

THE LAW OF CONTRACT AND PROPERTY

Engineering contracts form a vital phase of an engineering project life cycle. Contracts are awarded for the supply of materials and/or for the implementation of parts of or the entire project. In fact, contracts may be awarded at any phase of the project. Labour is also contracted, but this is treated under the contract of employment. Engineers, in their professional practice, also frequently deal with the personal possessions or properties of their Employers and other third-parties.

Contracts and properties are regulated by law. Therefore, it is very vital that the engineer has a working knowledge of the law of contract and property, which is the main theme of this chapter. However, before considering the contract and property law, some basic concepts of law are introduced.

8.1 The Basic Law Concepts

Law is a set of rules, enforceable by the courts, regulating the government of a State, the relationship between the organs of government and the subjects of the State, and the relationship or conduct of the subjects towards each other. It is a body of obligatory rules of behaviour for the members of a society whose contravention attracts sanctions. Law is a means through which a people order their existence. Law may be normative or imperative in character. The existence of law presupposes the existence of a sovereign body, the State, with the machinery to enact and enforce the law. The essence of law is justice, order, peace, harmony and progress for the individual and for the society as a whole. A *legal system* is an embodiment of the law of the State, the legislature, the courts, the Ministry of Justice, the police, and the legal professionals: the bench and the bar (judges and magistrates, and barristers and solicitors).

8.1.1 The Functions of Law

Law functions as an instrument for social justice, social control and socio-economic change. As an instrument for social justice, law seeks to treat all members of the society uniformly, equally and equitably; law does not respect persons. As an instrument for social control, law regulates the relationship between members of the society by prescribing rules and regulations guiding their conduct as well as the sanctions, which their contravention attracts. Finally, when properly formulated and implemented, law can be used to achieve positive social, political, economic and technological reforms or developmental goals; this is the socio-economic function of law.

8.1.2 The Nigerian Legal System

The Nigerian legal system is modelled along the British legal system for the obvious reason of her colonial past. Most of the laws operating in Nigeria are either received from the English laws or are extensions of the same. In addition to the applicable English law, indigenous statutes and subsidiary law as well as the customary laws and Islamic law combine to complicate the Nigerian legal system.

The Nigerian legal system is a multifarious system. This is due to her complex political structure, multi-ethnic and multi-religious background. The political structure is such that the Federal structure is housing multiple State structures, each of which in turn contains multiple Local Area structures. Each of these structures has its own, some how peculiar, legal system. Associated with the multiethnic set up are the multifarious customary laws, including religious laws, that are operating across the country. However, the Constitution of the Federal Republic of Nigeria, which is the creator of the various structures, also entrenches adequate rules for resolving the inevitable conflict among the various legal systems in Nigeria. For example, any legislation made by the local government council, which is repugnant to any of its State legislation becomes null and void. Similarly, any State legislation that conflicts with a Federal legislation becomes null and void. The same Constitution also stipulates areas of legislative jurisdiction for the federal, state and local government legislatures.

Laws are passed by the federal, state and local government legislatures as ordinances or acts, laws, and by-laws, respectively. Laws made by military governments (dictators) come as decrees and edicts for the federal and state governments, respectively.

8.1.3 Classification of Law

For greater specialization and hence more efficient dispensation of justice, law is often classified as *public law*, *private law*, *civil law*, *criminal law*, *common law*, *equity law*, *customary law*, *religious law*, *municipal law*, *international law*, *substantive law*, and *procedural law*. These are now briefly described.

8.1.3.1 Public Law

The public law regulates the government of the State, the relationship between the organs of government and between individuals and the State. Under this division are *administrative*, *constitutional*, *criminal* and *revenue laws*.

8.1.3.2 Private Law

The private law regulates the relationship between individuals in the society. The branches of the private law include: *contract*, *property*, *succession*, *family*, *tort*, *trust*, *commercial*, *company*, and *partnership* laws. The law of *contract* recognizes and protects interest in the performance of legally enforceable agreements between parties. It usually compensates the injured party in a breached contract by granting damages (the monetary worth of losses incurred). The law of *property* governs title to or interest in property. The law of *succession* regulates the devolution of property on death. The law of *family* regulates family relationships such as marriage, parent and child relationship, child custody and guardianship, and child adoption.

The law of *tort* regulates the civil wrong or injury arising out of a general duty for an act or omission created by law and not by contract, and grants damages to the injured. This law protects: *interest in the person*: *assault and battery*, *negligence*, *nuisance*, *malicious persecution*, etc; *interest in property*: *trespass to land*, *trespass to goods*, *detinue* (wrongful detention of property) and *conversion of goods*; and *interest in reputation*: *libellous* or *slanderous defamation* (publication of defamatory material in a permanent or transient form, respectively). The law of *trust* regulates the relationship, in respect of a property, between the *settlor*, the *trustee* and the *beneficiary*; if the trustee deals with the property improperly, a breach of trust results giving rise to damages against the trustee. The law of *company* regulates associations of persons having a common object, usually a business undertaking, while the law of *partnership* governs agreements between two or more persons to carry on a business and share the profits and losses of the business in

determined proportions. Finally, the law of *commerce* regulates trade and commerce.

8.1.3.3 Civil Law

The civil law regulates all the relationships between individuals that do not constitute crime against the State; it defines the rights and duties of individuals and stipulates remedies (financial compensation) for their contravention. The civil law is within the sphere of the private law. The right to institute civil proceedings is restricted to the injured (affected) party or to his representative on his death. Furthermore, there is a time limitation placed on the injured party within which to commence litigation from the time of commission of the civil wrong. To succeed in a civil suit, the plaintiff (claimant) is required only to prove his case on a *balance of probability*.

8.1.3.3 Criminal Law

This class of law regulates the acts and omissions that are prohibited and punishable by law, which specifies them as crime against the State (being against public order and the society as a whole) and stipulates the maximum punishment each offence (crime) attracts. It is a major branch of the public law. To be convicted of a crime, the guilt must be proved *beyond all reasonable doubts*. Some common offences created by the criminal law include: *stealing, assault, murder, rape, arson, kidnapping, obtaining by trick, burglary, house breaking, riot, perjury, bigamy, treason, treasonable felony, and criminal defamation*.

Offences, in terms of seriousness or extent of punishment they attract, are classified as *felony, misdemeanour, or simple offence*. A *felony* is a serious offence (crime) such as murder or arson; conviction attracts a death sentence or not less than three years imprisonment. It is only in the case of felony that a private person is empowered to arrest a suspect. An accused who committed felony that is punishable by death has no right to bail. A *misdemeanour* is an offence, which is generally less atrocious (heinous) than a felony; conviction attracts imprisonment for a term between 6 months and 3 years. And a *simple offence* is an offence which is neither a felony nor a misdemeanour; conviction attracts a fine or less than 6 months imprisonment. An accused who committed an offence other than a felony has right to bail, except the court has good reason to the contrary. Criminal proceedings for crime are instituted by the State through the Police, the Customs and Excise, the Director of Public Prosecutions, or the Attorney-General, or by a private individual with the permission of the Attorney-General. The State also administers

the tenses of convicted criminals, and may grant a convict pardon. There is *no time limit* between the time of commission and the time of prosecution of a crime.

8.1.3.5 Common Law

The common law is a major branch of the English law (common law, doctrines of equity, statute and subsidiary law). The common law courts administered the common law before the Judicature Acts of 1873-1875. The common law is the written equivalent of the customary law of England. The customary laws of various localities of England were distilled to obtain one that is *common* to all England. The common law doctrines are very strict and inflexible. The common law also marks the legal tradition of developing law through the instrumentality of judicial decisions, as opposed to the Roman law, which is based on codes written by jurists and is applicable in many parts of the world, including the former French colonies. The common law doctrines are applicable in the Commonwealth countries and in the U.S.A.

8.1.3.6 Equity

The law of equity is the set of rules administered by the court of Chancery before the Judicature Acts of 1873-1875 in England. It is a system of jurisprudence (law) developed on the principles of *natural justice, fair conduct and good conscience*. Equity supplements the common law and mitigates its inflexibility by providing remedies where none exists at common law. The common law, as a self-sufficient legal system, is stiff and has no provision for some matters. In some cases, the common law is found wanting in its provision of adequate remedies; for example, under the common law, the court cannot order specific performance in a breached contract.

