our courts on facts that are brought before them. Since many disputes and issues, which come before our Courts, cannot be determined by reference to an applicable Act our Courts necessarily exercise a judicial discretion tempered by reference to existing legal principles, rules of interpretation, relevant existing case authority and other authorities in making a determination. In the judicial discretion our courts are often required to interpret existing legislation and apply its interpretation to the applicable facts. Our Higher Courts decisions are recorded in Law Reports and by operation of the doctrine of *stare decisis* are binding on Lower Courts and are known as judicial precedent (see 1.2 below).

### 1.1.4 South African legal history

Jan van Riebeeck brought Roman-Dutch law with him to the Cape in 1652. The law here was the same as it was in Holland at the time, but subsequent to 1652, laws passed in Holland were applied in this country only if the government of the Netherlands intended them to be.

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The British occupied the Cape first in 1795 and later, more permanently, in 1806. The citizens of the Cape retained the rights and privileges, which they had prior to British occupation, and this included the continuation of the Roman-Dutch law as their legal system. It was inevitable, however, that there would be considerable English influence.

It is perhaps surprising that the Roman-Dutch law did not die out altogether. One of the reasons it did not was due to the efforts of certain judges to apply it consistently, and this process was helped by the translation into English of certain of the Roman-Dutch writers' works.

Union of South Africa came in 1910, with a constitution based on English constitutional norms, though Britain itself had no written constitution. Over the years, English influence on the law in South Africa has been considerable. Some legislation was adopted and the law of negotiable instruments draws very heavily from the English law. In the common law, English influence was strong in areas like criminal law and delict, but weak in the law of property.

In summary, the common law and legal system in South Africa today is basically Roman-Dutch, but infused with many English law doctrines and principles.

## 1.2 The South African court structure and the doctrine of *stare decisis*

The Supreme Court was created by the South Africa Act 1909 when the Union of South Africa was formed. The Supreme Courts of the four former colonies (the Cape Colony, the Transvaal Colony, the Orange River Colony and the Natal Colony) became provincial divisions of the Supreme Court. In 1957 the Eastern Cape Local Division was elevated to provincial status, and in 1969 the Griqualand West Local Division was similarly elevated, becoming the Northern Cape Provincial Division. During the apartheid era the Supreme Court of South Africa lost jurisdiction over the quasi-independent Bantustans (Transkei, Bophuthatswana, Venda and Ciskei) which created their own Supreme Courts. The interim Constitution which came into force in 1994 kept the existing structure of the Supreme Court, but absorbed the Supreme Courts of the Bantustans as provincial divisions. The final South African constitution transformed the Appellate Division into the Supreme Court of Appeal, and the provincial and local divisions into High Courts (see below) ([http://en.wikipedia.org/wiki/Supreme\\_Court\\_of\\_South\\_Africa](http://en.wikipedia.org/wiki/Supreme_Court_of_South_Africa), accessed on 2011/02/21).

In South Africa, the law is made up of:

- Legislation (Acts of Parliament);
- Previous court decisions (known as 'judicial precedent');
- Roman and Roman-Dutch law; and
- Influences from other jurisdictions, including the United Kingdom.

The function of judges in our law is to "speak" law but not to create law. However, because our law is not yet codified (*supra*) the rule of precedents, or also called "the rule of *stare decisis*", is applicable on the South African law system. The "rule of *stare decisis*" means literally to stand by previous decisions. In this manner new law is sometimes created by means of High Court judgments. This rule is not part of Roman-Dutch law but was rather derived from English law.

Basically, under the doctrine of *stare decisis*, the decision of a Higher Court within the same jurisdiction is binding on a Lower Court within that same jurisdiction. The decision of a court of another jurisdiction only acts as persuasive authority. The degree of persuasiveness is dependent upon various factors, including, first, the nature of the other jurisdiction, and second, the level of Court which decided the precedent case in the other jurisdiction.

The *stare decisis* principle means that the following two prerequisites must be present for the proper working of the system:

- a hierarchy of courts; and
- a proper system of court judgment reporting.

## A hierarchy of courts

The courts in South Africa are subdivided into higher, lower and certain other courts for special purposes (e.g. the court for small claims).

The South African court structure consists of two interrelated tiers:

- Higher Courts; and
- Lower Courts

The Higher Courts are all divisions of the Supreme Court, which are as follows:

- Constitutional Court;
- Supreme Court of Appeal;
- High Courts (each of the nine Provinces has its own, except Gauteng, which has two);
- Labour Appeal Court;
- Labour Court;
- Land Claims Court;
- Special Incomes Tax Court;
- Competition Appeal Court; and
- Electoral Court.

The Lower Courts are the Magistrates Courts, and the Small Claims Courts.

Decisions of the Higher Courts take precedence over and are binding on the Lower Courts. In civil matters, the order of precedence is as follows:

- Constitutional Court;
- Supreme Court of Appeal;
- High Courts;
- Magistrates Courts; and
- Small Claims Courts

Wille's (1991, p. 31) confirms that the rule *stare decisis* implies that the decision is binding on the court which actually pronounced the judgment, and also on all the other courts which are subordinate to that court. A decision of the Supreme Court of Appeal is therefore binding on any other court, for one of its chief functions is to make the common law uniform throughout South Africa. South Africa is divided up into a number of magisterial districts in which magistrates' courts have a limited jurisdiction on the amount in dispute, and a magistrate has no jurisdiction on matters such as granting sequestration orders, ordering of specific performance without an alternative of payment of damages, etc. In many districts of the Republic there are small claims courts for the cheap and expeditious hearing of minor civil matters. Any person, other than a juristic person, may institute a claim for an amount not exceeding a determined amount against any other person, including entities such as companies and municipalities, but excluding the state. The court's jurisdiction is much more limited than that of a magistrate's court and the proceedings are informal and inquisitorial. Legal representation is not allowed and the court is not bound by the rules of the law of evidence.

## A proper system of court judgment reporting

Juta, South Africa's oldest legal publisher has published law reports since the mid-nineteenth century. In 1947, Juta began publishing the (amalgamated) South African Law Reports (SALR), which includes leading judgments from all the South African superior courts as well as selected judgments from Zimbabwe and Namibia. Specialised law reports series from Juta include the Industrial Law Journal (since 1980), and the South African Criminal Law Reports (since 1990). The other major South African legal publisher, Butterworths, launched several series of law reports in the 1990's. These include: Butterworths Constitutional Law Reports; Butterworths Labour Law Reports; and the All South African Law Reports (All SA), which are modelled on the All England Law Reports and include leading judgments from South African courts on all areas of law.

### 1.3 Divisions of South African law

There exists no uniform division of South African law and different text books provide their own interpretation. It is also not possible to put law into individual boxes as the law will affect more than one division in most cases.

Some basic divisions of law are provided below (refer to Introduction to South African Law – My Fundi [http://myfundi.co.za/e/Introduction\\_to\\_South\\_African\\_Law](http://myfundi.co.za/e/Introduction_to_South_African_Law) accessed on 2012/01/20):

#### International v. National law

*International law* has to do with relations among the countries of the world and is normally expressed in treaties. It embraces the obligations one nation owes to another and also the conduct of a nation's citizens toward other nations and their citizens. *National law* is the law or legal system of a specific state. It is the set of legal rules that applies within a specific country and is interpreted and enforced by that country's justice system. The South African law is divided into two main divisions, namely "public law" and "private law".

#### Public v. Private law

*Public law* is that part of South African law which deals with the state and its powers. It includes the Constitution, the organisation of the state, the regulation of the different organs of government and the rules that deal with the relationship between the state and its subjects (citizens). It also regulates relationships that are concerned with public interests, in other words the interests of the community. If someone commits a crime, this act goes against the interests of the community and must be punished. Such an act becomes the concern of public law. *Private law* governs rights and obligations between individuals, which may include a business, company or other form of organisation. Sometimes the same events give rise to both public and private (civil) proceedings. A prosecution in a criminal court may well be brought against the driver of a vehicle under the Road Traffic Acts while the compensation aspects will be determined in a separate action brought by the claimant in a civil court. Both public law and private law are divided into main divisions and further subdivisions as illustrated in Diagram 1 below.

#### 1.3.1 Divisions of public law

**Constitutional law** – is concerned with the institution of the state, in other words how it is formed, its organization and its functioning. It also governs the powers of the organs of state such as Parliament, the Courts and the Cabinet. The Constitution forms the basis of South Africa's constitutional law

**Administrative law** – controls the administration of the state in general. It determines the way in which state bodies such as ministers, state departments and various boards (e.g. the licensing board) should exercise its powers, particularly in relationships with citizens

**Criminal law** – states which acts are crimes (criminal offences) and what penalties or punishments are imposed by the state for committing these crimes

**Law of procedure** – provides the process or procedure according to which a case must be practically handled when a legal rule has allegedly been violated

**Law of evidence** – determines how the facts in either a criminal or a civil case must be proved. It is concerned with how evidence is presented and regulates the manner in which witnesses should present their evidence before court and determines what kinds of evidence may be used in court.

#### 1.3.2 Divisions of private law

**Law of persons** – is concerned with persons as subjects of the law. It covers such topics as the definition of natural persons and juristic persons, how they come into being, legal capacity and a person's status or legal position, which is influenced by factors such as age (minority or majority), marital status or insanity

**Law of property** – focuses on the relationships between persons and "things". "Things" are divided into "movable property" or "immovable property" and it determines which rights persons can have with respect to such property. The best-known example of such right is ownership

**Law of obligations** – regulates relationships that come into existence between two (or more) persons in terms of which one person has a right against the other for performance, and the latter person has a corresponding duty to perform. These relationships are called obligations, which are mainly created by contracts and delicts. Therefore the law of contract and the law of delict are regarded as subdivisions of the law of obligations as illustrated in Diagram 1 below

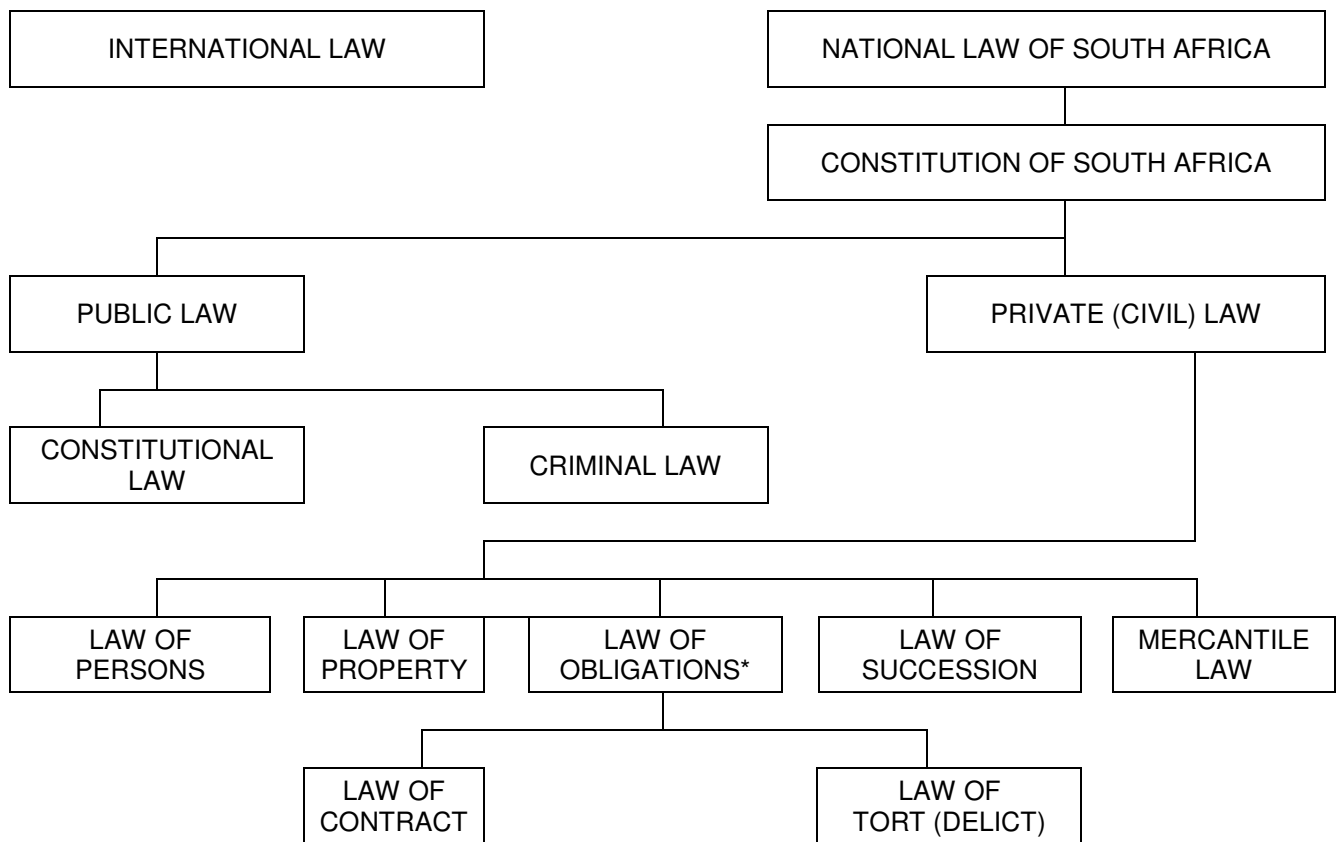
**Law of succession** – deals with how a person's property is to be treated after that person's death. This may be regulated by the rules of testate succession (the deceased left a will, or testament) or alternatively by the rules of intestate succession (the deceased left no will)

**Mercantile law – also known as commercial law or business law** - is the body of rules that deal with commercial transactions and is a large and very important field of law. It consists of a number of branches of law important for business, or trade and industry. It represents both public and private law and includes a number of specialised fields such as the law of insurance, special contracts of agency, suretyship and partnerships

**Other Divisions** – such as Law of Family (marriage, marital property, divorce, etc.), Law of Intellectual Property (human intellect, e.g. inventions, designs, computer software, works of art, etc.), Law of Personality (personal rights, e.g. reputation, dignity, honour, privacy, etc.) and others are found in most textbooks.

### 1.3.3 Other disciplines of law

There are various other disciplines of law not mentioned above because they are usually regarded as subdivisions of larger disciplines or cut across more than one area of law. Examples are social welfare law, forensic medicine, environmental law, municipal law, media law and military law. New areas of law are also continuously emerging, such as cyber law for instance.



\*e.g. Construction contracts

Diagram 1: Main divisions of South African Law (Source: author created)

## 1.4 The law of tort (aka law of delict)

### 1.4.1 Definition and Scope

Just a brief overview of the law of tort will be provided as this form of law is a complete legal study field on its own. Its application on the construction industry is limited, albeit important, especially in matters such as agency and public liability where no direct contractual nexus exists between the disputants.

Giliker & Beckwith (2008: 1) state that tort takes many forms. It includes for example negligence, nuisance, libel, slander, trespass, assault and battery. A tort is a civil wrong. The law of tort is developed from common law principles. Tort can be defined as a civil wrong independent of contract; or as a breach of a legal duty owed to persons generally. The practical consequences of the law of tort are concerned with the adjustment

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of losses. Where the elements of fault and damage exist, the law determines who should bear the resulting financial loss.

The term *tort* is very similar in meaning to *wrong*; yet tort is not intended to include all wrongful acts done by one person to another. Torts may be committed intentionally or unintentionally, and with or without force. It may be said that tortious acts consist of the commission (or omission, as the case may be) of acts whereby another individual receives an injury to his person, property, or reputation.

A *tort* is distinguished from a *crime* in that a tort is a private injury upon which suit may be brought, while the latter is an offence against the public for which any retribution must be sought by the appropriate authority. It is entirely possible for a single act to constitute at once a tort and crime.

*Contract liability* (which is confined to the parties in the agreement) can likewise be differentiated from *tort liability*. Contract actions afford the innocent party a means of protecting his legitimate interest in having whatever promises are made to him fulfilled. Tort actions, on the other hand, seek to safeguard the individual from various kinds of harm.

#### 1.4.2 Bases of Tort liability

Commonly stated there are three bases of tort liability:

- Intentional conduct;
- Unintentional conduct; and
- Strict liability for reasons of public policy.

#### 1.4.3 Negligence

Negligence is by far the most important of torts, for several reasons. It forms the cause of action in the majority of cases brought in tort; its scope is very wide; and it may also be an element of liability for other torts. Where the alleged tort is founded on negligence, the plaintiff may also be required to show that he is free from any contributory negligence. The term negligence is also found in the context of breach of contract, for example, where an architect is alleged to have carried out negligent design or supervision. Giliker & Beckwith (2008: 21) define the tort of negligence as: "... a breach of a legal duty to take care, which results in damage to the claimant", and continue that to establish the tort of negligence; the claimant must prove three things:

- the defendant owes the claimant a duty of care;
- the defendant has acted in breach of that duty; and
- as a result, the claimant has suffered damage which is not too remote a consequence of the defendant's breach.

#### 1.4.4 Vicarious liability

The concept of vicarious liability, or imputed liability, is based upon "the general common law notion that one who is in a position to exercise some general control over the situation must exercise it or bear the loss". Vicarious liability in this context means liability for the torts of others. In the construction industry this may arise in two ways. First, the employer may be liable for the torts of the contractor (e.g. employing an incompetent contractor, or for failing to give adequate directions to avoid damage to another) or the contractor, for his subcontractors; secondly, any of the parties involved in the work may be liable for torts of their own individual employees.

#### 1.4.5 Aquilian liability

Wille's (1991: 646) states that the *action legis Aquiliae* is aimed at the recovery of damages for patrimonial loss and either negligence or intention may be established to satisfy the fault requirement. Aquilian liability contains the following essential elements, each highlighting a different aspect of the damage-producing occurrence: conduct; wrongfulness; factual causation; fault; remoteness; and patrimonial loss.

### 1.4.6 The distinction between tort and contract

According to Giliker & Beckwith (2008: 12) contractual remedies seek to place the claimant in the position, so far as money can do it, that he or she would have been in had the contract been performed. By contrast, tort is concerned with compensating the victim who has suffered injury as a result of conduct classified as a civil wrong by law. They state that, in practice, the distinction between contract and tort is determined simply by asking the question: "Have the rules of contract law been complied with?" If the answer is "no", the obligation or wrong in question cannot be classified as contractual, but may be classified as tortious.

### 1.4.7 Remedies

The remedy claimed in most tort actions is damages. The successful claimant in an action for damages will generally be awarded a sum which is intended to compensate for the real loss suffered. The sum awarded must take into account future loss since usually only one action may be brought. Injunction is an equitable remedy which prohibits a wrongful act or sometimes requires a defendant to take steps to put matters right. It is discretionary in nature and must be appropriate to the circumstances.

## 2 THE LAW OF CONTRACT

*On completion of this part you should be able to:*

- *have an understanding of the general principles of contract law*
- *distinguish between the various standard forms of contract in use in South Africa*
- *explain the Standard for Uniformity in construction procurement*
- *have an understanding of the application of the JBCC, GCC, FIDIC and NEC*

### 2.1 General principles

The law of contract is frequently the first 'case law' subject to which students are introduced when they commence their legal studies. The main reason for this is that contracts affect the general public more than most other areas of law and arise daily in business and commercial life. The contract is the most important stage in the process when land or buildings are transferred and when building projects are undertaken.

Steyn *et al.* (2012: 393) defines a contract as "... an agreement with the serious intention to be legally bound". A contract is made up of a set of mutual promises stating the rights and obligations of the parties to that contract. These rights and obligations become enforceable by law and, therefore, parties rely on contracting and contracts in structuring their business relations.

Although parties have significant flexibility in setting the terms of their contracts the enforceability of these terms are subject to limits imposed by relevant legislation and common law.

Contracts are, therefore, *private law created by the agreement between contracting parties within the parameters of well-established basic legal mechanisms.*

In order for a valid contract to come into existence, certain requirements must be satisfied. According to McKenzie (2009: 7) these requirements are:

- The parties should be competent to contract;
- There should be agreement (consensus) between the parties;
- The contents or consequences of the contract should be possible at the time that the contract is entered into;
- The subject matter of the contract should be legal;
- The contract should not be contrary to public policy;

- The contract should be voluntarily, seriously and deliberately entered into for some reasonable cause; and
- The formalities required by law should be observed.

## 2.2 Agreement

The basis of a contract is agreement between the parties. The common law has developed a series of tests to determine whether or not agreement has been reached. These tests have been crystallised into the test of offer and acceptance.

In *Conradie v Rossouw* the Appellate Division (now the Supreme Court of Appeal) reaffirmed the traditionally accepted principle that:

*'According to our law if two or more persons, of sound mind and capable of contracting, entered into a lawful agreement, a valid contract arises between them which is enforceable by action'*

## 2.3 Offer and Acceptance

Steyn *et al.* (2012: 394) defines an offer as "... a declaration of intent made by a prospective party to a contract (the *offeror*) that contains proposals regarding the proposed contract, and that is of such a nature that mere acceptance thereof by the *offeree* (to whom the offer was made) creates a contract".

When an offer has been made, no contract is formed until the *offeree* accepts the offer. Many offers (or counter-offers) may be made during contractual negotiations, yet there can always be only one acceptance. The point at which the offer is accepted has been described as the moment when consensus has been reached, a '*meeting of the minds*', or when the parties are '*ad idem*'. Contractual liability is based on this consensus or '*meeting of the minds*.' Steyn *et al.* defines an acceptance as "... an unqualified declaration of intent made by the *offeree*, approving the offer without reservation".

However, consent is not always as clear-cut as the express acceptance of an offer. It is sometimes necessary to make enquiries into surrounding circumstances to determine whether or not an offer has been accepted. Judge Blackburn in the English case of *Smith v Hughes* cited by Alusani (2009) stated:

*'If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that the other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms'*

This judgment became known as the doctrine of quasi-mutual assent and has been accepted by the South African Courts. The doctrine of quasi mutual assent is often used to prove a contract which has been formed by the actions of the parties.

Accordingly, acceptance of an offer can be implied or tacit – i.e. it can be inferred from the circumstances that the offer has been accepted. However, acceptance (like an offer) must be clear and unequivocal so as to leave no doubt in the *offeror's* mind that the offer has been accepted.

A party to whom an offer has been made should not assume that the offer will remain open indefinitely. The party making the offer is free to revoke the offer at any time before acceptance by the other party (provided there is no express validity period). Once the offer is terminated, the party to whom the offer has been made can no longer accept that offer and form a valid contract. An offer is deemed to be open for a reasonable time when no time limit is stipulated.

**Example:** Company A offers to excavate 5000m<sup>3</sup> of hard rock for Company B at a price of R15/m<sup>3</sup> on 5 July. No validity period is expressed in the offer. Company A hears through the Kathu telegraph that its competitor is offering to excavate the rock for Company B at the price of R30/m<sup>3</sup>. On 7 July, Company A decides to revoke its offer and make a counter offer to Company B to excavate the rock at a price of R23/m<sup>3</sup> prior to acceptance of the original offer by Company B (adapted from Alusani, 2009).

Company B will have no legal recourse against Company A for such action as Company A is legally entitled to revoke its offer at any time before acceptance thereof.

Would this example be different if Company A had expressed a validity period of 7 days with their offer?



Generally construction contracts take some degree of clarification and negotiation to finalise. During such negotiations, various statements may be made by the parties, which may be interpreted by one party (and not the other) as a firm offer. Our courts have distinguished certain statements from true offers, some examples are:

- Invitations to negotiate – these are statements made to induce another party to enter into a contract.
- Requests for a quotation (RFQ, RFP or enquiry) – a request to submit an offer/an invitation to do business.
- Statements of information – these usually relate to information made by one party in respect of the terms on which he is prepared to conduct business.
- Statements of intention/letters of intent – there is an extremely fine line between stating that you intent to contract and actually offering to do so. The fine line usually turns on whether the party making the offer indicated an intention to be bound by contract without further thought on his part. See comments below regarding *letters of intent*.

All of the above do not constitute true offers and cannot be relied upon to prove the existence of a valid contract.

*What about an invitation to tender?*

An invitation to tender is no more than a request to submit offers, and each tender is an offer that the employer may accept or reject.

*Can an offer be terminated?*

A party is free to revoke its offer at any time before acceptance of that offer (provided no validity period is expressed), however, there are a number of other ways in which an offer can be terminated. These include:

- Expiry of the stated validity period.
- Lapse of a reasonable time – where no validity period is stated, the offer shall terminate after a reasonable time has lapsed.
- Death – if the party making the offer is a natural person and that person dies, the offer is terminated.
- Loss of contractual capacity – if the party making the offer loses its contractual capacity, the offer is terminated. Would a company placed in liquidation lose its contractual capacity?
- Rejection of an offer – if the party to whom the offer has been made, rejects that offer, the offer is terminated.
- Counter offer – where a counter offer is made in respect of an original offer, that original offer terminates.

*What is reasonable?*

The concept of “reasonableness” is used extensively on our law and a number of tests have been developed to determine what constitutes “reasonable”. Perhaps the widest use of the concept of reasonableness is found in our law of delict which allows persons to claim for civil wrongs brought against them.

One of the cornerstones of the law of delict is the test applied to the *diligens paterfamilias* or reasonable man. This test aims to establish whether a person acted negligently and asks the following questions:

- Would a reasonable person, in the same circumstances as the defendant, have foreseen the possibility of harm to the claimant;
- Would a reasonable person have taken steps to guard against that possibility; and
- Did the defendant fail to take the steps which he or she should have reasonably have taken to guard against it?

If the above three questions are answered in the affirmative then negligence is established.

In the case of *S v Burger* 1975 (4) SA 877 (A) cited by Alusani (2009) the court described the reasonable person by stating the following:

*‘One does not expect of a [reasonable person] any extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or the trained reflexes of a racing driver. In short a [reasonable person] treads life’s pathway with moderation and prudent common sense’*

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This same logic is applied when determining 'reasonable notice' or the elapsing of a 'reasonable period of time'.

## 2.4 Legal and physical performance

### 2.4.1 Legality

In principle, an agreement must be legal. Agreements are illegal if they conflict with legislation or common law. Examples of illegality occur where the performance or purpose of an agreement is illegal. An example of a contract which is in conflict with the common law is when a contract is said to be *contra bonos mores*, or against the morals of society.

Examples of contracts contrary to legislation would include contracts related to the sale and distribution of drugs, dangerous weapons, pirated goods, etc.

### 2.4.2 Physical possibility of performance

According to Steyn *et al.* (2012) this requirement covers two aspects. The first is that the performance of a contract must be objectively possible at the time of entering the agreement, if not, then performance is physically impossible and no enforceable agreement can come into existence. The second is that any performance must be at least determined or determinable. Care must be taken to describe performances extensively, failing which the contract could be found to be void for vagueness.

Contracts, which are physically impossible to perform at the time of contracting, are unenforceable. South African courts have adopted a four-point test to determine whether or not, at the time of contracting, performance is in fact objectively impossible. The party alleging that performance was impossible at the time of contracting will have to prove (on a balance of probabilities) that:

- The impossibility of performance was absolute, not probable. The mere likelihood that performance will prove impossible is not sufficient to destroy the contract. Absolute impossibility in this sense refers to definite, unqualified impossibility;
- The impossibility is absolute, as opposed to relative. If the party promises to do something which, in general, can be done, but which that particular party cannot for whatever reason do, that party will still be liable under the contract;
- The impossibility must not be the fault of either party. A party who has caused the impossibility cannot take advantage of it; and
- The principle that a contract is nullified by the impossibility of performance must not be contrary to the common intention of the parties.

## 2.5 Capacity to enter into contracts

According to Steyn *et al.* (2012: 399) our law distinguishes between natural persons (people) and legal persons (artificial persons with own legal personality such as companies).

- Natural Persons:
  - Persons with no contractual capacity, e.g. infants under the age of seven years and persons under the influence of alcohol or drugs;
  - Persons with limited contractual capacity, e.g. minors between the ages 7 and 18 years and persons married in community of property; and
  - Persons with full contractual capacity.

Minors and mentally incompetent natural persons do not have the legal capacity to enter into contracts. All others are generally assumed to have full legal capacity to enter into contracts. In South Africa, the legal age for entering into contracts is 18.