This was why those disfranchised by the inflexibility and incompleteness of the common law petitioned the King of England for justice. Their petitions were sent to the Lord Chancellor, a cleric and keeper of the King's conscience, for adjudication. Thus, the Lord Chancellor developed a body of principles, based on what he thought to be *just* and *fair*, which specifies *where* and *how* an equity court should grant relief (remedies). Unlike the common law remedies, which are granted as a matter of course, the equitable remedies are at the discretion of the court. The abrogation in 1875 of the separate administration of the common law by the common-law courts and the doctrines of equity by the Court of Chancery, through the instrumentality of the Judicature Acts

of 1873-1875, led to the concurrent administration of the common law and the doctrine of equity by the courts.

8.1.3.7 Customary Law

The customary law is a set of *unwritten* rules and regulations entrenched by long usage in a given society as a standard of conduct. In societies where the customary law is still applicable, its enforceability is usually subject to the limitations imposed by statute. In Nigeria, for example, a customary law provision loses validity should it be repugnant to natural justice, equity and good conscience or incompatible, directly or by implication, with any law for the time being in force. Despite its numerous shortcomings, customary law is still operating in many developing countries.

8.1.3.8 Religious Law

The religious law is a set of rules, regulations and orders, which guides the conduct of members of a given religion and which is recognised and entrenched in societies where religious power is synonymous with political power. In fact, in such a society, all powers usually flow from the religious leader. The religious law, which has any relevance in Nigeria, is the *Islamic law*. It is applicable in the Northern States of Nigeria, provided that it is not incompatible with any statute law of the Federal Republic of Nigeria.

8.1.3.9 Municipal Law

The municipal law deals with the entire law of a sovereign State. In Nigeria, this is the totality of all the law belonging to the Nigerian legal system.

8.1.3.10 International Law

The international law deals with the rules and regulations guiding the relationship between sovereign States (*public international Law*) as well as the problems arising from the association or contact of a municipal law (legal system) with another (foreign) legal system (*private international law or conflict of laws*).

8.1.3.11 Substantive Law

The substantive law deals with the existence or otherwise of rights and duties with respect to the circumstances and situations which gave rise to a given litigation. The circumstances and situations, which fit into the model provided by a given legal system, constitute the basis of rights in favour of one party and duties on the other.

8.1.3.12 Procedural Law

The procedural law regulates the conduct and relations of courts and parties before them in respect of the legal proceeding itself. It deals with the means and instruments by which the purposes of substantive law are realised.

8.1.4 Sources of Nigerian Law

The sources of Nigerian law are those organs and means through which the sets of obligatory rules of behaviour of government and its organs, individuals and organizations in Nigeria derive their authority. They include: *Nigerian legislation, English law, case law, customary law and Islamic law*. These sources of the Nigerian law are now briefly described.

8.1.4.1 The Nigerian Legislation

The Nigerian legislation comes as statutes and subsidiary (or delegated) legislation. Statutes are enacted by the legislature (National and State Assemblies, and Local Government Councils). Subsidiary legislation consists of rules, orders and regulations made by those delegated by the legislature or the enabling statute so to do. In a democratic Nigeria, the *Constitution of the Federal Republic of Nigeria* is the *basic law*. It, among other provisions, vests the power to legislate on the National Assembly, State Assemblies and Local Government Councils for matters under the Federal, State and Local Government Area jurisdictions, respectively. And any legislation made in Nigeria that is inconsistent with or repugnant to any provision of the Constitution is null, void and of no effect whatsoever.

Nigerian legislation is the most important source of Nigerian law. It comes as *ordinances, acts, laws, bye-laws, decrees or edicts*. An *ordinance* is the legislation made before 1st October, 1954 by the Nigerian central legislature; otherwise it is an *act*, if enacted by the national assembly, or a *decree*, if signed into law by the head of a military junta. The legislation made by the State legislature is called (state) law, or an edict, if signed into law by the military administrator of the State. The validity of a decree or an edict cannot be a subject of litigation, except where an edict is repugnant to a decree. A *bye-law* is the term given to the legislation made by the legislative arm of the local government (the Council). The legislative process, other than one involving decrees and edicts, is very rigorous, involving the introduction and repeated reading and debating of bills in a legislative house.

A statute may be a new law, a modification of an existing law, a declaration of law, or a repeal of an existing law. Its format is as follows:

- (i) *The Long Title*: states the general purpose of the statute; the *short title* being the long title's short form, which is used for citation purposes; sometimes, the commencement date of the statute appears in a square bracket immediately after the long title;
- (ii) *The Preamble*: an optional section which states in some details, the purpose of the statute and the reason for passing it;
- (iii) *The Enacting Sections*: contain the main text of the statute; the sections include:
 - (a) the *interpretation sections*, explaining the details of the statute;
 - (b) the *operations* sections, stating the extent of operations of the statute, and
 - (c) the *commencement section*, stating the date of commencement of the statute
- (vi) *The Schedules*: contain details of topics dealt with in the enacting sections, whose non-detachment may lead to clumsiness.

8.1.4.2 The English Law

The English law is made up of the common law, the doctrine of equity, the statute and the subsidiary laws of England. That English law is a source of the Nigerian law follows from the fact that virtually the entire Nigerian legal system is modelled along the British legal system for the obvious reason of Nigeria's colonial past. The English law that constitutes part of the Nigerian law is subdivided into two: the *received English law* and the *extended English law*. The former is made up of the common law, the doctrine of equity, and the statutes of *general application* in force in England on 1st January, 1900. Here, the statute of general application roughly means one that is in force in England on 1st January, 1900 and which, depending on its subject matter, applied to everybody in England on that same date. This law was introduced (received) into the Nigerian law through the instrumentality of Nigerian legislation and is applicable subject to any other provision made by any Federal or State legislation.

On the other hand, the *extended English law* was introduced (extended) into the Nigerian legal system by English legislation. It is made up of those statutes and subsidiary laws enacted in England on or before 1st October, 1960, which are yet to be repealed by any Nigerian legislation. As with the received English law, the English law extending

to Nigeria is subject to Nigerian legislation; limits of local jurisdiction, local circumstances and formal verbal alterations. Furthermore, the English law (received and extended) is independent of any English legislative alterations after 1st October, 1960, except otherwise provided by the relevant Nigerian legislation.

8.1.4.3 The Case Law

The Case law or *judicial precedent* is the law based on past judicial decisions. The part of a case that constitutes judicial precedent is the *material fact of the case* plus the *decision thereon*; this is also known as *ratio decidendi*. The main function of courts is to interpret the law in such a manner as to reflect the intention of the legislature who made it. However, in doing that, the courts sometimes have to make decisions on matters which do not fit into any existing legislation, or for which the meaning of a law in respect of a given case is obscure or absurd. This is how the judges enact the case law. But to be effective:

- (i) there must be a hierarchy of courts in the judicial system;
- (ii) the system of law reporting must be such as to promptly and authoritatively disseminate information on court decisions; and
- (iii) the reputation of the judges who make the decisions must not be in doubt.

There is a definite hierarchy of courts at common law such that the decisions of a court *bind* on the lower courts and may persuade peer and higher courts. Therefore, a judicial decision or judgment is either a *binding precedent* or a *persuasive precedent* depending on whether or not it *must* be followed (adhered to) by a court. A judgement (as presented in law reports) usually consists of:

- (i) a statement of the facts of the case;
- (ii) a statement of the issue to be determined;
- (iii) a discussion of relevant legal principles; and
- (iv) the actual judgment, which is the decision or order of the court.

To determine the *ratio decidendi* of a case, the court considers: the reason for the decision as given by the judge, the principle of law on which the decision was based and/or the actual judgment in relation to the material facts. If a difference in material facts is found between the cited previous case and the instant case, the court has to distinguish the previous case by mentioning the difference, which renders it not applicable and thus, not a binding precedent.