- Legal persons:
  - Companies;
  - Close Corporations (soon to be phased out);
  - Joint Ventures between corporations; and
  - Others such as the State, statutory entities and common law societies, clubs, etc.

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Companies, close corporations, joint ventures, the State and others have capacity to enter into contracts as separate, distinguishable legal entities (these entities are known as juristic persons – as opposed to natural persons). These entities contract through the acts of their agents, officers and employees. Whether a particular employee has the power to bind an entity to a contract is determined by an area of law called agency law.

A company or corporate body has a separate legal existence and personality from its founders, shareholders, officers, and employees – called juristic personality. The founders, shareholders, officers and employees of a company enjoy protection against the company's creditors by operation of the principle of limited legal liability, which means that the individuals associated with a company or corporate body are not themselves responsible for the company's debts or liabilities, including the liability for breach of contract.

It is vital that you bear this in mind when contracting generally and you must always determine precisely who and what legal entity you are contracting with. This is one of the most fundamental contracting principals, which is often overlooked with serious consequences.

**Example:** Joe Soap enters into negotiations with Siphon Ndlovu for the supply of a 500m<sup>3</sup> of sand. After various negotiations, they settle on a price and Siphon provides Joe with a contract to sign. The contract states that the contracting parties are Joe Soap and Ndlovu Sand Quarry cc. The contract makes provision for an advance payment by Joe Soap of R 100 000.00, which he pays to Siphon Ndlovu. When the sand is not delivered Joe goes to see his attorney who advises Joe that he has no cause of action (in terms of the contract) against Siphon and that, after conducting a company search, he has found that there is no such entity as Ndlovu Sand Quarry cc (Alusani, 2009).

### 2.5.1 Privity of contract

As a general rule only the parties to a contract may claim against each other in terms of that contract. This rule is referred to as the doctrine of privity of contract and is necessary to prevent third parties from drawing themselves into the parties' peculiar contractual relationship.

The doctrine of privity of contract in the context of construction contracts applies in subcontracting and professional services contracts.

By operation of the doctrine a subcontractor, even a nominated subcontractor, contracts with the main contractor and has no privity of contract with the employer. Therefore, the subcontractor has no recourse whatsoever against the employer as there is no contractual nexus between them. Likewise, the contractor has no recourse against an agent appointed by the employer in terms of a contract, as he is usually not party to the professional services contract between the agent and the employer.

## 2.6 Formalities and requirements for a valid contract

Generally speaking there are no special formalities (other than consensus and capacity) required to create and enforceable contract. A contract may be written or verbal. The written contract, obviously has its advantages – those being firstly that a party has time to consider its position in respect of the contract before signature, and secondly that the terms are definite and there can be less scope for disagreement in future.

The only formalities that exist in respect of contracts are:

- Those decided on by the parties; and
- Those required by law.

The common-law principle that an oral contract is every bit as legally valid as a written contract has been altered by legislation in respect of various types of contracts. For example, unless recorded in writing a contract relating to the alienation of land, executory donations, contracts of suretyship and credit agreements are void and unenforceable. In terms of the Arbitration Act 42 of 1965 an agreement providing for the reference to arbitration of any existing or future dispute must be in writing, but according to the judgement in *Kamstra & Holmes v Stallion Group* 1992 (3) SA 825 (W) it is not necessary for the parties to sign it.

There are certain essential terms required by law, which have been developed through the courts, for the creation of a valid contract. For example if a price is not fixed or determinable in a contract for purchase and sale any agreement purporting to sell an item will be void and unenforceable.

## 2.7 Terms and conditions in contracts: General principles

The parties to a contract often refer to the “terms and conditions” (or Ts & Cs – as often heard over the radio) of the contract but what are the “terms” and what are the “conditions” of a contract?

Terms and conditions of contracts fall into various categories. Alusani (2009) sets out these categories as follows:

### 2.7.1 Conditions – General

A condition qualifies a contractual obligation in such a manner as to make implementation of that contractual obligation dependant on the occurrence (or non-occurrence) of an uncertain future event. The most distinguishing characteristic of a condition is that it relates to an *uncertain future event*. In a contract, a condition operates to suspend, rescind, or modify the principal obligation under given circumstances.

A further example of a condition is the condition common in most agreements of sale of an immovable property which stipulates that the agreement of sale is subject to the purchaser obtaining a bank loan of a certain amount. If the purchaser fails to obtain a loan as provided for in the agreement of sale, the obligations set out in the agreement fall away. This is known as a *condition precedent*, which is discussed further below.

Conditions can be used in contracts, offers and, in some instances, acceptance.

Conditions are classified into different categories that describe the different types of conditions:

#### *Suspensive conditions*

A suspensive condition *suspends* the operation of an obligation, in whole or in part, pending the occurrence or non-occurrence of a particular specified future event i.e. until certainty is reached in respect of that future event.

An example of a suspensive condition is a standard clause relating to special risks (FIDIC). In the event of a special risk occurring, such as an outbreak of war, and damage taking place to the site and/or contractor’s equipment, the contractor shall be entitled to suspend the works and claim payment of the cost of rectifying the site and replacing his equipment. Another example can be found in the new FIDIC red book, clause 4.24 which relates to “fossils” etc.:

*‘All fossils, coins, articles of value or antiquity, and structures and other remains or items of geological interest found on the site shall be placed under the care and authority of the employer. The contractor shall take reasonable precautions to prevent contractor’s personnel or other persons from removing or damaging any of these findings.*

*The contractor shall, upon discovery of any such finding, promptly give notice to the engineer, who shall issue instructions for dealing with it.’*

#### *Resolutive conditions*

A resolutive condition, on the other hand, does not postpone the operation of a contractual obligation – the obligation becomes effective immediately and operates in full, but the obligation may come to an end if certainty is reached in that the condition is fulfilled or in that it fails.

#### *Condition precedent*

A condition precedent is a condition that the parties agree must be fulfilled before any contractual obligations at all come into existence between them. Usually the securing of financing for a project is a condition precedent to either party incurring contractual obligations.

Another example of a condition precedent is the obtaining of board approval before the project or contract commences.

#### *Options*

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An option is a right acquired under a contract and agreed to between the parties in terms whereof one party acquires a right to something that may be exercised and realised in specified circumstances. An option is actually a contract within a contract.

**Example:** Some contracts contain an option for the employer to extend the scope of one contract, which relates to one phase of a project, into another phase of the same project if the employer is satisfied with the performance of the contractor. Once the option is exercised the contractor then becomes obliged to perform the required works, usually under and subject to the same conditions of contract.

### 2.7.2 Terms

The terms of the contract are the undertakings agreed to by the parties, which in turn make up the contract. Alusani (2009) explains the terms as follows:

#### *Express terms*

When parties enter into a contract they normally give expression to their common intention by some form of conduct. The conduct usually consists in expressing the terms of the contract in words, but may also take some other form, like the nod of the head or the wave of a hand; in short, the conduct may take any form in which one party can make his intention known to the other. The following is an example of an *express term*:

*'The price for excavation in hard rock shall be R400/m3'*

#### *Implied terms*

The parties generally determine the terms of any contract by agreement between them. Often, however, the legislation under the common law implies certain terms as a matter of course. These terms need not be stated in the contract. The following are examples of *implied terms*:

- Under South African law, there is a statutory requirement that all agreements which relate to the alienation of the land must be reduced to writing. Most contracts of sale of land do not contain a specific clause stating that the contract must be in writing, it is naturally implied and dictated by legislation.
- Legislation also dictates terms which should be implied into certain types of contracts – the Housing Consumers Protection Measures Act states that certain guarantees must be implied into all building contracts such as the 5-year guarantee against structural defects.
- Section 2 of the Conventional Penalties Act 15 of 1962 states that a *creditor shall not be entitled to recover in respect of an act or omission which is the subject of a penalty stipulation, both the penalty and damages, or except where the relevant contract expressly so provides, to recover damages in lieu of penalties*. This provision will be implied into all contracts which are subject to the laws of South Africa and it is not necessary to include wording in the penalty clause which expressly excludes the employer's ability to claim damages over and above penalties.
- In a contract of sale the common law places an obligation on the seller to warrant that the goods sold shall not suffer from any latent defect. This is known as the implied warranty against latent defects.

A *tacit term* of a contract can be described as a term implied from the facts and is based on an inference of what both parties must or would have agreed to, but which, for some reason or other, remain unexpressed. An implied term must be distinguished from a tacit term – an implied term is implied from law.

There is no difference between express terms and tacit terms as far as their nature and effect in law is concerned. However, there is a difference in the way in which these terms are to be proved. Express terms require very little proof as they are generally written into the contract. Tacit terms require evidentiary proof in order to prove their existence.

#### *Exclusionary terms*

These are terms, which contain an express reference to a particular liability or risk and exclusion in respect of that liability or risk.

Exclusionary terms must be distinguished from those which define the parties' rights and duties, such as agreed damages clauses or defects liability clauses which confer additional rights/obligations, and which are

construed like any other rights in the contract whereas exclusionary terms are construed against the party seeking to rely on them.

### 2.7.3 Content of a contract

According to Steyn *et al.* (2012: 407) the contents (the provisions) of all valid contracts, irrespective of their nature or value, whether written or not, can be divided into three categories, i.e. *essentialia*, *naturalia* and *incidentalia*:

*Essentialia*: The essential minimum characteristics which have to be contained in a contract in order to be valid and to identify it as a certain type of contract (e.g. a sales agreement, where consensus has to be reached on 1) the intentions of the parties to buy and sell; 2) the object to be sold; and 3) the price.

*Naturalia*: Terms that are automatically and by operation of law part of a contract without the parties having specially agreed thereto (e.g. a warranty against latent defects given by a seller to a buyer in a sales agreement).

*Incidentalia*: All other terms - that are neither *essentialia* nor *naturalia*.

*Naturalia* can be excluded by *incidentalia*. Terms specially agreed upon by the parties (conditions).

### 2.7.4 Interpretation of contracts

Finsen (2005: 10) states that building contracts usually consist of numerous documents – a standard form agreement, bills of quantities, drawings, schedules and specifications – and that inconsistencies frequently arise between the provisions in one document and another. The courts follow basic rules to assist them in the interpretation of such contracts and the following list is a summary of the list provided by Finsen:

- The first rule is to determine what the parties intended, and to give effect to it (the “Golden Rule”);
- A particular word or phrase must be considered in context and not in isolation;
- Words should be given their common meaning;
- Where words may have more than one meaning, the meaning shall be chosen that will make the context sensible and practicable
- Where a clause is ambiguous, it shall be interpreted so that it is in harmony with the contract as a whole;
- Where a general word or phrase follows a series of specific words or phrases, the meaning of the general word or phrase shall be restricted to the same category as the specific words or phrases (the *eiusdem generis* – or ‘same class’ rule);
- Words written by hand take preference over typewritten words, which in turn take preference over printed words;
- Later written words take preference over earlier written words; and
- Where none of these rules assist, the meaning of is to be adopted which is less favourable to the author of the words, because he had the opportunity to avoid the ambiguity (the *contra proferentem* rule).

### 2.7.5 Breach of contracts

Steyn *et al.* maintain that there are only five forms of breach of contract, which are:

- *Default by debtor*; this occurs when the debtor does not deliver his performance to the creditor on time. The requirements for default by debtor are that:
  - performance must still be possible;
  - the debtor must fail to perform on time;
  - performance must already be due and enforceable; and
  - the delay must be due to the debtor’s fault.
- *Default by creditor*; this occurs when the creditor does not co-operate or accept delivery of the debtor’s performance. The requirements for default by creditor are:
  - the debtor’s performance is due and enforceable;
  - performance by the debtor must still be possible;
  - proper performance must be tender by the debtor;
  - the creditor delays performance by the debtor; and
  - the delay must be due to the creditor’s fault.

- *Positive malperformance*; this form of breach occurs where a party to the contract only performs partially or delivers a defective performance.
- *Repudiation*; this occurs where a party to the contract communicates to the other contracting party that he rejects his contractual duties or will not be able to perform.
- *Prevention of performance*; this occurs where any party prevents delivery of performance by destroying the performance or rendering it impossible to deliver the performance.

### 2.7.6 Remedies

Steyn *et al.* (2012: 412) mention that the law automatically provides for three remedies, namely *specific performance, cancellation and damages*.

#### *Specific performance*

Specific performance is performance of that which has been agreed upon by the parties. A claim for specific performance will be successful only if the party who claims performance has himself performed or at least tendered to perform in terms of the contract unless under the terms of the contract, the other party is bound to perform first.

In order to obtain specific performance, an innocent party is required to launch an application in order to obtain an interdict from the courts forcing the other party to perform in accordance with its contractual obligations.

South African courts take the view that an order for specific performance is an exceptional remedy for breach of contract, which will only be granted where it is equitable to do so. Our courts have been reluctant to grant an order for specific performance in respect of obligations arising out of service agreements such as where a builder has undertaken to do alterations to a house. The courts' discretion is subject to no rigid rules and is exercised upon consideration of all the relevant facts.

#### *Suspension and Cancellation*

The aggrieved party will be entitled to remedy of suspension or cancellation in the event that there is either a forfeiture clause or alternatively if the breach of the contract is a material breach of the contract going to the heart of the contract. A forfeiture clause may be so worded as to apply only in the event of *mora* or it may apply in the event of a specified breach or any breach. If any breach, however trivial, to which a forfeiture clause applies, is committed, the aggrieved party may rely on the forfeiture clause and suspend or cancel. See for example clauses 28.0 and 29.0 of the JBCC 6<sup>th</sup> edition and clauses 15.2 and 16.2 in the FIDIC Red Book (1999).

#### *Damages*

An aggrieved party who wishes to claim damages for breach of contract must prove on a balance of probabilities that:

- The other party in fact committed a breach of contract;
- There are actual damages suffered;
- There is a casual connection between the breach and damage; and
- The damage suffered was reasonably foreseeable or agreed to by the parties at the time of contracting.

### 2.7.7 Termination of contracts

According to Steyn *et al.* (2012: 417) contracts can terminate in the following ways:

*Proper performance*; where both parties perform as agreed, the contract terminated naturally.

*Agreement to terminate*; where the agreement may be in the form of a release, a settlement or a novation of debts.

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*Statutory right to terminate*; where the Consumer protection Act (CPA) in its section 14 allows a consumer to terminate any fixed-term agreement without penalty or charge, provided that he gives at least 20 business days' written notice of termination.