8.1.4.4 The Customary Law

The customary law is a body of laws deriving from local customs and long usage in a given community or ethnic group in Nigeria. Thus the customary law varies from place to place in Nigeria. This has been dealt with under the section on the *classification of law*.

8.1.4.5 The Islamic Law

The Islamic law in Nigeria is an imposed legal system following the advent of Arab Islamism in the Northern part of Nigeria. This law seems to have eroded the customary laws of most aboriginal cultures in that part of Nigeria. The Islamic law applicable in the Northern part of Nigeria pertains to the personal law of the *Maliki School*, which regulates the following matters:

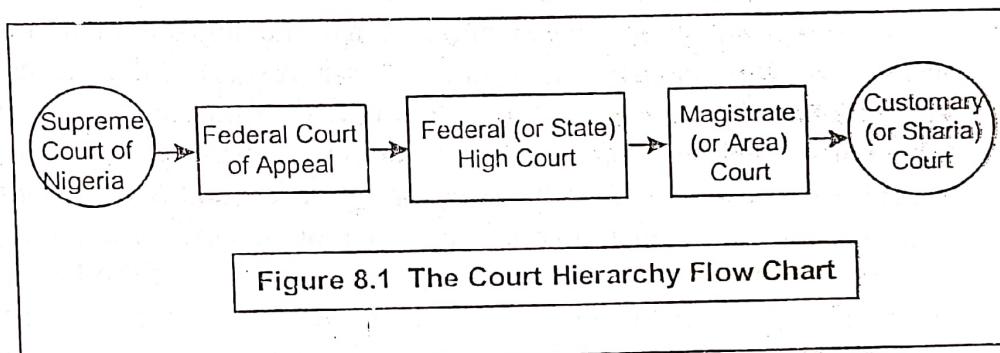
- (i) any question of moslem law regarding a marriage concluded in accordance with that law, including a question relating to the dissolution of such marriage or a question that depends on such marriage relating to family relationship or the guardianship of an infant;
- (ii) where all the parties to the proceedings are moslems, any question of moslem law regarding a marriage, including the dissolution of that marriage or regarding family relationship, a foundling or the guardianship of an infant;
- (iii) any question of moslem law regarding a dower, gift, will or succession where the endower, donor, testator or deceased person is a moslem;
- (iv) any question of moslem law regarding an infant, prodigal or person of unsound mind who is a Moslem or the maintenance or guardianship of a moslem who is physically or mentally infirm; and
- (v) any other question "where all the parties to the proceedings (whether or not they are moslems) have by writing under their hand requested the court that hears the case in the first instance to determine that case in accordance with moslem law, provided that it is limited to civil jurisdiction".

8.1.5 The Nigerian Courts

The *courts* are legal institutions or theatres where law is interpreted and applied in dispensation of justice. There is always a pre-established hierarchy of the courts in such a manner that decisions of a higher court binds all lower courts and are given due consideration by 'peer' courts.

The highest court in Nigeria, the Supreme Court, is peerless and its decisions are final and binding on all courts in the country.

In Nigeria, the courts are *customary courts* or *Sharia courts*, *magistrate* or *area courts*; *high courts*, *appeal courts* and the *Supreme Court*. Their hierarchy chart is given in Figure 8.1. The Sharia and area courts are Islamic and operate only in the Northern part of Nigeria.



Courts are created by legislation. The law creating a court specifies, among others, its jurisdiction on civil wrongs and criminal offences, as well as its jurisdiction to grant monetary relief (remedies) and impose sentences (punishments). It also decorates the court with the relevant judicial personnel and procedures.

A court is classified either as a *superior court* or as an *inferior court*. A *superior court* has an unlimited jurisdiction with respect to the monetary value of the subject matter of a case, and minimal jurisdictional limits with respect to the type of subject matter. A court may also be classified either as a *court of record* or as *not a court of record*. The former has the power to punish contempt of court, while the latter does not. A *superior court of record* is empowered to punish a party summarily (instantly and in the absence of a charge and other legal formalities) for contempt whether or not the offence is committed in the face of the court. On the other hand, an *inferior court of record* can only summarily punish contempt when it is committed in the face of the court.

A court that has the power to entertain a case and grant remedies or impose sentence is called a court of *competent jurisdiction*; and if it is competent to entertain the case in the first instance, then the court is said to have *original jurisdiction* over the case. If only one court has jurisdiction over a case, it is said to have *exclusive jurisdiction*; otherwise, if more than one court have jurisdiction over a case, they are said to have *concurrent jurisdiction*.

8.1.5.1 Court Jurisdictions

The jurisdictions of Nigerian courts are now briefly described:

- (i) *Customary courts* are created by State legislation and they have jurisdiction over civil actions arising from a relationship between the contesting parties that are known to customary law. However, no such jurisdiction exists on claims relating to ownership of land or rights in land, whether or not such claim is based on customary law. The customary courts have criminal jurisdiction over offences against Local Government Council rules and bye-laws, and against the provisions of any enactment which expressly confers jurisdiction on them plus contempt of court committed in the face of the courts. They can impose a maximum of one-month sentence and a limited amount of money as fine. Customary courts are inferior courts of records.
- (ii) *Magistrate's courts* are the creation of a State legislation and are inferior courts of records. Their jurisdiction in respect of the causes of action within their competence and the remedies they can grant and punishment they can impose is limited. The *magistrates courts* have concurrent jurisdiction with the *customary courts* (and *Sharia courts* in the case of the Northern part of Nigeria), though superior to them.
- (iii) *State High Courts* are the creation of the Constitution of the Federal Republic of Nigeria as amended. Every State plus the Capital territory, Abuja, has State High Courts. These courts have civil and criminal jurisdiction in all cases. However, their jurisdiction excludes such cases that have been legislatively moved to the *federal high courts, national industrial court, court of appeal* or other *special courts and tribunals*.

The high court has concurrent jurisdiction in cases in which the lower (inferior) courts have jurisdiction. They also have exclusive original jurisdiction in matters relating to land and others Issues arising out of State legislation, and contempt of themselves. The jurisdiction of the high courts to grant reliefs and to impose maximum punishment is unlimited. Therefore, the high courts are superior courts of records. The *State high courts* have appellate jurisdiction over appeals from inferior courts: the magistrate courts, the *area courts* (in the case of Northern part of Nigeria) and the *customary courts of appeal*, where they exist. They also exercise supervisory jurisdiction over the inferior courts by orders of *mandamus, prohibition* and *certiorari*.

An *order of mandamus* by a high court to a person or an inferior court commands him or it to do the thing specified in the order, being a thing relating to his or its office and in the nature of a public duty. For example, where an inferior court refuses or neglects to exercise its jurisdiction, the high court may grant the order of mandamus to command it to exercise that jurisdiction. An *order of prohibition* by a high court to an inferior court forbids it to continue a specified litigation (proceedings) that is outside its jurisdiction. Finally, an *order of certiorari* by a high court to an inferior court, which has exceeded its jurisdiction in terms of proceedings before it, removes the proceedings to that high court for trial. When this happens, the proceedings and the decision, if any, of the inferior court are quashed (annulled).

(iv) *The federal high court* is a creation of the Constitution of the Federal Republic of Nigeria. It has civil and criminal jurisdiction in cases:

- (a) relating to the revenue of the Federal Government of Nigeria;
- (b) connected with or pertaining to the taxation of corporate bodies and other persons subject to federal taxation, customs and excise duties, and banking, foreign exchange, currency or other fiscal measures;
- (c) arising from the operation of the companies decree, 1968 or its subsequent amendments; and any enactment relating to copyright, patents, designs, trademarks and merchandise marks; and
- (d) of admiralty jurisdiction.

This court is a superior court of record, but has no appellate jurisdiction, except for the few cases stipulated by the law creating it.

(v) *The federal court of appeal* is a creation of the Constitution of the Federal Republic of Nigeria. It is a superior court of record. Although this court has exclusive original jurisdiction in any dispute between the Federation and a State or between States, which involves any question of law or fact, its main jurisdiction is appellate. Appeals lay to the federal court of appeal from the State and federal high courts, and from such other courts or tribunals as the law may specify.