*Set-off debts*; where the same parties owe each other different debts of the same nature which can then be set-off against each other and some or all debts may then terminate.

*Merger*; where the identities of the parties involved in the contract merge, e.g. a lessee of property buys and becomes the owner, the contract of lease terminates.

*Subsequent impossibility of performance*; where impossibility is not the fault of any of the parties, the contract terminates. This will be the case in the event of *force majeure*.

*Prescription*; where contractual claims expire after three years, unless specifically changed by statute.

## **2.8 Standard forms of contract**

The purpose of standard forms of contract is to facilitate the contractual arrangements between parties in a construction project. Standard forms of contract are ready-made terms and conditions when making a contract. These standards are commonplace in construction transactions and generally accepted by the different contracting parties. It would, however, be practically impossible to devise a standard form of contract that would account of all eventualities that might occur in a construction project as there are several factors that affect what type of contract is suitable for a certain project, e.g. the amount of involvement from the client, technical complexity, the location, nature and size of the project. In the initial stage of the design phase, the client has to adopt a suitable contractual arrangement for the project and a corresponding standard form of contract.

### **2.8.1 Advantages**

Some advantages are:

- The standard form is usually negotiated between the different bodies that make up the industry (e.g. JBCC's Technical Committee representing eight constituent members – see p.30) in the interests of standardisation and good practice. As a result the contractual risks are spread equitably;
- Using a standard form avoids the cost and time of individually negotiated contracts;
- Changes made to the provisions of the standard form should be clearly identified in the procurement documents, failing which they shall be null and void;
- Contracting parties should be familiar with the terms and conditions of the standard form as seminars and workshops are organised on a regular basis that are presented by experts with extensive knowledge of the standard documentation and the construction industry; and
- Tender comparisons are made easier since the risk allocation is the same for each tenderer. Parties are assumed to understand that risk allocation and their pricing can be accurately compared.

### **2.8.2 Disadvantages**

Some disadvantages are:

- The forms are cumbersome, complex and often difficult to understand; and
- Because the resulting contract is often a compromise, they are resistant to change. Much-needed changes take a long time to bring into effect.

## **2.9 Uniformity in construction procurement**

Some employer/contractor organisations develop their own “*in house*” set of terms and conditions for use on their projects. Such terms and conditions of contract are referred to as *bespoke* conditions of contract (*bespoke* – made to customer's own specifications or requirements). Such terms and conditions of contract often cause problems for the other party due to the fact that they are not familiar with the terms and conditions, which more often than not contain conditions and terms favourable to the drafter thereof.

To avoid the foregoing the Construction Industries Development Board (*cidb*) through various Board Notices (latest 1 Feb 2008) published a STANDARD FOR UNIFORMITY IN CONSTRUCTION PROCUREMENT in



terms of the CIDB Act (Act No. 38 of 2000). The following is an extract from the cidb Construction Procurement Toolbox designed to establish minimum requirements that:

- provide cost efficiencies through the adoption of a uniform structure for procurement documents, standard component documents and generic solicitation procedures;
- provide transparent, fair and equitable procurement methods and procedures in the solicitation process;
- ensure that the forms of contract that are used are fair and equitable for all parties to a contract; and
- enable risk, responsibilities and obligations to be clearly identified.

The Standard establishes a uniform framework for procurement and minimum requirements for:

- the solicitation of tenders;
- the manner in which quality is to be incorporated in procurement documents;
- the formatting and compilation of procurement documents; and
- the application of the register of contractors to public sector contracts.

The Standard requires that specific standard forms of contracts be used, with minimal project specific variations and additions which do not change their intended usage and that procurement documentation be compiled and formatted in a uniform manner. The standard forms of contract endorsed by the cidb will now be discussed in more detail.

## 2.10 Construction contracts

*What is written endures; things spoken speed away (Peters & Pomeray, Commercial Law)*

The parties to a construction contract are bound to each other for a certain period of time by a unique and exclusive relationship they created for their mutual benefit. This unique relationship, called 'privity of contract' (see 2.5.1 above), gives them both obligations and rights which they have agreed to accept so that both may benefit. This contractual relationship persists until the contract is discharged or terminated, that is, until it is performed, or terminated because of impossibility, agreement (by the parties), bankruptcy (in some cases), or breach of contract.

The common law rules discussed above are usually inappropriate for both the contractor and the client. It is therefore most common for construction contracts to introduce entitlement to money, time, instructions, suspension, etc. by way of agreements. BCA Training, 2012 provides the following table to illustrate this:

Common Law	Most Construction contracts
Contractor gets all his money at the end of the construction period once the completed works are handed over.	Contractor is entitled to claim interim payments, valued according to the method of valuation agreed in the contract.
Contractor is not entitled to additional money where the works are damaged before hand over. If the damage is attributed to an act of the client (or his employees/agents) then the contractor would have a direct action to recover the cost.	Allow the contractor to claim additional money where the works are damaged through acts of God, acts of the employer and various other circumstances. Entitlement to claim and the amount that the contractor can claim is determined by the terms of the contract.
No general entitlement to claim additional time. If the employer causes delay then the agreed date for completion lapses and time becomes 'at large'.	Allow the contractor to claim additional time under certain circumstances (including those attributable to the employer). Circumstances when contractor can claim and extent of claim determined by the terms of contract.
Employer not entitled to instruct changes to the agreed work.	Allow employer (through his agent) to instruct changes. Amount of compensation is determined by the terms of contract.

Construction projects are unique in nature and every situation and every problem in construction is different and contains unique facts that may require a different approach and solution from that of another apparently

similar situation or problem. The structure may be a new building on virgin ground. It may involve the demolition of an existing building and its full reconstruction. It could involve partial demolition and rebuilding, or the refurbishment and extension of an existing building or structure. General principles alone are not sufficient to solve legal problems that may occur. Increasingly, common law is modified by statute, and the services of legal experts are often required to provide legal advice and guidance on specific issues.

### 2.10.1 What is a construction contract?

In *Modern Engineering (Bristol) Ltd v. Gilbert-Ash Northern (1974) AC 689*, Lord Diplock described a building contract as:

*'an entire contract for the sale of goods and work and labour for a lump sum price payable by instalments as the goods are delivered and the work done. Decisions have to be made from time to time about such essential matters as the making of variation orders, the expenditure of provisional and prime cost sums and extension of time for the carrying out of the work under the contract'*

Most statements made about construction contracts and practices should be preceded by the words *usually, often, probably, sometimes*, and similar qualifiers, because few things are absolute in construction, and almost always there are exceptions. This fact of exception applies not only to legal situations but also to matters of design and production of construction work. Diversity and difference are the norms. Construction is always unique. Standard forms of contract invariably require amendments and supplements. All references to standard contracts should be checked, and the actual wording read.

The need for standard forms of contract arises from the foregoing to provide written contracts that can be economically executed, usually without the need for extensive legal services, and from a desire to standardise certain relationships and practices according to the general agreement about contract fundamentals reached by the representatives of the parties involved. Standardisation attempts to ensure that certain fundamental and recognised practices are always followed in construction contracts, and that better agreement is achieved by using a form of contract with which the parties are already familiar.

Amendments to standard contracts should be kept to a minimum. It is very true that an increase in the number of supplements to standard forms of contract can decrease the effectiveness of a standard form to the extent that the contracting parties have to read and understand more, and which can result in misinterpretation and disputes later during the execution of the contract works.

The JBCC recognises this fact and from its inception has incorporated the principle that the documents are compiled in the interests of standardisation and has warned users of the dangers inherent in modifying any part of it (see **Warning** note in JBCC's preface to their main documents), and in addition the JBCC makes it clear that when changes are made to the provisions of its documents such changes be clearly identified. (See **Agreement** on p.32 in the JBCC 6<sup>th</sup> edition where it states that *[N]no agreement or addendum varying, adding to, deleting or terminating this agreement including this clause shall be effective unless reduced to writing and signed by the parties*).

The ASAQS and cidb both firmly support standardisation, as the large number of documents published by these bodies that specifically deal with standardisation and uniformity in the construction industry clearly indicate. One such example is the extract hereunder that is from a recent publication by the ASAQS regarding standardised Procurement Documentation Guidelines. These Guidelines are based on the cidb Standard for Uniformity in Construction Procurement (*supra*), which engenders a culture of consistency and predictability within the procurement process, and which aims at bringing about standardisation and uniformity in construction procurement documentation, practices and procedures.

*'The Association is committed to and supportive of the cidb regulations which are aimed at bringing about standardisation and uniformity in construction procurement documentation and appeals to members and practises to be supportive of the regulations and to refrain from making unnecessary amendments to the documents'*

The construction industry standard forms of contract differ in material respects from other standard form contracts in use in the commercial world, as the former seek to define the risk profiles of the parties to the contract, whilst the latter – such as supply agreements and credit agreements – are often extremely one-sided. Standard form construction contracts seek to regulate the relationships between the contracting parties, particularly in respect of risk, management and responsibility for design and execution.

Most conditions of construction contracts incorporate a set of conditions whose primary purpose is to lay down procedures of general application to a variety of types of work. There is no rule to what should be included in conditions of contract, but according to Uff (2009: 277) most sets of conditions follow a standard pattern. Typically, conditions deal with:

- General obligations to perform the works;
- Provisions for instructions, including variations;
- Valuation and payment;
- Liabilities and insurances;
- Provisions for quality and inspections;
- Completion, delay and extension of time
- Role and powers of the certifier or project manager; and
- Disputes.

### 2.10.2 What documents form part of the contract documents in construction contracts?

Typically, a construction contract will contain a set of conditions of contract, a specification, bills of quantities, a set of drawings, and other documents of varying sorts. The question necessarily arises, how these documents fit together, which (if any) are to have precedence, and what happens if they are in conflict. There are two distinctly different approaches to the question. The first, and simplest, is to make all contract documents of equal weight and significance. Another solution sometimes found, is to provide that the contract documents shall have an order of precedence, i.e. a conflicting requirement in two documents is to be resolved in favour of that having the higher priority, e.g. as provided in the FIDIC conditions. The new JBCC 6<sup>th</sup> edition for the first time now also provides an order of precedence in sub-clause 5.6, stating:

*'The **contract documents** shall be deemed to be mutually explanatory of one another. In the event of ambiguity, discrepancy, divergence or inconsistency in or between them, this **agreement** shall prevail over all other **contract documents**'*

### 2.10.3 Standard form construction contracts in the South African construction industry

The cidb stipulates which standard forms of contract are to be used in the sphere of public procurement. The forms currently endorsed are the JBCC, FIDIC, NEC and GCC (see Best Practice Guideline #C2: *Choosing an appropriate form of contract for engineering and construction works*, cidb, 2005, for a detailed comparison of these forms of contract).

Hereunder follows a brief description of each of these aforementioned construction contracts:

#### a) The Joint Building Contracts Committee (JBCC)

##### Short historical review

Although there is proof of the fact that a standard form of contract was introduced in England in the 1870s by agreement between RIBA (Royal Institute of British Architects), the Builder's Society and the Central Association of the Master Builders of London, the first form of contract, comprised of articles of agreement and conditions of contract to which BIFSA (Building Industries Federation South Africa) had access, was that published in 1909 under the sanction of the RIBA and the NFBTE (National Federation of Building Trade Employers).

After using the 1909 form unaltered for some time in Britain consideration was given to amend the document by a committee that was especially set up for this task, and a document, with appropriate annotations, was published in 1928 under the heading "Agreement and Schedule of Conditions of Building Contract". The document had been published with the idea to replace the 1909 RIBA form. However it later transpired that although the document had met with agreement at the level of a representative negotiating and drafting committee, it had failed to gain approval of the general membership of RIBA and, as such, it was never used in practice. The result was that in Britain the revision of the 1909 RIBA form was tackled *de novo*, while on the South African scene discussions were deferred until such time as the approved revised RIBA edition became available. The first published annotation appeared in Britain in 1931 that substantially revised and brought up to date the 1909 RIBA form. Subsequent annotations appeared regularly thereafter.

##### Development history of standard building agreements in South Africa

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Although standard conditions of contract were introduced in South Africa to a restricted extent in some regions, more notably Natal and the Western Province, shortly after the establishment of BIFSA in 1904 – then known as the National Federations of Building Trade Employers in South Africa – it was only during the late 1920s that serious attempts were initiated to prepare and enforce standard conditions of contract on a national basis in the private sector.

Although available local records are by no means decisive on this point, it is a reasonable assumption that no concerted effort towards the achievement of national standard conditions was made prior to the 1909 RIBA form becoming available. The 1931 RIBA form referred to above, was found acceptable to the Institute of South African Architects, the Chapter of South African Quantity Surveyors and BIFSA, and according to BIFSA's annual report published in 1932 it was adopted by all the interests concerned, subject to the introduction of such amendments as were necessary to satisfy the requirements of differing local conditions. Thus this form became the basis of the first standard form of contract in South Africa – the 1932 edition. It carried the endorsement "Approved and Recommended by the Institute of South African Architects, the Chapter of South African Quantity Surveyors and the National Federation of Building Trade Employers in South Africa" and was entitled 'Agreement and Schedule of Conditions of Building Contract'. This cumbersome name required a nickname. As the 'with quantities' version was printed on white paper and the 'without quantities' on blue, the two versions became known as the 'white form' and the 'blue form' respectively.

This agreement was amended from time to time as the South African building industry developed and became more sophisticated, and a permanent review committee was appointed for this purpose, known as the Joint Study Committee, constituted of representatives of the Institute of Architects, the Chapter of Quantity Surveyors and BIFSA. The last amendment of this agreement was published in 1981; shortly afterwards the Joint Study Committee, rent asunder by internal dissent, was dissolved.

A deadlock developed in the consultations between the building professions, the building contractors and the property owners. In an effort to break the deadlock and to effect contact again, an architect, Brian Pringrove, initiated the so-called "Supper League". The purpose of the "Supper League" was to create a forum whereby interaction could at least take place in an informal level.

The "Super League" was born out of the "Supper League" which held its first meeting on 12 December 1983. A new committee, called the "Major Contractor's Committee" (MCC committee) was established that comprised of a number of the bigger developers and bigger building contractors. The purpose of the committee was to formulate a set of conditions of contract for use on bigger contracts (very much prevailing at that time) to be acceptable to both property owners and building contractors. The first formal edition of the MCC-contract was dated 1986 and the next edition appeared in 1988. The MCC-contract was an important step in the development of the JBCC-contract.

In 1984 another new committee was established, the Joint Building Contracts Committee or JBCC for short. The JBCC first put its standard building contract documentation into the marketplace in 1991 (the First Edition) that used some of the principles developed in the MCC-contract, e.g. the Construction Guarantee i.l.o. of the Retention Fund. This contract quickly gained acceptance in most quarters and is today the foremost contract document suite in use in South Africa. The primary contract documentation is comprehensive and fully integrated with over 25 support Forms and Guides.

It was recognised from the outset that an enormous advantage could be gained by employers, contractors and professionals should the document meet the needs of both the private and public sectors. A joint committee was set up with the Department of Public Works (DPW) and over a number of months the apparent differences of requirements were reduced to manageable proportions that could be accommodated without impairing readability.

This led to an intensive re-examination and re-drafting of the documents by the Review and Main committees and in 1998 the new documents, designated JBCC Series 2000, were published (the Second Edition). These replaced all the documents published in 1991.

The DPW, however, in the words of one of the previous Director Generals "... will use the form of agreement that is most suitable for the particular project". Focus Group 6, an advisory body set up by the DPW after the 1994 elections, identified in their Report to the DPW in 1996 that only the four aforementioned contracts be considered for use by the state for construction procurement. This proposal was later confirmed in the cidb's Notice 62 of 2004 *Standard for Uniformity in Construction Procurement*, which was published in the Government Gazette No. 26427 on 9 June 2004. (Compliance with this standard is from this date mandatory for organs of state who solicit tenders in the construction industry):

Certain clients like ESKOM, SASOL and some Mining Houses (e.g. Anglo American) favour making use of the NEC or FIDIC types of contracts because of their suitability to be used on engineering as well as building contracts and of their international origin. However, an international version of the JBCC Series 2000 was published in July 2000 to cater for this shortcoming in the JBCC 1998 edition. In order to further broaden the scope of the JBCC Series 2000, a minor works document was published in 1999.

Revised editions were published at regular intervals without substantially changing the format, style and numbering of the documents. JBCC published the new Sixth Edition in September 2013 featuring some major modifications to previous editions; with the removal of the Works Completion stage presenting the most significant of these modifications. Other modifications include:

- More economical wording and less clauses (30 vs. 42 in the 5<sup>th</sup> edition)
- Actions by the parties/principal agent within a given time page added
- Rewording/removal of some Definitions
- The complete redrafting of the insurance and security clauses
- The introduction of the contractor's right to suspension of the works in a separate clause (clause 28.0)
- The shifting of the Schedule of Variables to a separate single Contract Data document (CD)
- Active use of 'notices' to create an audit trail
- Duties of the parties summarised in one clause (clause 12.0)
- The previous four clauses for termination condensed into a single clause (clause 29.0)

The introduction of adjudication as an ADR process necessitated the provision of *Adjudication Rules*, which were published by JBCC in consultation with the Association of Arbitrators (SA). These rules are to be used when the parties choose adjudication as the ADR process in terms of sub-clause 30.6. Should the parties elect the arbitration process in terms of sub-clause 30.7 the arbitration shall not be construed as a review or appeal from any adjudicator's determination but that the resolution of the dispute shall commence anew.

It is further important to note that because of the discontinuation of the JBCC Preliminaries in 2007 the ASAQS prepared and published the ASAQS Preliminaries in November 2007 to cater for those clauses that were not accommodated into the JBCC documents and which needed a new home. The Preliminaries have subsequently been revised with the publication of the JBCC 6<sup>th</sup> edition in September 2013.

The State will have its own version based on that of the private sector and issuing thereof is expected to happen early in 2014.

### **Constituent members**

JBCC is a committee drawn from its current eight constituent members, namely:

- Association of Construction Project Managers (ACPM)
- Association of South African Quantity Surveyors (ASAQS)
- Consulting Engineers South Africa (CESA)
- Master Builders South Africa (MBSA)
- South African Black Technical and Allied Careers Organisation (SABTACO)
- South African Institute of Architects (SAIA)
- South African Property Owners Association (SAPOA)
- Specialist Engineering Contractors Committee (SECC)

The constituent members have two representatives each, but to better balance the interest of members the MBSA has six representatives, two representing their contractors, two representing their major contractors and two representing their subcontractors.

### **Objectives of JBCC**

The JBCC documents are compiled in the interests of standardisation and portray the consensus view of JBCC of good practice and an equitable distribution of contractual risk in the building industry. The JBCC covers all aspects of contract for most types of building projects and should consequently simplify the administration of building contracts. The other objectives of JBCC are to:

- Foster good and consistent management by all concerned
- Provide standardisation of defined terminology, thereby eliminating ambiguities in interpretation



- Clearly define and identify the responsibilities of the contracting parties
- Define notice periods and time bars required to protect the parties against prejudice or error
- Set standard methodology for dealing with contractual responsibilities and obligations
- Promote contractual protection of the innocent party in the event of default
- Provide practical options within the contracting process
- Provide for reciprocal guarantees between the contracting parties
- Set payment conditions that offer significant protection to the contractor and subcontractors
- Ensure the maintenance of the independent duty of the principal agent to act fairly between the parties

### **JBCC Documentation Services**

Query answering: A free query service related to the interpretation and implementation of the Series 2000 documents is offered to users of the JBCC documentation

Availability: The JBCC documents are obtainable at most regional offices of constituent members as listed above

Contact details: JBCC can be contacted at [info@jbcc.co.za](mailto:info@jbcc.co.za) in relation to the abovementioned services

### **JBCC Electronic Service (JES)**

The JBCC Electronic Service (JES) has been introduced as a result of market research and in order to meet the demand to accommodate electronic facilities and to consolidate them with the existing electronic service offerings. It forms a convenient and comprehensive professional on-demand contract document and information service. JES comprises of five modules. Modules 1, 2, 4 and 5 can be used on an unlimited number of workstations per office, whilst Module 3 is provided for one workstation per office, at additional cost. The Modules are briefly the following:

- Module 1: Multimedia Reference (view only of all documents in the Series)
- Module 2: Active forms (allows input of data into forms and schedules on screen for printing, but without computational capability)
- Module 3: Automated Payment Certificates (full calculation capability in the preparation of payment certificates, notification and advice statements, etc)
- Module 4: On-line Document Printing (enables the purchase of JBCC documents on-line and their printing after the user has pre-paid for the facility)
- Module 5: CPAP Indices (monthly e-mails sent from Stats SA that contain the Indices necessary for calculating the fluctuations in costs for building contracts)

### **Composition**

The JBCC documents comprise of the following documents (available at the various constituent members):

Principal Building Agreement (PBA) – suitable to be used for contracts with or without quantities

Contract Data - PBA

Nominated/Selected Subcontract Agreement (NSA)

Contract Data – NSA

CPAP - Work Group Composition

CPAP – Application

Minor Works Agreement (MWA)

Contract Data – MWA

Adjudication Rules

Waiver of Contractor's Lien

Payment Guarantee – PBA

Payment Guarantee – NSA

Advance Payment Guarantee – PBA and NSA

Construction Guarantee - PBA

Construction Guarantee - NSA

Site Possession Certificate

Payment Certificate – PBA

Payment Certificate Notification - PBA

Recovery Statements - PBA and NSA

Payment Advice Statement – NSA

Payment Certificate – MWA

## **b) The General Conditions of Contract of Construction Works 2010 (GCC 2010)**

### **Introduction**

The General Conditions of Contract for Construction Works, GCC, or so-called “blue book”, has been a well-respected and widely used document that served the South African industry over many years. The first edition of the current document was developed in 2004 and involved a serious revision of the so-called GCC 1990 and combined it with the COLTO document. Based on the experience gained over five years with the first edition, there was a need for a review of the first edition. At the same time, in view of the current state of the construction industry with new emerging role players, revised procurement rules, introduction of different forms of dispute resolution and so forth, there was also a need to produce a guide for the correct interpretation and implementation of the new GCC 2010.

### **Development and application of the GCC**

As a result of this continuous development, GCC sets out clearer conditions compared to those set by individuals or international forms of contract. These conditions have become familiar and understood over the years, and a considerable bulk of case law has been built around them.

In the GCC clauses dealing with similar matters have been grouped together for better comprehension, while new matters such as the Construction Regulations on Health and Safety, greater emphasis on programming of the works, a new performance guarantee, clarification of the acceleration of the works, updating dispute resolution with the latest thinking, and various other amendments that were proposed over the past five years, are also addressed.

### **Objective of the GCC**

The main objective of GCC is to set out fair, equitable, efficient, economic and transparent contract administrative procedures, and the allocation of risks. This is based on the uniformity requirements stipulated in the Government’s Green Paper on Public Procurement and the equity requirements set out in the essential and desirable criteria developed by the Inter-ministerial Task Team for Construction Industry Development. In contrast to some of the other permissible forms of contract, GCC complies fully with all the CIDB requirements for a form of contract.

### **The appropriation of risks**

If the Contractor is expected to carry inappropriate risks, which he cannot assess beforehand, he will add high risk allowances to his tender. This is extra money the Employer will have to pay, whether the risk materialises or not. In addition the Employer will have less control over the additional work required, for instance the risk of unforeseen physical conditions. The purpose of GCC is to appropriate risks fairly by applying the following well proven principles:

- The risk is to be carried by the party that can control it best, for example the Contractor should carry the risk of normal weather conditions.
- The risks that nobody can control are to be carried by the Employer, for example abnormal conditions in nature.
- Where possible, the risk should be insured, for example, liability against harming third parties.
- The point of departure of risk appropriation in GCC is that, in the long run, it is cheaper for the Employer to pay for what does happen rather than for what the Contractor thought might happen in the uncertain areas that the Contractor cannot control. In GCC the Employer is required to accept the risks that the Contractor cannot assess better than the Employer.

### **Relevance of the GCC**

GCC is suited for the full range of complexity: from straightforward to complicated projects of building and engineering works. Risk appropriation across the full range of complexity remains the same. Employers must not accept greater risks for less complex projects and Contractors must not accept greater risks for more complex projects.

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GCC is written in plain language which makes it easy for all people to understand the provisions. It is divided into chapters that deal with similar issues. These improvements should assist new entrants into construction to comprehend the gist of GCC. It is, therefore, particularly suitable for contracts in the lower region of a Contractor's grading, where the emphasis is on community-based and labour-intensive projects.

The management of the Contract is the responsibility of the customary Contractor's Site Agent and the Employer's Engineer.

The Site Agent is authorised to receive, on behalf of the Contractor, all communications from the Engineer and is also required to submit notifications, requests and claims to the Engineer on behalf of the Contractor.

The Engineer's function is to administer the Contract as agent of the Employer, in accordance to the provisions of the Contract. GCC bestows substantial authority on the Engineer. To keep this authority in check, the Engineer must consult with the Employer and Contractor before giving a ruling on any matter. Provision is also made for a knowledgeable Employer to state which functions of the Engineer he wishes to subject to his specific approval, thereby providing for skilled resources within his organisation to deal with specific administration matters more effectively.

This time-trusted arrangement of contract management by the Site Agent /Engineer ensures that timeous and well-considered decisions are made, and encourages the parties to take all possible steps to avoid conflict.

### **Pricing strategy for the GCC**

The pricing strategy suitable for GCC is fixed price (lump sum) or re-measurement (admeasure). (GCC is not suited for the pricing strategy of cost contracts.) GCC is suitable for the contracting strategies of design and build, as well as develop and construct where the Contractor is largely responsible for the design of the project. It is also suitable for the conventional approach where the Employer is responsible for the design and the Contractor for building or constructing the Works. (GCC is not suited for management contracts or construction management contracts.) By using the pricing strategy of a fixed price contract or a re-measurement contract, the risks involved in pricing can be properly appropriated.

### **c) NEC3 Engineering and Construction Contract (NEC3)**

#### **Introduction**

The over-riding aim of this new standard form of contract has been to form a stimulus to good management and a collaborative and co-operative method of working. This is quite a departure from most conditions of contract and law, and covers both obligations and attitude. In this regard clause 10.1 requires certain players to 'act as stated' and reads as follows:

*'The Employer, the Contractor, the Project Manager and the Supervisor shall act as stated in this contract and in a spirit of mutual trust and co-operation. The Adjudicator shall act as stated in this contract and in a spirit of independence'*

The original version of this form, the New Engineering Contract (NEC) was published in 1993 by the Institution of Civil Engineers. The NEC was praised in the Latham Report as being a means of responding to growing discontent within the construction industry to long winded contractual procedures and adversarial attitudes. The NEC sought, and has substantially succeeded, in being applicable to both building and engineering projects. A further objective for the NEC was to accommodate all varieties of design responsibilities. This is achieved by the flexibility of using core clauses which can be adapted to various types of projects. Secondary option clauses can also be "bolted on" to the contract to suit the client's requirements. All the clauses are written in plain English using only common words and written in the present tense.

The NEC3 is the latest version of this form and is the result of feedback from industry on years of use since its inception.

#### **The Main Options**

Options A and B: these are priced contracts with the risk of carrying out the work at the agreed prices being largely borne by the Contractor;



Options C and D: these are target cost contracts in which the financial risks are shared between the Client and the Contractor in an agreed proportion; and  
Options E and F: these are cost reimbursable types of contract with the financial risk largely taken by the Client.

The Main Option titles are:

- A: Priced contract with Activity Schedule
- B: Priced contract with Bills of Quantities
- C: Target contract with Activity Schedule
- D: Target contract with Bills of Quantities
- E: Cost Reimbursable Contract
- F: Management Contract

Each of the main options contains a set of “secondary options” which are equivalent to appendices which cover the following matters: Price adjustment for inflation; Changes in the law; Multiple currencies; Parent company guarantees; Sectional completion; Bonus for early completion; Delay damages; Partnering; Performance bond; Advance payment to the contractor; Limitation of design liability; Retention; Low performance damages; Limitation of liability; and Key performance indicators

In addition to the six main forms of contract the NEC package contains a “Short Contract”, a form of subcontract, a short subcontract, and a professional services contract. The forms are published as a boxed set, together with extensive guidance notes and flow charts covering all the different options available.