(vi) *The Supreme Court of Nigeria* is a Constitutional creation. It is a superior court of record. The Supreme Court is the highest court in Nigeria whose decision on any case or matter before it, is final. It has appellate jurisdiction in civil and criminal cases, and original jurisdiction only in cases relating to the interpretation of the

Constitution and, as a court of record, in contempt of court. Appeals lay to the Supreme Court from the federal court of appeal.

(vii) *Special courts* are not the ordinary courts so far considered. They are created for special purposes. Some of the special courts are The national industrial court, the coroners, the juvenile courts, the tribunals, and the military courts.

The national industrial court (NIC) was created by Federal enactment (decree) to deal with trade disputes and the collective agreements arising thereof. It has exclusive original jurisdiction to make awards for the purpose of settling trade dispute. The court also has exclusive jurisdiction to determine questions concerning the interpretation of: a collective agreement, the award made by an arbitration tribunal or by the court itself under the decree; and the terms of settlement of a trade dispute as stated in a memorandum, in cases where a conciliator is appointed under the *trade dispute decree 1976* to deal with a trade dispute.

However, if the case before NIC involves an allegation about the contravention of a provision of the chapter on Fundamental Rights (chapter III) of the Constitution of the Federal Republic of Nigeria, in any territory in Nigeria, then the aggrieved may seek redress in the High Court of the territory. The decisions of the NIC is final, except on questions as to whether any of the provisions of chapter III of the Constitution has been contravened in relation to a person, in which case appeals lay to the Supreme Court.

The *coroners* are persons empowered to hold inquests on the body of a deceased person who appears to have died a violent or an unnatural death, or on the body of a deceased person belonging to any other class specified by the appropriate coroners law. A magistrate is also a coroner. Every death in the police or prison custody, or lunatic asylum must be subjected to the coroner's inquest, while other situations requiring the coroner's inquest may be subject to his judgment. The findings of the coroner are usually deposited in the high court.

The *juvenile courts* are established by the *children and young persons law* of a State and they have the jurisdiction to hear charges against children and young persons, which exclude homicide and where the commission of the offence is jointly with an adult. Proceedings in these courts are usually conducted in places (or times) other than the usual places (or times) for the ordinary courts' sitting (proceedings). This is to protect the young persons from associating with adults charged with crime. A child

is a person below 14 years of age, while a young person is one whose age is not less than 14 and not greater than 17 years. The law establishing the juvenile courts seeks to protect the interest and welfare of the juvenile offenders. For example, a child under the age of 7 has no criminal responsibility. If he is above 7 years but below 12 years old, then he becomes liable only if the prosecution proves that at the time of commission of the offence, the child had the capacity to know that he ought not to do so. A young person cannot be sentenced to death.

The children and young persons law provides alternative punishments for guilty children and young persons. These include: discharging the offender and placing him under the supervision of a probation officer; sending him, by means of a correction order, to an approved institution; ordering him to be caned; and ordering his parent or guardian to pay fine or to give security for his good behaviour.

The *Tribunals* are special courts, usually established by decrees, to summarily try specified cases, usually, offences. Their procedures differ from those of the ordinary courts but they facilitate speedy disposal of cases. However, tribunals usually deny the accused the due process (fair trial). Tribunals have exclusive original jurisdiction in respect of the offences for which they are created. Some tribunals in Nigeria today are: the *robbery and firearms tribunals*, the *Currency Offences Tribunals*, the *failed banks tribunals* and the numerous *civil disturbances tribunals*.

The *military courts* or *courts martial* are established in the *armed forces*: the Army, the Navy and the Air Force, to try officers and men charged with the commission of offences. They have exclusive original jurisdiction over all offences committed by the members of the military, except cases of treason, treasonable felony, murder, or rape, which must be tried in the ordinary courts. The military courts interpret and apply military law, and their judicial personnel (presidents and members of the courts) are members of the military.

8.1.5.2 The Principal Judicial Personnel

The independence of the judiciary as a separate arm of Government in Nigeria is expressed by the constitutional provision for the appointment and tenure of the principal judicial personnel: magistrates, judges and justices, in respect of the courts it created. To ensure their capacity to uphold the judicial oath, which demands that the duties of their office shall be discharged without fear or favour, the Constitution protects, once

appointed, the tenure of judicial personnel from the whims and caprices of the appointing authorities. It provides that judicial personnel may retire upon attaining the age of 60 years, and shall cease to hold office when he attains the age of 70 years. His removal from office before the age of 70 years is subject to the approval of two-third majority of the Senate or the State House of Assembly in the case of a Federal or State judicial personnel, respectively. However, he may also be removed from office for professional misconduct on the recommendation of the appropriate Judicial Service Commission.

The judicial personnel in the various courts and the requirements for their appointment are now briefly described:

- (i) *The Supreme Court of Nigeria:* The judicial personnel in the Supreme Court are the Chief Justice of Nigeria who heads it and ten or more judges, called the Justices of the Supreme Court. The judicial personnel of the Supreme Court are appointed by the President of the Federal Republic of Nigeria in his discretion in respect of the Chief Justice of Nigeria, and on the advice of the Federal Judicial Service Commission (FJSC) in the case of the Justices of the Supreme Court. These appointments are, however, subject to Senate approval by a simple majority.
- (ii) *The federal court of appeal (FCA):* Here, the judicial personnel are the President of the FCA who presides and at least 21 judges, called the Justices of Appeal. The judicial personnel of the FCA are appointed by the President of the Federal Republic of Nigeria on the advice or recommendation of the FJSC subject to the approval of Senate by a simple majority.
- (iii) *The federal high court (FHC):* The judicial personnel here are the Chief Judge of the FHC who leads it, and at least four judges. These personnel are appointed by the President of the Federal Republic of Nigeria on the recommendation of the FJSC.
- (iv) *The State high courts (SHCs):* The head of the (main) State high court is the Chief Judge of the State. However, other judges are also appointed to preside over each of the State High Courts established in the judicial divisions of the State. The appointment of the judicial personnel for the SHCs is made by the Governor on the advice or recommendation of the State Judicial Service Commission (SJSC), subject to the approval of the State House of Assembly by a simple majority.
- (v) *The magistrates' courts:* Each State is divided into a number of magisterial districts, each with its own magistrate court. The

magistrates are graded, say, as chief magistrate, senior magistrate grades I, and II, magistrate grades I, II and III. Usually, magistrates are qualified to practice as legal practitioners in Nigeria, and their post-qualification experience, ranging from one year to seven years, affects their grade. The Interim Judicial Committee (IJC) established by the State, appoints magistrates, except the appointment of magistrates grade III which is made by the State chief judge.

- (vi) *The customary courts:* The judicial personnel of a customary court are the president of the customary court and a number of members, say, 2 or 4. These personnel are appointed by the Interim Customary Courts Judicial Services Committee (ICCJSC), established by the State. They are required to be literate enough and to come from the locality over which the court has jurisdiction.

8.1.5.3 Court Procedures

The law establishing a court provides rules (procedures) for the conduct of its business (proceedings). The rules guiding civil cases are different from those for criminal proceedings. There is a slight difference between civil procedure in the magistrates' courts and civil procedure in the high courts. But the procedures for criminal proceedings in both types of courts are largely similar. Court procedures are strictly kept.

To reasonably follow and appreciate the judicial procedures and proceedings in the Nigerian courts, some of the more frequently used terms are set out in Table 8.1.

The judicial procedures for civil and criminal actions in both magistrates and high courts are briefly presented in Table 8.1 in a pseudocode algorithmic format. This format should prove easy to follow and comprehend.