#### **d) FIDIC International Conditions**

*Federation Internationale des Ingénieurs – Conseils* (International Federation of Consulting Engineers) (FIDIC) was originally founded in Ghent, Belgium in 1913 by the National Associations of Consulting Engineers of Belgium, France and Switzerland. Today FIDIC represents associations from more than 50 countries all around the world and is based in Lausanne, Switzerland. FIDIC published its first standard form of contract in 1957 – The 1<sup>st</sup> edition of the Red Book for Civil Engineering Works in the international field. Since then FIDIC has become a familiar name within, as well as outside, the engineering profession for its standard forms of contract.

FIDIC has since 1999 been actively engaged in overhauling its pre-1999 contracts in response to trends in the international construction industry. There are currently eight contracts in the FIDIC family and the following four new forms are of particular relevance to the South African market:

- Conditions of Contract for Construction for Building and Engineering Works designed by the Employer: *The construction Contract or New Red Book*
- Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant and for Building and Engineering Works designed by the Contractor: *The Plant and Design-Build Contract or New Yellow Book*
- Conditions of Contract for EPC/Turnkey Projects: *The EPC/Turnkey Contract or New Silver Book*
- Short Form of Contract: *The Short Form or New Green Book*.

Apart from the above-mentioned four FIDIC has recently published the following four further contracts:

- The 2005 MDB Harmonised Construction Contract (Version of the Red Book which incorporates special provisions of Multilateral Development Banks)
- The 2006 Model Services Agreement (White Book)
- The 2006 Dredgers Contract (Blue Book) for dredging and reclamation work, and
- The 2008 Design Build Operate Contract (Gold Book).

The following is a summary of when each of the four first-mentioned Contracts will be suitable:

##### The Short Form (Green Book)

Suitable where the Works are of a relatively low value or the Works are to be completed in a relatively short time period or the Works are repetitive in nature

##### The Construction Contract (Red Book)

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In projects where the Employer or his agent (the Engineer) provides the design, irrespective of the type of work being executed

#### The Plant and Design-Build Contract (Yellow Book)

In projects where the design is to be carried out by the Contractor, to meet the Employer's outlined performance specification, or where the Contractor is to design the project, but the Engineer is to administer the contract; thus suitable where:

- Electrical and/or mechanical/or process plant is involved
- The Contractor provides most of the design
- The Employer's agent monitors, administers and certifies the work
- Payment is made when milestones are reached, usually on a lump sum basis

#### The EPC Turnkey Contract (Silver Book)

Suitable where:

- The Contractor designs the Works and the Contractor undertakes responsibility for the construction of the Works
- The Employer wants to have certainty as to price, even if this means paying more to have the Works executed
- The Contractor is prepared to assume greater risk
- The Works are financed by way of public-private partnership, a concession, a BOT or BOOT arrangement
- The Employer does not want to appoint an engineer but prefers to deal with the Contractor directly

The new FIDIC forms aim to bring uniformity to the various clauses, definitions and wording, across all the new forms (more particularly the New Red and Yellow Books). The choice as to which of the new forms to use is based primarily on "Employer Design" versus "Contractor Design" rather than "Civil Works" versus "Electrical and Mechanical Works".

All of the FIDIC contracts follow the same form as follows:

- The contracts are divided into General Conditions (which are standard and generic to all contracts) and Particular Conditions (which are those conditions agreed by the parties for particular application to their project). The Particular Conditions are further divided into two parts; Part A: Contract Data, and Part B: Special Provisions
- All contracts follow a twenty clause layout
- All contracts use the same definitions and terminology where relevant
- All provide sample forms of guarantees, certificates, and other documentation
- All provide flow charts where relevant, and
- All are backed up by guidance documents.

While the different contracts are suitable for different types of projects, they all try to follow the same ideology and philosophy with respect to matters such as risk allocation. Where the contract departs from this (as does the Silver Book in the allocation of risk), the guidance documents highlight and explain this departure.

The new FIDIC forms, as with previous editions, state the order of priority of the contract documents (*supra*), as follows: a) The Contract Agreement, b) The Letter of Acceptance, c) Letter of Tender, d) The Particular Conditions, e) The General Conditions, f) The Specification, g) The Drawings, and h) The Schedules and any other documents forming part of the contract. If an ambiguity or discrepancy is found in the documents, the engineer shall issue any necessary clarification or instruction.

### 3 SELECTED CONSTRUCTION DEFINITIONS AND TERMS

*On completion of this part you should be able to:*

- *have an understanding of a selection of the definitions and legal terms that are regularly encountered in the construction industry*
- *distinguish between some of the Rules regularly applied in the interpretation of construction contracts*

The following section includes a glossary of definitions and legal terms that are regularly encountered in the construction industry. The list is not exhaustive at all and readers are invited to add their own definitions and terms to the list as and when they come across additional relevant ones. Most of these definitions and terms have been extracted from the course notes of Alusani (2009), but the author has added a number from his own course notes at the University of Pretoria or from other sources as referenced.

#### **DEFINITIONS ETC**

##### **Activity**

An item or area of work carried out on a project which is separately identified for the purpose of planning the works and/or in relation to delay claims, e.g. drainage, brickwork, plastering, etc.

##### **Agency**

An agent is a person who, by performing juristic acts for and on behalf of another person, known as his principal, places the latter in legal relations with third persons. A juristic act is one whereby a legal relationship is created, altered or discharged (Wille's, 1991: 592).

##### **Cause and Effect**

The breakdown of a loss and expense claim to show how much loss and expense has been caused by each of the events said to have caused delay and disruption.

##### **Certificate**

A formal record of certain events issued by the certifier under a Standard Form Contract, e.g. payments, practical completion and final completion.

##### **Certifier**

The person named in the Contract as having power to issue certificates which have a contractual effect. This will usually be the Principal Agent involved in overseeing the construction of the project.

##### **Concurrent delay**

Delay to completion of the Works caused by 2 or more different causes overlapping.

##### **Contract document**

A document specified in the contract as being a contract document and intended to have contractual effect by forming part of the rights and obligations of the parties.

##### **Critical path**

A linked sequence of critical activities - a delay to any of which will cause a delay to the completion of the Works.

##### **Defects Liability Period**

The agreed period commencing from practical/works completion within which the Contractor must remedy any defects appearing in the Works.

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## **Delict**

A delict is wrongful and blameworthy conduct that causes harm to a person (e.g. defamation, or negligent damage to property). Such conduct obliges the wrongdoer to compensate the injured party.

## **Disruption**

Delay to one or more activities which are not on the critical path. Although the activities may be delayed, there is no delay caused to the overall completion date.

## **Extension of Time**

The alteration of the agreed date for completion to a later date as a result of delays caused by matters for which the Contractor is entitled to an extension of time under the contract, for example adverse weather, variations, late design information, etc..

## **Extras**

Extra work, that is work required to be carried out by the Employer over and above the original scope of contract work.

## **Float**

A period of time contained in a Contractor's programme which allows for delays to occur to critical activities without causing a delay to completion.

## **Front end loading**

A practice sometimes used by Contractors of increasing the rates for work which is to be carried out early in the project, thereby improving his cash flow.

## **Latent Defect**

A defect that is not visually apparent, and which may take some time, even many years, to become apparent.

## **Letter of Intent**

A letter, usually written by or on behalf of an Employer to a Contractor or a Contractor to a Sub-Contractor, which indicates an intention on the part of the Employer or Contractor to enter into contract with the Contractor/Sub-Contractor at some time in the future. Generally, a letter of intent will make it clear that the parties are not at that stage entering into contractual relations and that the Employer/Contractor will pay for any work carried out by the Contractor/Sub-Contractor in reliance upon the letter.

## **Loss and Expense**

Claimed by a Contractor or Sub-Contractor in the event of delay and/or disruption for which the Employer/Contractor is responsible during the course of the Works.

## **Method Statement**

A document prepared by the Contractor or Sub-contractor detailing the methods, processes and procedures he intends to use to carry out the Works or part of the Works.

## **Mora debitoris**

When the debtor culpably fails to make timeous performance of his or her obligations

## **Mora creditoris**

When the creditor culpably fails to cooperate timeously with the debtor so that the latter may perform his or her obligations

## **Mora ex re**

Where the parties have expressly or impliedly stipulated a time for performance in their contract, a culpable failure by the debtor to perform on or before the due date automatically places him in *mora (ex re)*

## **Mora ex persona**

Where no time for performance has been stipulated in the contract, expressly or by implication, mere delay by the debtor in performing his or her obligation cannot automatically result in the debtor falling into *mora*, even though the debt may be due and the delay quite unreasonable; the creditor must place the debtor in

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*mora (ex persona)* by demanding that he or she perform on or before a definite date or time that is reasonable in the circumstances.

### **Patent Defect**

A defect that is visually apparent (compare with Latent Defect).

### **Pay when/if Paid clause**

A clause in a sub-contract which provides that the Contractor need not pay the Sub-Contractor until the Contractor himself receives payment from the Employer in respect of the Works for which the Sub-Contractor has applied for payment.

### **Plant**

(a) Items of portable or mobile equipment such as cranes, towers excavators, portable lighting, etc. used to carry out building works; and (b) machinery and equipment installed in a finished building, particularly that which operates the mechanical and electrical services in the building, for example the equipment used to provide heating and air-conditioning.

### **Practical Completion**

This usually means the stage at which the Works are sufficiently complete to be fit to hand over to the Employer (i.e. the Employer takes occupation of the building), even though there may be minor defects or omissions for the Contractor still to sort out. Practical completion is important, not least because it is the stage at which the Contractor's liability for penalties ceases.

### **Preliminaries**

Items of cost (e.g. site hutting, insurances, temporary lighting) that are spread across the whole of the works, rather than relating to any one area. There will often be a separate preliminaries Bill (in the Bills of Quantities)

### **Prime Cost**

The delivered cost of materials and goods obtained from a supplier to a Contractor for carrying out the required work, which excludes any element of overheads or profit.

### **Prime Cost contract**

A contract where the amount the Contractor is to be paid is determined after the work has been carried out by reference to the prime cost of the work. In addition to the prime cost as calculated, the Contractor receives an allowance or his overheads and profit.

### **Provisional Sum**

A sum included in the Bills of Quantities where the actual cost of the work has not yet been determined.

### **Quantum Meruit**

Means 'what the job is worth' and usually is a 'reasonable sum' or 'reasonable remuneration'. Payable where there has been no specific agreement as to the price to be paid or where work is carried out under an ineffective contract (for example, under a letter of intent which does not later result in a contract).

### **Referral notice**

A document prepared by the party who starts adjudication proceedings (i.e. the one who refers the dispute to the Adjudicator to decide). The document is intended to set out details of the applicant's claims, the basis of those claims, and any materials relied upon to support those claims.

### **Re-measurement (admeasure) contract**

A contract where rates for carrying out certain types of work are pre-agreed but the quantities of such work are not determined in advance. Upon completion of the works, the total quantities of the work carried out are measured and, using the agreed rates, the total due to the Contractor for the works is calculated.

### **Repudiation**

The test for repudiation is whether one party acted in such a manner as to lead a reasonable person to the conclusion that he is not intending to fulfil his part of the contract. A mere proposal to modify the contract is not repudiation.

### **Services**

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The mechanical and electrical installations including water, gas, electricity, heating, air conditioning, etc.

### **Site Instruction**

An instruction given by the agents (in building contracts) and the Engineer (in civil engineering contracts) on site in a site instruction book kept on site for this purpose.

### **Snagging List / Defects List**

A list of minor defects and uncompleted work, which is usually prepared by or on behalf of the Employer and which lists the matters to be corrected. A comprehensive list is usually prepared as Practical Completion approaches. The snagging list often forms the document which the contractor works to during the Defects Liability Period.

### **Specification**

A document that sets out specific requirements in relation to the type and standard of the Works, whether they are to comply with any South African Standards and, if so, which ones; or whether the workmanship is to be carried out in a certain way or is to comply with a specified standard; or whether materials are required to be of a specific quality or have particular characteristics.

### **Summary judgment**

A procedure to enable a party to obtain a speedy and enforceable judgment from the courts without having to have a trial. The courts will grant summary judgment if satisfied that the defendant has no real prospect of successfully defending the claim. This procedure is commonly used in England to enforce decisions of adjudicators.

### **Suspension**

The temporary cessation of the contract works by the Contractor and / or his Sub-contractors, mainly in the event of no or partial payment of the amount(s) certified and due for payment in a payment certificate.

### **Time at Large**

The principle of "time at large" provides that the completion date for a contract may no longer be enforceable if the Employer prevents or hinders the Contractor's performance, which will prevent the Employer from deducting any penalties or liquidated damages from monies owing to the Contractor as there is no longer a fixed date for completion of the works. All that the Contractor is required to do is to complete construction within a reasonable time. However, in order for "time to be at large", there must be no provision in the general conditions of contract providing mechanisms for extensions of time due to Employer delay.

### **Valuation**

Usually, the process of measurement and valuation by a Quantity Surveyor of work carried out by a Contractor or Sub-contractor at periodic intervals for the purpose of making an interim payment to the Contractor or Sub-contractor.

### **Variation**

An alteration to the scope of Contract Works (e.g. to add or omit works) required by the Employer or the Architect/Engineer on the Employer's behalf.

### **Vesting clauses**

Building contracts frequently contain specific vesting clauses, e.g. a provision that unfixed materials intended for the works (whether on or off site) shall become the property of the Employer when included in any certificate in respect of which the Contractor has received payment.

### **Waiver**

When a party to a contract gives up a right or remedy provided for in a contract with the full knowledge of the right or remedy (e.g. waiver of lien on receipt of a payment guarantee)

### **Warranty**

An agreement entered into between parties who would not normally have any contractual link, for example between an Employer and a Sub-Contractor. In such a situation, the Sub-Contractor guarantees the standard of his work and materials to the Employer. The purpose is to enable the Employer to sue the Sub-Contractor directly under the warranty for breach of warranty if defects appeared. Other common situations where warranties are given are in relation to design and build contracts where Contractors are often asked to provide warranties to the tenants who are to occupy the building they have constructed.

## Without Prejudice

Any admission, proposal, offer, etc. which is made during the course of negotiations to settle a dispute is said to be 'without prejudice' to whatever may be subsequently stated in any formal proceedings and the courts will not permit documentary or oral evidence to be given of any part of without prejudice negotiations. The purpose of the rule is to enable parties to be able to have a free and open discussion during negotiations to settle a dispute without fear of their words or documents being later repeated in any legal proceedings.

## RULES ETC

### Parol Evidence Rule

Where the wording of the written agreement is clear and explicit, the *parol evidence* rule precludes a party from leading any evidence of anything previously said or done which he contends varies the unambiguous meaning of the agreement.

### Contra Preferentum Rule

The meaning (interpretation of the contract) to be adopted is the one that is the least favourable to the author of the words, because he had the opportunity to avoid the ambiguity.

### Caveat Subscriptor Rule

Means "let the signatory beware". Where there is a clear and unambiguous written agreement between the parties, this will be deemed to be the only and exclusive record of their agreement and neither party will be permitted to allege that the terms of the written agreement bearing his signature are not the true terms, and that he signed the document believing it to contain other terms or to mean something else.

### Rules of Natural Justice

These are usually expressed in the form of two LATIN MAXIMS (regispreuk)

1. audi alteram partem (hear the other side)
2. nemo iudex in propria causa (no one may judge in his own cause)

There is a multitude of rules that governs procedures in the various courts of law and safeguards the rights of the individual to ensure that he is treated fairly and justly. But there are many types of administrative tribunals, commissions of enquiry, disciplinary committees, arbitrations, etc., which have the power to affect the rights of the individual, which are not part of the structure of the courts, and for the conduct of whose duties there are no prescribed rules of procedure.

In order that the rights of individuals who must appear before such bodies are not prejudiced, such bodies are required to observe the rules of natural justice. These are common law rules that form the basis of our judicial system. The above maxims may be briefly explained as follows:

- A person who is brought before such body is entitled to be told of the charges, complaints or claims that are being made against him, and is entitled to prepare for and lead whatever evidence he wishes in order to rebut such charges, complaints or claims.
- Such a person is entitled to be present whenever such body is receiving any evidence, and to know of any communication made by any person with such body. In the context of arbitration, the arbitrator may not receive any communication from one party without conveying its contents to the other.
- The members of such body (and the body itself) must have no interest in the outcome of the enquiry, and must be totally impartial and unbiased.
- Justice must not only be done but should clearly be seen to be done.

While there is very frequently no appeal from the decision of such bodies, the courts always have the right to review the procedure that such bodies follow to ensure that these rules of natural justice have been applied, and where there has been a breach of such rules, they may set aside the decision of such body.

### Postulates of Justice

POSITIVE LAW should possess or display certain qualities if it is to avoid being labelled an unjust or bad law

- Reasonable (equitable)
- Impartial (same for all persons – equal treatment)
- Certain (definite – clear language – no ambiguity/vagueness)
- Comprehensive (should deal fully with particular topic)
- Promulgated (must be known to the public – notice to be given)

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- In accordance with public opinion (should have approval of the general public – if a law is so disliked by a substantial portion of the community that they break it habitually, it undermines the respect for law in general, e.g. the previous pass act)

### **Constitutum Possessorium**

The transferor retains physical control of the thing to be transferred but acknowledges that the thing is henceforth owned by the transferee and that it is retained on behalf of the latter. For practical reasons it is therefore not necessary for the transferor to deliver the thing to the transferee first and thereafter to reacquire physical control of the thing in a different capacity.

Some requirements are however essential for *constitutum possessorium* to take effect:

- The transferor must be the owner
- He must cease to possess the thing for himself and begin to hold the thing in the name of the transferee
- The transferee must consent the detention be retained by the transferor, and
- There must be a clearly proven contractual relationship under which the transferor becomes the detentor (retainer) for the transferee.



## 4 SELECTED TOPICS PECULIAR TO BUILDING CONTRACTS

*On completion of this part you should be able to:*

- *have an understanding of a selection of topics peculiar to building contracts that are regularly encountered in the construction industry*
- *gain an understanding of the meaning of these mechanisms, how they work and how they should be applied in practice*

The following section includes a selection of topics that are regularly encountered in the construction industry. The list is not exhaustive at all and readers are invited to add their own topics to the list as and when they come across additional relevant ones. Some of these topics have been copied from the course notes of Alusani (2009), but the author has added a number from his own course notes at the University of Pretoria or from other sources as referenced.

### 4.1 Assignment

Assignment is the act of transferring one or more, or all of a party's rights arising under a contract to a third party who is not a party to the original contract. It is important to distinguish between contractual rights and contractual liabilities when discussing the concept of assignment. Only contractual rights can be assigned, contractual liabilities cannot. Thus a contractor can assign his right to receive payment under the contract to a third party who is not a party to the original contract. That third party will then be entitled to claim payment from the employer in terms of the assignment.

However, the liabilities of the contractor cannot be passed on to its partners and therefore it remains ultimately responsible for the performance of the contract and any liabilities which may flow therefrom.

Most modern forms of construction contracts contain express provisions prohibiting assignment without the consent of the employer. Clause 1.7 of the New FIDIC Red Book deals with assignment and states that:

*'Neither party shall assign the whole or any part of the Contract or any benefit or interest in or under the Contract. However either Party:*

- May assign the whole or any part with the prior agreement of the other Party, at the sole discretion of the other Party, and*
- May, as security in favour of a bank or financial institution, assign its rights to any monies due, or to become due, under the Contract.'*

JBCC 6<sup>th</sup> edition covers assignment and cession in its Clause 4.0.

### 4.2 Breach provisions

Breach of contract can be broadly described as a breach of a promise to perform timeously and properly, as undertaken in the contract.

*Forms of Breach*

- Delay by debtor (*mora debitoris*)
- Delay by creditor (*mora creditoris*)
- Positive malperformance
- Repudiation
- Rendering performance impossible

Breach by one party of their contractual obligations does not necessarily automatically terminate a contract, even if the contract expressly states that it will do so, because the party in breach cannot be permitted to profit from his own wrong doing by bringing the contract to an end if the innocent party wishes it to continue.

The significance of breach of contract is that the aggrieved party becomes entitled to one or more of the remedies prescribed either in terms of the contract or alternatively at common law as a result of the other party's breach. The mere fact that the aggrieved party has suffered loss is not enough. The aggrieved party must prove that the loss was specifically caused by the other party's breach.

When a party has failed to perform in time he is said in Roman Dutch law to be in *mora*. Our law and most breach provisions in construction contracts oblige the aggrieved or innocent party to give notice of breach to the other party. The notice will necessarily afford the party in breach an opportunity to remedy that breach. Only if the breach is not remedied within the prescribed time will the aggrieved party become entitled to the remedies available at common law and/or under the Contract.

*'If the Contractor fails to carry out any obligation under the Contract, the Engineer may by notice require the Contractor to make good the failure and to remedy it within a specified reasonable time.'*

Breach may take a number of forms other than *mora* and whether a breach has been committed or not will be determined by comparing what the party has done or not done with what it ought to have done on a proper interpretation of the contract. Once it has been determined that a breach has been committed, it is necessary to decide next whether the innocent party is entitled to the most drastic remedy of cancellation of the contract, or whether he must be content with one of the other available remedies.

Where a party by words or conduct, leads the other party (as a reasonable person) to the conclusion that he does not intend to fulfil his contractual obligations he is said to have repudiated the contract. If this repudiation takes place before performance is due it is described as an anticipatory breach of contract and the innocent party may immediately cancel.

Repudiation not only entitles the innocent party to cancel, but will immediately relieve the innocent party of performance of its obligations, provided the innocent party makes it clear to the repudiating party that he remains willing and able to perform.

### 4.3 Cession

Cession is a legal act which transfers the right to performance due from the creditor to that of another (cessionary) who thereby becomes the creditor in his stead. The fundamental difference between assignment and cession is that with cession, the debtor who owes the performance to which the ceded right relates need not participate in the cession or be aware of it – cession is a bilateral act or agreement between two parties, namely the cedent and the cessionary.

The act of cession does not create any obligations on the parties to the cession and accordingly cannot be seen as a contract.

Very briefly, the requirements for an effective cession are the following:

- The cedent must possess a right;
- There must be an agreement between the cedent and the cessionary to give and to accept transfer of a right;
- The right must be capable of cession;
- Any formalities by law must be complied with; and
- The cession must not be illegal.

Cession is not usually covered under international standard form contracts, however the South African standard form contracts such as the JBCC, GCC 2004 and the COLTO General Conditions of Contract for Road and Bridge Works for State Authorities (1998 Edition) contain a prohibition on cession (which has been replaced by the GCC 2010).

Clause 4.1 of the JBCC 6<sup>th</sup> edition reads as follows:

*'Neither **party** shall assign or cede his rights or obligations under this **agreement** without the prior written consent of the other **party**, which consent shall not be unreasonably withheld.'*

## 4.4 Completion

Best practice dictates that contract documentation should include a detailed distribution of the works, drawings, and specifications in order to allow the contractor the opportunity to assess the work correctly and thereafter execute the works in accordance with the provisions of the contract.

A well-drafted contract provides little scope for confusion when it comes to assessing when completion has been reached. One of the major problems encountered with South African contracts is that contract documents are often lacking when it comes to detailed description of the works, specifications and drawings. This in turn leads to numerous variations being instructed during the execution of the contract which in turn creates difficulty in assessing exactly when completion is reached.

Once the contract works have been complete, the risk and responsibility of the works generally passes back to the employer save for the contractor's obligations in respect of defects liability.

## 4.5 Deeming provision

A deeming provision is a clause which provides that should certain specified circumstances be (or not be) present then (and only then) will the obligation created in the clause be deemed to come into operation.

The JBCC 6<sup>th</sup> edition summed up the effect of a deeming provision as follows:

*'The word 'deemed' shall be conclusive that something is fact, regardless of the objective truth.'*

## 4.6 Defects liability obligations

The defects liability or maintenance obligations generally start on "completion". The defects liability obligations contained in a contract generally act as a warranty to be furnished by the contractor to the employer, in respect of materials and workmanship supplied by the contractor. In the event that any defect appears in the works after completion, but during the defects liability period, the contractor is generally required, regardless of the cause of the defect, to rectify such defect within a specified time period. In the event that the defect is not caused as a result of the contractor's workmanship or materials supplied by the contractor, then the employer shall be liable for payment of the defect rectification work.

It is important to distinguish between patent and latent defects and the liability of the contractor in respect of these two categories of defects. A latent defect is a defect which is hidden at the time of inspection and manifests itself with time. A patent defect on the other hand is a defect which is clearly visible upon inspection. These two categories of defects also carry different liabilities to the contractor. The contractor's liability to correct patent defects is generally limited to the duration of the defects liability period and the provisions of the defects liability clause contained in the contract. The contractor's liability to rectify latent defects is determined by reference to the common law.

The leading case in respect of latent defects in South African law is Holmdene Brickworks (Pty) Ltd v Roberts Construction Limited which defined a latent defect as "an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the *res vendita*, for the purpose for which it has been sold or for which it is commonly used. Such a defect is latent when it is one which is not visible or discoverable upon an inspection of the *res vendita*".

## 4.7 Design obligations

Under most standard form contracts used in building or civil engineering projects, the design is supplied by the employer, alternatively the architect/engineer. Furthermore, in these contracts the employer's design is usually defined as an employer's risk. Contractors should define design obligations accurately and ensure that during the execution of the contract they do not take on any additional design obligations. It must be remembered at all times that the design supplied by the architect/engineer is usually provided by a professional who is in turn covered by professional indemnity insurers. Therefore, if there is a failure in the design provided by the professional, the professional indemnity insurers will cover the resultant costs and damages. Contractors are not generally covered by professional indemnity insurance and therefore should a design, which they supply fails, they will not be covered by an appropriate insurance policy and the direct result will be that the contractor may suffer financial loss.

The design obligations placed on a contractor under most building or civil engineering contracts are usually quite limited. It relates specifically to the design of temporary works (See JBCC PBA 6<sup>th</sup> edition clause 7.1 for

example). The design obligations are generally defined in the technical specifications. A practical application of design obligations under a contract can be seen with reference to SABS 1/200 B Item 5.2.3.1 which states:

*'Embankments: Where approved material from excavations is insufficient to form designated embankments, the Contractor shall, unless otherwise ordered, obtain the additional material, as directed; from borrow pits at sites approved by the Engineer.'*

What happens on certain projects is that borrow pit material is obtained by the contractor without obtaining the engineer's direction. If this is done, the contractor in essence takes on an additional design obligation and should the borrow pit material fail at some later date, the engineer could raise the defence that he did not direct which borrow pit material to use and hence he is not liable for the selection of poor borrow pit material. This is a major problem area on roads and earthworks contracts and can be easily avoided by ensuring that the design obligations are well defined and that the contractor does not take on any additional design obligations.

## **4.8 Estoppel**

Although many of us enter into contracts by ourselves every day, there are occasions when it is necessary for others – for example, lawyers – to act on our behalf. Usually a person (known as 'agent' or 'representative') may enter into a contract or an agreement on behalf of another (the 'principal') only with express or tacit authority to do so. There are, however, exceptions to this rule and these revolve around the legal principles of 'ratification' and 'estoppel'. Ratification, briefly, means that principals retroactively grant permission for contracts to be entered into on their behalf. However, certain requirements must be met for ratification to be legal. Often doing this may not even be possible. Principals may be held liable for contracts entered into on their behalf even if they refuse to ratify the contracts. When courts are satisfied that the drawing up of contracts meets all legal requirements, they will hold that the principals are 'estopped' (precluded) from denying that the agents were properly authorized to act on their behalf. If principals, by words or conduct (even by silence or inaction), lead others to believe that their agents have authority to act on their behalf, which lead to third parties believing and acting on that behalf, they may be estopped from alleging otherwise. Agents have the authority to act. Note, however, that agents simply holding themselves out as having authority are insufficient grounds for estoppel. It is necessary for the representation of authority to come from, or somehow be attributable to, the principals.