Table 8.1b. Some Terms in Judicial Proceedings

| Term | Meaning |
|----------------------|---|
| the accused | the person facing criminal prosecution; he is usually arrested by the police, arraigned before a court, charged and tried for the commission of an offence. |
| writ of attachment | an order issued by the Sheriff of the court that enables the judgment creditor to cause the assets of the judgment debtor to be attached and sold to offset the judgment debt; this is also called a <i>writ offifa</i> . |
| actual complainant | the party that suffered directly from a criminal act. |
| address the court | a speech made by the counsel for one party, summarizing the facts as distilled by him from the case on both sides, and also attempting to convince the court with submissions on law to reject the other party's case. |
| allocutus | plea for leniency. |
| charge | a statement of an alleged offence containing the date, description, place and manner of its commission and the maximum punishment the accused faces, if convicted. |
| conviction | found guilty of an offence as charged. |
| cross-examination | questions put to a witness after the examination-in-chief by the counsel for the other party in an attempt to contradict or discredit the story of the first party. |
| enter appearance | a formal notice that the defendant or his counsel intends to contest the issue. |
| examination-in-chief | questions put to a witness by the counsel to the party that calls him, in a manner that elicits the story the party desires the court to believe, without suggesting the answer. |
| garnishee order | an order issued by the sheriff and made upon a bank where the judgment debtor maintains an account to enable the judgment creditor to apply the credit balance in the account to offset the judgment debt. |

| | |
|----------------------|--|
| join issues | the completion of all necessary pleadings before/on the date of mention of the case. |
| judgment creditor | a party in whose favour the court awards damages (monetary compensation). |
| judgment debtor | a party against whom the court awards damages |
| nominal complainant | the party prosecuting the accused in criminal proceedings: the State or a private person empowered to do so. |
| plaint: | a statement, in writing, of grounds of complaint made to a court of law and asking for redress of grievance. |
| plea | something alleged by or on behalf of a party to legal proceedings in support of his claim or defence. |
| pleadings | the formal written statements (of claim, defence and reply) presented alternately by the plaintiff and defendant in a lawsuit, setting out the respective matters relied upon. |
| proof of service | a copy of the writ of summons, or other document, endorsed by the defendant as evidence of service. |
| re-examination | questions put to a witness after the cross-examination, by the counsel for the first party with a view to clear some ambiguity and obtain further explanations to answers given by the witness during cross-examination. |
| statement of claim | the pleading made by the plaintiff in a High Court action showing the facts upon which he relies in support of his claim and the relief asked for. |
| statement of defence | the pleading made by the defendant in a High Court action showing the fact upon which he relies in support of his defence. |
| substituted service | service of summons and plaint, or writ of summons by means other than personal service; for example, by postage, by e-mail or by newspaper publication. |
| summons | an official order requiring a person to attend court, either to a charge or to give evidence. |
| the Reply | the answer to a defendant's statement of defence. |
| writ | a formal legal order to do or not to do something, issued by a court. |

Main Procedure : **CIVIL PROCEEDINGS**
(THE MAGISTRATE COURT)

start

the plaintiff applies to the Registrar of the Magistrate Court for summons which is made in the prescribed form and includes the particulars of his claims (plaint), and he pays the prescribed fees at the Registry;

the Registrar of the court issues the summons, signed and sealed which also bears the date for hearing of the case;

the court bailiff personally serves a copy of the summons and plaint on the defendant, and provides a proof of service;

if a *proof of service* is not obtained

then

the court grants a *substituted service*;

end_then

the court convenes on the appointed date;

if the defendant fails to appear

then

the court enters judgment against him in default of appearance;

end_then

else ** *the defendant appears***

the Registrar requests him to *plead: liable or not liable*

to the claims brought against him;

if the defendant pleads *liable*

then

the court enters judgment against him;

end_then

else ** *he pleads not liable* **

the trial proceeds;

the plaintiff is requested to prove his case against the defendant;

SUBMISSION (plaintiff); **see "procedure SUBMISSION" **

the defendant is requested to defend himself;

SUBMISSION (defence);

the counsel for the defendant *addresses* the court;

the counsel for the plaintiff *addresses* the court;

the counsel for the defendant *replies* on points of law raised in the address of the plaintiff's counsel, which he did not cover in his earlier address;

the court delivers *judgment*, which may be an award against or in favour of the plaintiff in the form of damages to the limit stipulated by the law creating the Magistrate Court;

end_else ** *he pleads not liable* **

end_else ** *the defendant appears***

stop.

Main Procedures: CIVIL PROCEEDINGS (THE HIGH COURT)

start

the plaintiff applies to the registrar of the high Court for a writ of summons, which is made on the prescribed form, and he pays the required fees at the Registry; the Registrar issues the writ of summons which he seals, and which also bears the date fixed for mention; the court bailiff personally effects the service of the writ on the defendant and provides a proof of service;

if the bailiff did not provide a proof of service

then

he deposes to an affidavit of non-service;
the plaintiff applies to and obtains from the court leave
for a substituted service;

end_then

the defendant enters appearance to the writ of summons in the prescribed form;

if the defendant fails to enter appearance

then

the court enters judgment in default of appearance against him;

end_then

else ** the defendant enters appearance **
PLEADINGS; **see "procedure PLEADINGS" below**

if issues are joined

then

the court fixes a date for hearing of the case;
HEARING; **see "procedure HEARING" below**

the court announces date for judgment;

the court reconvenes on the appointed date;

the judge delivers judgment, which may be for or against the plaintiff, and is an award of either damages, specific performance or injunction;

end_then

end_else ** the defendant enters appearance **

stop.

Procedure: PLEADINGS

start **for the Civil Proceedings**
counsel for the plaintiff files and serves the counsel for the defendant a *Statement of Claim*;
if the counsel for the defendant desires
 then
 he files and serves the counsel for the plaintiff a *Statement of Defence*;
 if the counsel for the plaintiff desires
 then
 he files and serves the counsel for the defendant a *Reply*;
 end_then
 end_then ** the plaintiff's counsel desires **
stop.

Procedure: HEARING

start **for the Civil Proceedings**
the court constitutes to hear the case on the appointed date;
the court does not entertain or admit any evidence not pleaded, but with its leave, the two parties, if they desire and at any stage before judgment, may amend their pleadings;
SUBMISSION (plaintiff);
SUBMISSION (defendant);
the counsel for the defence *addresses* the court;
the counsel for the plaintiff *addresses* the court and also seizes the opportunity to reply the defendant's counsel;
the counsel for the defendant *replies* on points of law;
stop.

Procedure: SUBMISSION (X)

start **for the Civil Proceedings**
 ** the counsel for X calls witnesses into the witness box, including X, **
 ** if necessary, one at a time, to substantiate X's stand on the matter; **
 ** here, X stands for either the plaintiff or the defendant.
repeat with each of the witnesses, including X, the following:
 swear him in according to his religion;
 put question to him, without suggesting the answers, in the process of:
 examination-in-chief, cross-examination and re-examination;
 call next witness;
until all the X witnesses, including X have given evidence;
the counsel for X has closed his case;
stop.

8.2 The Law of Contract

A *Contract* is an agreement, which the law recognises. It is a promise enforceable by law. This promise may be to do something or to refrain from doing something. Put differently, a contract is a legally valid promissory agreement for a future exchange, freely and voluntarily arrived at. The law of contract has the purpose to facilitate the process of exchange and to minimise breaches, and thus improve transaction efficiencies. The basic concepts of this law are considered in this section.

8.2.1. Attributes of a Contract

It is not every promissory agreement for exchange that constitutes a contract. A promissory agreement becomes a contract only if it is decorated with the following seven attributes:

- (i) offer;
- (ii) acceptance;
- (iii) consideration;
- (iv) capacity (of the parties);
- (v) legality (of the subject matter);
- (vi) intention (to create a legal relationship); and
- (vii) formality.

Otherwise, the agreement is not a contract, and is therefore void or voidable under the law. These seven attributes of a contract can be easily remembered by applying the abbreviation 'OAC-CLIF'. Each of these attributes is now briefly explained:

- (i) An *offer* is a definite promise to be bound. There are two parties to an offer: the offeror - the party that offers, and the offeree - the party that the offer is made to. An offer may be *oral*, *written*, or *implied* from conduct.

When an offer is made to a particular person or group of persons it is said to be a *specific offer* and can only be accepted by that offeree; on the other hand, a *general offer* is one made to the public at large. The following rules govern an offer:

- (a) An offer must be *communicated* before an offeree can be reached.
- (b) An *invitation to offer* is not an offer by itself; it may be an invitation to treat (negotiate) or to make an offer. For example, the Employer usually prepares and sends tender packages (documents) to prospective contractors to complete and return. In this manner, the Employer invites offers and the

- (d) Consideration must not be *past*; a past consideration is one in which performance was concluded before striking a bargain for consideration (reward).
 - (e) Consideration need *not* be *adequate*, but must be of some value in the eye of the law.
 - (f) Consideration may include a promise to surrender a claim to a legal right.
- (iv) *Capacity* of the parties is the ability of the parties to enter into a binding agreement. Agreements entered into by children or young persons (persons under 18 years of age), mentally impaired persons or drunkards are void or voidable. Void or voidable are also agreements entered into by corporate bodies (companies), which are not within the object clause in their Memorandum of association; this is because companies are persons under the law.
- (v) *Legality* of the subject matter is the validity, under the law, of the items covered by the agreement. An invalid agreement is one whose subject matter or essence contravenes the statute, public policy, and/or the peace, health or moral of the society; and thus, it is not a contract. For example, a bargain to build an Indian hemp or cocaine factory is an illegality.
- (vi) An *intention* to enter into legal relationship makes a contract enforceable in case of breach. For commercial agreements, intention to create legal relationship is implied, unless the parties expressly state otherwise; such expression may be: *agreement is binding in honour only*. However, it is assumed that there is no intention by the parties to enter into legal relationship for a domestic agreement; agreements of social or family character are said to be domestic.
- (vii) *Formality* is the specific format for a given class of contracts. The formality for certain contracts may be oral or by implication. But for most serious contracts, such as the engineering contracts, the formality is a *document*.

8.2.2 Contract Terms

Contract terms are the undertakings and promises contained in a contract, which specify the rights and duties arising under the contract. Contract terms are of two kinds, namely, *express* and *implied* terms. *Express terms* are terms which are explicitly entrenched in the contract, while *implied terms* are those not explicitly entrenched in the contract, but which the

court will assume as forming part of the agreement in order to achieve business efficacy, maintain standard behaviour, submit to trade custom, or submit to statute.

There are also two other classes into which a contract term may be divided, namely, *condition* and *warranty*. *Condition* is a contract root-term whose non-observance distorts the essence (goal) of the contract, while *warranty* is a contract subsidiary-term whose non-observance would not affect the contract objective, though it would have some minor effect on the contract.

Other classes of contract terms are the *exemption* and *limiting clauses*. An *exemption clause* is a contract term, which totally excludes one of the parties from liability, while a *limiting clause* limits one party's liability should some specified event occur. These clauses must be agreed upon by both parties for them to be honoured by the court. The exemption and limiting clauses will be accepted by the court, if:

- (i) the offeree signed the document containing them;
- (ii) the clauses are not vague and not subject to misinterpretation;
- (iii) notice of the clauses is given to the offeree.

If there is ambiguity as to the meaning of any of the clauses, the court will interpret it in a manner unfavourable to the party that entrenched it; this rule is termed *contract proferentum*. Again, if a breach of condition occurs, that is, a fundamental breach of contract, an exemption or limiting clause will not exonerate the breaching party.

8.2.3 Contract Vitiators

Contract vitiators are the situations or factors, which are capable of destroying or jeopardising the validity of an otherwise valid contract. They include *mistake*, *misrepresentation*, *duress*, and *undue influence*:

8.2.3.1 Mistake

A *mistake* is an error about truth. Mistake of law in a contract is not acceptable; and since ignorance of law is no excuse, the court will not assist the mistaken party. However, a fundamental mistake of fact (not law) or the so-called *operative mistake* may void a contract, provided that such mistake existed prior to the contract formation. Mistakes, which can vitiate a contract, may be *common* mistake, *mutual* mistake, *unilateral* mistake, mistake in *appending a signature* or mistake in *equity*.

A *common mistake* is one committed by both parties and on the same view or subject. A *mutual mistake* is one committed by both parties but on different views or subjects. A *unilateral mistake* is one committed by only one of the parties. *Mistake in appending a signature* is the mistake in signing a written document; this vitiates a contract provided that the signing was not fraudulently induced, that it is a fundamental mistake and that the signer provides proof of non-negligence. *Mistake in equity* is a situation where equity takes over to make good the adverse condition the contract imposed on one of the parties due to mistake.

8.2.3.2 Misrepresentation

A *misrepresentation* is a false statement of fact (not law) made by one party to the contract to the other before the contract formation, with a view to inducing the other to the contract. Misrepresentation may be *fraudulent, negligent* or *innocent misrepresentation*. A *fraudulent misrepresentation* is one made knowingly or without belief in its truth, or recklessly careless about its truth value. A *negligent misrepresentation* is when a statement made by a party, without verifying its truth value, is proved to be false. On the other hand, an *innocent misrepresentation* is when a statement made by one party honestly believing it to be true turns out to be false.

The various misrepresentations carry different compensations under the law. Generally, however, the contract remains voidable by the injured party, and he may also bring an action in tort (civil wrong) for damages.

8.2.3.3 Duress

Duress is when a party is induced by the other to enter into a contract by force or by the threat of force. The contract is entered into as a result of undue pressure and not by free consent. It is therefore voidable.

8.2.3.4 Undue Influence

Undue influence is said to exist where one party dominates the mind of the other such as to undermine the free mind or judgement of the other, and this factor is the reason for the contract. In this case, the contract is voidable.

8.2.4 Discharge of Contract

A contract can be ended or discharged by *performance, agreement, frustration* or by *breach*. These forms are now briefly described:

8.2.4.1 Discharge by Performance

Discharge by performance is a situation where both parties have fulfilled their obligations under the contract completely and precisely such that the contract ceases to exist. Anything short of complete and exact execution by one or both parties renders the contract in breach. However, if what makes for partial performance is inconsequential or trivial, the contract may be deemed to be discharged, since the law does not concern itself with trivialities.

A partial performance may also be deemed as discharge in cases where: i). the injured party accepted it or has no choice than to accept it; ii). the contract is severable, that is, it is subdivided in several parts for each of which payment is required upon completion, so that a party may decide not to perform the entire contract; and iii). substantial performance obtains, that is, performance in terms of quantity and not quality, so that money can be paid less than required to make good the bad quality.

8.2.4.2 Discharge by Agreement

Discharge by agreement occurs when both parties agree to release themselves from their contractual obligations; this is natural since the contract is a relationship by agreement, it follows that by agreement the parties can also discharge the contract. This can be done either by release, fresh agreement, accord and satisfaction, contract provision or novation:

- (i) *Release*: the waiver or mutual release of each party from all rights or obligations under the contract leads to an agreement to discharge the contract; this can occur before the performance is due or after a breach.
- (ii) *Fresh agreement*: the parties enter into new contract in respect of the subject matter, and thus cancel the existing contract.
- (iii) *Accord and satisfaction*: the party to whom an obligation or consideration is owed after completing his own part of the contract agrees to accept a different consideration from that originally bargained.
- (iv) *Provision* under the contract: the contract specifies conditions for discharge besides performance.
- (v) *Novation* is the obligations arising from a number of contracts between several parties are settled by substitution; for example, agreement is reached between A, B and C for B to set A free from his obligations to him which will now be settled by C who owes A some obligation.

8.2.4.3 Discharge by Frustration

Discharge by frustration is possible if the event which engendered the discharge: i) was not contemplated by any of the parties during the contract formation, ii) *fundamentally altered the original contract*, and iii) *was not caused by any of the parties*; or iv) *resulted in a situation in which none of the parties originally wished to be bound*.

Events which may make a contract to be discharged by frustration include: *statutory interference* or *subsequent illegality*; subsequent *physical impossibility* or *destruction* of a specific object necessary for performance; *death* or *personal incapacity* of either party to a contract requiring personal performance; *removal of the basis* for the contract as in the case when a contract is struck in respect of a future event which failed to occur; or *force majeure*.