### **4.8.1 Misleading a third party**

Other requirements for estoppel are that, to operate, representatives must have been of such nature that they could reasonably have been expected to mislead the third party. The Courts take into account the circumstances of the principal and the third party. The representation must have been one in which:

- A reasonable person in the position of the third party would have been misled;
- A reasonable person in the position of the principal would have expected to mislead the third party; and
- The third party must have acted on the strength of the representation and, as a result, suffered prejudice. The principal of estoppel implies that the 'agent' had no authority at all to act: the principal is merely precluded from denying that authority existed. It is sometimes difficult to decide whether a principal is liable on the grounds of estoppel or tacit authority. While the basis of liability makes no difference to the third party, it is important to the principal and agent, since in the case of estoppel the principal has recourse against the 'agent' in respect of any loss incurred as a result of being bound to the contract with the third party.

## **4.9 Exemptions**

Exemption clauses are terms that exclude or limit liability of a particular contracting party. Exemption clauses are the same as exclusionary terms which has been discussed earlier.

## **4.10 Force majeure / vis major**

In the administration of contracts delays fall within three categories from which the party's obligations and/or entitlement will flow. If a delay occurs for reasons within the contractor's control, he may attract the obligation to accelerate the work so as to avoid the imposition of penalties for late completion. However, if a delay occurs which is at the risk of the employer (according to the contract) the contractor will, if he complies with the notice requirements of the contract (if any) earn the right to claim extension of time and be recompensed

for some of the costs or losses which he incurs as a result of the delay, depending on the terms of the contract.

The third classification of delay is of those that arise through no fault of either of the parties. Traditionally, these claims were described as acts of God, more recently as *vis major* and currently as events of *force majeure*.

*Force majeure* and what can be defined as *force majeure* is often a ground for confusion and misunderstanding in construction contracts. The term *force majeure* does not have any precise definition, nor is it recognised as any special doctrine in South African law.

Its significance in respect of our law depends on its use as an express provision in a contract. The expression *force majeure* covers a wide class of events such as acts of God, strikes, wars, insurrection, etc. *Force majeure* clauses provide that the event in question must be beyond the control of the party relying on it and the contractual provision relating to *force majeure* must release that party from performance in the event of the occurrence of *force majeure*.

The JBCC has removed from the text all non-English (Latin) terms such as 'vis major', 'prima facie' or 'mutatis mutandis' and replaced it by plain English, but has included in its 6<sup>th</sup> edition a definition for *force majeure* that reads as follows:

**'FORCE MAJEURE:** *An exceptional event or circumstance that:*

- a) *could not have been reasonably foreseen*
- b) *is beyond the control of the **parties**, and*
- c) *could not reasonably have been avoided or overcome*

*Such an event may include but is not limited to:*

- *Acts of war (declared or not), invasion, and hostile acts of foreign enemies*
- *Insurrection, rebellion, revolution, military or usurped power, war (whether declared or not, terrorism*
- *Civil commotion, disorder, riots, strike, lockout by persons other than the **contractor's** employees or his **subcontractors***
- *Sonic shock waves caused by aircraft or other aerial devices, and ionising or radioactive contamination*
- *Explosive materials, except where attributable to the **contractor's** use of such technology*
- *Natural catastrophes including earthquakes, floods, hurricanes, or volcanic activity'*

#### 4.11 Indemnities

An indemnification contained in a contract document is used to exclude liability and pass that liability on to the other contracting party.

Where an indemnity is furnished, the party furnishing the indemnity is accepting liability in respect of the event or circumstance against which that party is indemnifying.

See clause 9.0 in the JBCC PBA 6<sup>th</sup> edition, which deals with indemnities in detail.

#### 4.12 Contract instructions (variation orders)

Most standard form contracts contain express provisions that the contractor shall comply with all the instructions given by the principal agent/project manager/engineer. Again it is important to understand what constitutes an instruction and whether or not and in what circumstances the contractor is obliged to execute that instruction.

Clause 17.2 of the JBCC PBA 6<sup>th</sup> edition states that:

*'The **contractor** shall comply with and duly execute all **contract instructions**.'*

The JBCC PBA 6<sup>th</sup> edition clause 17.5 makes it very clear that all instructions have to be in writing.

## 4.13 Penalties

Damages that are claimed are normally termed “illiquid damages” as they have to be proved by the person claiming them. This means that the onus of proof in respect of such damages rests on the shoulders of the party alleging that such damages are due.

As this onus of proof can be difficult to discharge, over the years a practice has arisen whereby the parties attempt to agree upfront the extent of damages that would be suffered by an aggrieved party as a result of the other party’s failure to perform, and once agreed such damages are thereafter referred to as “liquidated damages”. Once damages are liquid the onus of proof in respect of such damages passes from the person claiming them to the person who should be paying such damages. Should the payee wish to avoid payment of such damages, he would have to prove to the satisfaction of a court that the liquidated damages claimed are out of proportion to the actual damages suffered by the claimant arising from the particular breach of obligation.

This is the global position and the expression “LDs” (i.e. liquidated damages) is often referred to in international contracts. The term “a genuine pre-estimate of liquidated damages” is also seen in certain English contracts as English law requires that a determined effort be made to fix the extent of damages which would arise from a particular breach before they can be construed as being liquid.

In South Africa the situation is somewhat different in that in 1962 the Conventional Penalties Act No. 15 of 1962 was passed. The object of this Act is to:

- Create a situation whereby a penalty stipulation set out in a contract is enforceable by law;
- Prevent the imposition of unfair or excessive penalties under a contract; and
- To prevent both penalty and damages being claimed in respect of the same breach of contract.

This Act contains a provision that if the penalty is out of proportion to the prejudice suffered by the aggrieved party, the Court may on application by the party called upon to pay, reduce the penalty so that it is equitable in all the particular circumstances of the matter.

Section 1 of the Act makes it clear that the Act applies to both penalty and liquidated damages clauses as used in engineering and construction contracts.

The distinction, however, between a penalty claimed in terms of the Act and damages claimed as a result of breach of contract, is that as stated above, the person from whom the damages are claimed can always allege that the damages are out of proportion to the damages actually suffered by the claimant arising from that particular cause of action. In the case of a penalty, however, the Act is clear that the person paying the penalty can apply to Court to have the penalty reduced if he is able to prove that the agreed penalty is out of proportion to the prejudice suffered by the claimant. These are two totally differing situations in that the word “prejudice” is far wider than damages and the claimant can therefore bring into account issues which do not flow directly from the breach of a contract condition or performance but which indirectly have caused the claimant prejudice. The distinction needs to be understood clearly.

Section 2(1) of the Act states:

*‘A creditor shall not be entitled to recover in respect of an act or omission which is the subject of a penalty stipulation, both the penalty and damages, or, except where the relevant contract expressly so provides, to recover damages in lieu of the penalty.’*

## 4.14 Performance security

Construction contracts generally contain a number of provisions in respect of security. Security is furnished in many different forms and can be used to ensure that a party to a contract carries out its obligations in terms of the contract. For more information on construction securities see journal article of Maritz (2011), *Doubts raised on the validity of construction and payment guarantees*.

### Guarantees

A guarantee is an express undertaking given by a party in terms of which the party making the guarantee undertakes that in the event of it not performing the obligation (which is guaranteed) there will be a consequence.

## Surety bonds

Suretyship is defined as an accessory contract in terms of which a person (the surety) undertakes to the creditor of another (the principal debtor), primarily that the principal debtor who remains bound, will perform his obligation to the creditor and, secondly, that if the principal debtor fails to do so, the surety shall perform such obligation, or failing performance, indemnify the creditor.

## Performance bonds

A performance bond is an undertaking whereby a guarantor unconditionally and irrevocably undertakes to pay certain amounts, typically expressed as a percentage of the contract sum, without the necessity for the employer to prove any breach by the contractor. The sum of money is usually recovered by the bank from the contractor's account with them.

Performance bonds may take various forms, the most onerous of which, from a contractor's perspective, is an "on demand" bond. An "on demand" bond usually provides that the guarantor must pay to the employer a certain sum of money upon receiving a written demand from the employer. Such demand does not usually require that the employer prove any breach of contract.

## Advanced Payment Guarantees

An advanced payment guarantee is a guarantee issued by the contractor's bank in favour of the employer. The advanced payment guarantee enables the employer to recover monies advanced to the contractor in the event of the contractor failing to comply with its contractual obligations.

## Liens

A lien is a right that the possessor of an item has to retain possession of that item in the event that he has expended money on that item or carried work on that item and has still not been paid what he is owed in respect of that item. The contractor's right to exercise a lien is well defined in our common law; however, this right is often excluded in contract forms.

## Retention

Some construction contracts contain provisions for retention which grant the employer the right to retain a percentage of payments due and payable to the contractor until satisfactory completion of the works. The purpose of retention monies is to act as a form of security to ensure that the contractor performs his obligations in terms of the contract.

## 4.15 Repudiation

A party to a contract may be excused from further performance where the contract has been repudiated by the other party. Under repudiation is included:

- An express statement by one party that he is unable or unwilling to fulfil his obligations under the contract;
- Conduct by one party that exhibits a deliberate and unequivocal intention no longer to be bound by the contract;
- Any failure by one party to perform an essential term of the contract; and
- Failure to comply with a court order for specific performance.

The fact that one party repudiates a contract does not in itself put an end to the obligations arising out of the contract. It does so only if the other party accepts the repudiation. He may elect not to accept the repudiation and insist that the other party perform his obligations.

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## ADDENDUM A: SAMPLE QUESTIONS ON CONSTRUCTION LAW

1. What are some essential elements of a valid contract?
2. What is a quasi-contract?
3. When is a contract void?
4. Who may suffer if a contract is poorly or unwisely prepared?
5. A agreed to pay B R5000 for certain diamonds, which B was to smuggle into the country. When B delivered the diamonds, A refused to accept them. What can B do about it? Why?
6. By means of construction-related examples distinguish between: Specific performance, damages and penalties.
7. Discuss the "Stare Decisis" rule in full with reference to its definition and application.
8. Distinguish between the higher and lower courts in the RSA.
9. To which courts may a party appeal if his case in the Pretoria High Court, with one judge in the bench, fails? Name two further courts of appeal available to him.
10. "All contracts are based on consensus, i.e. agreement as to performance, but the modern construction contract has certain unique features which also result in many claims; this equally applies to construction contracts." List THREE such features, and discuss each with reference to the appropriate clause(s) in one of the CIDB endorsed construction contracts.
11. Discuss the "Parol Evidence Rule" under the following headings:
  - a. The importance that the courts lay on the performance by the parties to a contract of their obligations under the contract
  - b. The succinct summary of the rule as stated in *De Klerk v Old Mutual*
  - c. The consequences of the rule in the case of a contractor who qualifies his tender
12. Briefly discuss the three "Rules of Natural Justice".
13. The "audi alteram partem" rule is one of a number of common law rules that ensures that both arbitration and adjudication proceedings are conducted in a fair and equitable manner. Explain the meaning of this rule and give appropriate example.
14. A called builder B and described in detail an additional room she planned to build on her house. She asked B how much he would charge to build it. After lengthy discussion, B said: "I think it will cost you R30 000." A said, "That will be satisfactory." The next day B called A and said that, after making a careful estimate of the job, he found that the addition would cost R34 000. A claimed that B had already contracted to do the work for R30 000. Is A correct? Why?
15. A, a builder, promised B that she would engage the latter to install all the gas furnaces in houses to be built by A. B ultimately sued A for loss of anticipated profits because A changed all of her house plans and installed hot-water heating systems instead of gas systems. Can B collect? Explain.
16. A had agreed to sell his house to B for R500 000 and stated that he would confirm his offer by letter the next day. When A wrote the letter, he made a typographical error, stating that the selling price was R400 000. What are the rights of the parties?
17. X promised to buy Y's house for R250 000 and made a deposit of R10 000 to bind the bargain. She was to receive transfer of the title on the 10<sup>th</sup> of August. On the 6<sup>th</sup> of August the house burned down. What happens to the contract? What happens to X's deposit?

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18. On the 2nd of April, A contracted to deliver 50 m<sup>3</sup> of topsoil to B for grading the latter's lawn. In spite of A's telephonic requests, B had not delivered the soil by the 15th of May, whereupon A purchased the topsoil from C (without notifying B) and had the job finished by the 21st of May. A week later B started to deliver and insisted that A go through with the bargain. If litigation ensues, what result can be expected?
19. Discuss the **contractor's** or **subcontractor's** rights in each of the following:
- The **principal agent** requires certain adjustments to the **priced document** submitted by the main **contractor**
  - The **contractor** found certain existing levels to be different to those shown on the plans available at tender stage. The **contractor** regards these as **defects** and requires a **contract instruction** (and additional payment).
  - During the **construction period** certain debris resulted from the **subcontractors'** activities. The **principal agent** instructs the main **contractor** that it has to be cleared away and removed from the **site** on a daily basis.
  - The **contractor's works** are behind **programme** but the **contractor** insists the "completion dates" will be met and there is no need for the additional resources on which the **principal agent** insists.
  - Prior to **interim completion** a number of **subcontractors** receive a **n/s recovery statement** on which is reflected a deduction in respect of **penalties** levied by the **principal agent** against the main **contractor**.
20. In the JBCC the **principal agent** is allocated full authority and obligation to act in terms of the **agreement** whilst other **agents** are appointed to deal with specific aspects of the **works**. What are the implications hereof and what contractual rights do the **employer** surrender? Does the State grant the same authority to the **principal agent** under its contracts? How do the other CIDB endorsed construction contracts differ in this regard from the JBCC?
21. When **defects** come to light after the **principal agent** has issued the **final completion certificate**, does the **contractor** still have the liability or can he argue that once the certificate has been issued the **employer** loses his rights?
22. Float included in the programme, to whom does it belong: Client, Main Contractor or the project?
23. Extension of Time (EOT) claim with two issues running concurrent to each other i.e. adverse weather (EOT without cost) and late instruction (EOT with cost); which one is dominant? How should concurrent delays be approached in general?
24. Discuss breach of contract provisions in its various forms as a breach of a promise to perform timeously and properly, as undertaken by the parties under the contract conditions, and what the aggrieved party's rights will be, with specific reference to building contracts
25. Write a letter to the contractor in which you notify him of the employer's intention to terminate the contract because of the contractor's default. Use your own hypothetical circumstances when drafting the letter
26. When an employer terminates its contract with a contractor, does it have an automatic right to force the contractor off site without the contractor's consent or having first obtained a court order? Support your answer by referring to relevant contractual clauses and case studies