A *force majeure* is an act occasioned by a superior irresistible force, and thus beyond the control of either party to the contract. It may excuse one of the parties from fulfilling his own part of the contract. Force majeure has no precise legal definition. Depending on the angle from which a party views it, force majeure could mean an act by a presently uncontrollable force such as God, Allah, dictator, a military junta, coup lords or armed robbers, or an act due to out break of hostilities.

The phrase force majeure is usually entrenched in many contract documents. It frequently leads to different interpretations by each party to the contract with unpleasant consequences. Therefore, it is advisable to avoid using it in engineering contract documents. However, if one must use the phrase, force majeure, it should be clearly and precisely defined to mean what both parties to the contract want it to mean.

Discharge by frustration is impossible in any of the following situations: if the contract unexpectedly becomes very *exerting* or more *expensive* to a party than previously envisaged; if the frustration is *self-induced*; or if both parties *expressly provided* for a *contingency*. *Contingency* is a means for the allocation of risk and distribution of losses in unforeseen events.

If a contract is *discharged by frustration* then: all sums paid before the frustration less expenses are recoverable; money payable before the frustration ceases to be payable; and where a benefit is obtained under the contract before the frustration, reasonable sum as compensation will be paid for it.

8.2.4.4 Discharge by Breach

Discharge by breach occurs in any of the following two instances: failure by a party to fulfil any of his obligations under the contract; and *anticipatory breach* in which a party indicates before the due date his inability to perform on the due date. Thus, a breach of contract is when one party expressly repudiates his liabilities and refuses to perform at or before the performance date.

A breach may be of condition or of warranty. A *breach of condition* occurs when the main obligation imposed on a party by the contract is broken, in this case, the injured party has right to *void the contract* reasonably promptly, and also to *recover damages*. However, a *breach of warranty* (a minor obligation is broken) empowers the injured party to only recover damages.

8.2.5 Remedies for Breach of Contract

Some remedies for breach of contract of interest to the engineer include damages, quantum meruit, specific performance and injunctions. These are now discussed.

8.2.5.1 Damages

Damages are the financial compensation awarded by the court to the injured party in a breached contract. It is measured as the monetary value of performance, which the injured party failed to obtain because of breach. This procedure is termed the rule of *financial equivalent performance*. Damages simply mean the loss suffered by the injured party, in monetary terms. The damages are an estimate of the cost to the Employer of completing the works as envisaged under the breached contract plus lost earnings due to delay in completing the works, and so on. Punitive costs are not considered.

Damages must be and reflect the amount that was reasonably foreseeable when the contract was struck as likely to result should the breach occur. Punitive or exemplary damages are not allowed, and are an amount, which exceeds the actual amount suffered, and is meant to punish or teach the offending party a lesson.

Damages are usually compensatory, because they usually seek to place the injured party in the same position as he would have been, if the other party had performed his own part of the contract, this is also called *substantial damages*. However, if the injured party has not suffered any real losses in a breached contract, the court grants a token monetary award, called *nominal damages* representing the minimum damages due from any breach of contract. However, the injured party is expected to

take reasonable steps to mitigate losses in a breached contract. This fact is also taken into account by the court in granting damages.

Liquidated damages are the amount of money stipulated in a contract document as being payable in the event of a breach, provided that it is a genuine estimate of the losses, which such breach is likely to occasion; but if this amount is such as to frighten and deter a party from breaching a contract, it is termed a *penalty*. Liquidated damages are recoverable by court action, while a penalty is not.

8.2.5.2 Quantum Meruit

A *Quantum Meruit* is an award granted by a court to the injured, of a sum of money, which it considers that he merits under a discharged contract. The quantum meruit principle simply means: *as much as a thing is worth, or percentage of contract price in proportion to percentage of work done*.

Quantum meruit may be given in the following situations:

- (i) When an Employer wins his suit for damages as a result of breach of contract, but instead of full damages as claimed, he is awarded a smaller sum. This is because after careful consideration of all evidence, for and against, the court applied the quantum meruit principle to arrive at the actual sum due him;
- (ii) When a party to a contract, which has been discharged either by agreement or by frustration appeals to the court for a decision on a fair settlement for which both parties to the contract could not reach an agreement. The court considers the two sides of the case and orders a quantum meruit;
- (iii) When the injured party claims compensation for his input before the breach, the court may grant him a quantum meruit provided that:
 - (a) work has been done under a valid contract;
 - (b) the contract can be discharged as a breach of condition and work done is worth more than the contract price;
 - (c) work has been done in return for a promise to be paid without actually fixing the amount; or
 - (d) the injured party was prevented from performing by the offending party.

8.2.5.3 Specific Performance

A *Specific Performance* is an award granted to the Employer by (and at the discretion of) the court, requiring the completion of a contract by the contractor or his surety following a breach. Specific performance is

usually awarded when a court feels that monetary recompense would not be enough. In practice, specific performance is usually awarded against the contractor's parent company or surety (guarantor).

When specific performance is ordered against a surety, the court runs into enormous problems associated with monitoring and enforcement. Another difficulty is the fact that guarantors, such as banks and insurance houses, lack the expertise to execute the works abandoned by contractors. Therefore, award of specific performance is not common. Instead, damages are usually awarded against the sureties. On the other hand, it is easier to hold a parent company to accomplish a job started by its subsidiary. In this case, specific performance can be effective.

However there must be *mutuality* for specific performance to be ordered; that is, a party can expect specific performance, only if the other party could obtain specific performance against him.

8.2.5.4 Injunction

An *Injunction* is a court order forbidding a party from doing (or continuing to do) something, or commanding him to do (or continue to do) something. An injunction forbidding a legal person from doing something is termed a *prohibitory injunction*, while one, which commands a legal person to do something, is called a *mandatory injunction*. If an injunction is granted temporarily or provisionally to preserve the status quo, it is known as an *interlocutory injunction*, otherwise, it is a *perpetual injunction*, since its validity is limitless.

When a plaintiff applies for an injunction, the court grants it only if a *prima-facie* case (evidence) has been made on the case. Otherwise, an injunction may create more problems than solve the one it sets out to address. This is why careful courts are not too hasty with injunctions and they restrict considerations of injunction to situations requiring the prevention of crime, maintenance of public peace and security, restraint of nuisance, defamation, trespass or pre-emption of court ruling.

Injunctions have no business with, and are of no effect on, an action that has been concluded. That is, injunctions are only concerned with present and future actions.

8.2.6 Arbitration

The law of contract affords legal persons the opportunity to agree to make laws, which they intend to bind them in their legitimate transactions. The result of this agreement is a contract, which the law recognises and protects. In the course of contract performance, disputes

and differences often arise. In such cases, the court is the natural place for settlement. However, experience shows that legal proceedings consume time and money and are likely to bring about strained relations between the contracting parties. The obvious consequence of this is delayed completion or total abandonment of the project. Both parties are, therefore, usually desirous of a more effective and expedient means of fulfilling their contractual obligations. Submission to arbitration satisfies this desire.

Arbitration is the reference of a dispute or difference between parties in contract to a person or persons other than a court of competent jurisdiction for determination in a judicial manner. The person who arbitrates in a case is called the arbitrator. In Nigeria, the rules, regulations and procedures guiding arbitration are stipulated in the Arbitration and Conciliation Decree No. 11 of 1988. Submission to arbitration may be directed by a clause in the contract conditions, or by a court order with or without a pending suit.

Engineering contracts are usually such that *arbitration clauses* are entrenched in the contract documents or in separate arbitration agreements. In this case, the number and method of appointment of arbitrators as well as the procedure for submission to arbitration are clearly stipulated. Most engineering professional bodies provide standard conditions of contract, which include adequate arbitration clauses for various contracts (see Appendix H). For engineering contracts, the appointment of arbitrators is usually made by the President of the professional body. In Nigeria, the professional body is the Nigerian Society of Engineers (NSE).

In the case where parties to an arbitration agreement are unable to appoint an arbitration panel, an application to a court by a party will result in the appointment of one by the court; this is the case of *arbitration by court order without a pending suit*. On the other hand, an *arbitration in a pending suit* results if the court appoints one, based on the request made by the parties before the pronouncement of judgement, to settle their dispute and differences by arbitration.

The decision or award of the arbitrator or arbitration panel (if more than one arbitrator), if made in writing, is final and binding on the parties. The court will always uphold the decision of the arbitration panel except in certain points of law such as incapacity of a party, invalidity of the contract, want of proper notice, improper composition of the arbitration panel, and arbitration award not on disputes referred to it or not in public policy: corruption, partiality, fraud, etc.

The advantages of arbitration in the settlement of disputes and differences arising from engineering contracts are enormous: The arbitrators are usually experts in the technical area of the contract and would, therefore, render fair and speedy settlement. The time and cost of arbitration are reduced as a result of absence of legal formalities. The venue, date and time of proceedings are arranged to suit all parties including the arbitrator. Arbitration proceedings are in private and not in public. Furthermore, areas of disagreement are narrowed through the process of *discovery of documents* in which both parties exchange, at the preliminary hearing, all documents of claims and counter claims relating to the case submitted to arbitration; this permits each side to know the strength of the case of his opponent and also appreciate its weaknesses.

The Engineer (the Employer's contract manager) is in fact a *first-line* arbitrator in the sense that disputes and differences are first referred to him for adjudication as stipulated in most engineering contract documents. The Engineer's decision is binding on the parties and any party that is not satisfied with such decision may now submit to arbitration by a notice to the Engineer. Submission to arbitration is usually delayed until the practical completion of the project or determination of the contract, except otherwise stated in the conditions of contract.

Disputes for which prompt arbitration proceedings may be desirable include those arising from: the appointment of a new Engineer; the validity or otherwise of the Engineer's instruction; the delay in preparation or payment of an interim certificate; the justification or equitability of a determined contract by one party; the reasonable objection to comply with the Engineer's instruction; the work not in accordance with the terms of contract; the denial of consent for partial possession of project; the application for extension of completion time; and force majeure. For some matters, the Engineer's decision is final and not subject to arbitration. These details must be clearly specified in the contract document.

Other means of settlement of disputes and differences other than the courts and arbitration panels are *mediation* and *conciliation*. *Mediation* is the settlement of disputes and differences by a neutral party, called the mediator, appointed by both parties in dispute. Here, none of the parties is willing to give up any of his claims or rights at the beginning, and therefore, would not want to come face to face in a settlement process. Each of the parties (legal persons) presents his case to the mediator in the absence of the other, the mediator then analyses the facts and determines the relative positions of each party, which he again

discloses separately to each of them. This continues until a compromise is reached. This method of settlement of disputes and differences has two main shortcomings, namely, the isolated hearing of each party prior to reaching agreement and the possibility of divulging privileged information to a party.

Conciliation is the settlement of disputes and differences by an expert, called the conciliator, appointed by the parties who strive to reconcile their differences. Here, the parties are desirous of settlement proposals from the conciliator in order to reconcile their differences, and communication with the disputants is usually jointly but could be separately.

Conciliation or mediation always ends in an agreement if it is successful. This agreement represents a contract, which may be subject to legal proceedings. On the other hand, arbitration always culminates in an award, which, if properly arrived at, is final and not legally contestable.

8.2.7 Breach of Contract by Tort

A *Tort* is a breach by an individual of a civil duty to his neighbour imposed on him by civil or common law. Such *breach* of duty includes negligence or lack of care or respect for a person's possessions, damage and assault. The *Police* have no business with tortious acts; they are only involved with *criminal offences*. On the other hand, criminal offences are those, which endanger or are capable of endangering the public at large.

Tort has no connection whatsoever with a contract or breaches of contractual terms. However, a party to a contract might breach a contractual term by tort. In this case, the injured can seek redress either by contract law or by civil law or by both laying two different charges, one for contract and the other for tort; but he cannot claim recompense from both charges. Compensation awarded for damages by contract law may not be the same as that by tortious law on the same issue. The Engineer should, therefore, consult the legal adviser of the Employer for appropriate choice of legal action.

8.2.8 Authentication of Contract Documents

An *authentication* is the accordance of legal validity to a document. It may be either *under hand* or *under seal*.

8.2.8.1 Agreement under Hand

A document (contract or agreement) bearing the signatures of the representatives of the parties to the document is said to be *under hand*. A contract or agreement under hand is also called a *simple agreement*. In it, each party is represented by the signature of one person who stands for that party; and each signature has its own witness who signs solely in testimony that he saw (witnessed) the named person apply his signature to the document. The *advantages* of a simple agreement are:

- (i) easier and faster to execute;
- (ii) recommended where there is a high degree of mutual trust between the parties such as is possible after a prolonged business relationship; and
- (iii) useful as an interim agreement pending a formal agreement.

The *disadvantages* of an agreement under hand are:

- (i) the contract documents are not automatically binding in case of dispute arising from the truth value thereof, and the court will, through evidence and testimony, establish the validity of the documents;
- (ii) it is possible for one of the signatories to act outside his powers, and thus render the agreement not binding;
- (iii) it is also possible for a signatory to impersonate an authority, and thus render the agreement not binding;
- (iv) this mode of contract is not attractive, especially when the subject matter of the agreement is involved or complicated.

8.2.8.2 Agreement under Seal

A document (contract, agreement or undertaking) bearing the *common seal* (the official seal of a corporate body) of each of the parties to the document is said to be *under seal* or a *deed*. An agreement under seal is also called a *formal agreement*. In it, each party is represented by its own common seal which the appointed "seal custodian", say, the chief executive, applied to the document and signed in identification of same and certification of his action. He however, has no obligations under the contract.

Each of the two affixed common seals is a mark of approval, authentication or confirmation of the document by the entire board of directors, council or legislature as the case applies to each party to the document. Here, no powers are delegated, no doubt as to intent or honesty; the deed is done by the legal owners themselves. Thus, the

validity of the document is incontestable. Should any of the parties to the document not have a common seal, an Agreement under seal can still be obtained by sticking a token seal (a small circular red sticker) to the document. To distinguish formal from simple agreement, the first letter of the word 'agreement' is usually capitalised for a deed: *Agreement*.

The *advantages* of a deed are:

- (i) it signifies complete corporate commitment to the terms of the Agreement;
- (ii) it may be used to strengthen an earlier agreement or to formalise a simple agreement, entered into by the chief executive, after board or legislative ratification, provided always that modifications are not introduced therein.
- (iii) it offers the Employer greater period of protection, under the Limitation Act of 1939, against post-contract damages.

8.2.9 Contract-Related Documents

There are some vital legal documents in which consideration passes only in one direction; that is, only one party makes a promise. Such documents are *bonds*, *guarantees* and *warrantees*. Although these promises are not contracts, they are related to contracts, and are therefore briefly considered here.

8.2.9.1 Bonds

A *bond* is a *deed* of undertaking or promise by one party. It is discharged upon performance of the promise. A bond is not a contract because the undertaking or promise to do something is entered into by just one legal person and the consideration involved is one-directional. The promisee does not counter-sign a bond.

Promissory notes or letters, or IOUs are legal undertakings, which are similar to bonds, but they are not bonds because they are documents under hand. Bonds are employed to deal with many contract-related issues. An Employer may require a bond from a tenderer to ensure that he stands by his offer should it be accepted within its validity period, and to recover a financial compensation as damages, in case of breach thereof, to the tune stated therein; this is known as a *tender or repayment bond*. It also serves to dissuade unserious tenderers from tendering. In it, the contractor promises to refund the money so advanced, up to a maximum sum stated therein.

A contract to supply and install a plant or machinery usually terminates after installation and testing. But the risk of its sub-standard

operation, breakdown or failure is normally very high during the infant mortality phase of its life cycle. Plant performance problem that occurs at this phase can be handled by the Employer in two ways: he can incorporate the responsibility for plant performance in the main contract with the contractor or he can bond the contractor to ensure proper operation of the plant within the said period. The latter is called a *plant-performance bond*.

It is usually preferable to separate the duty for early-life plant performance from the main contract. This is because of the problems associated with enforcing performance when the supply contract has been completed and paid for. Even if the Employer withholds some retention of the contract price, there is still the problem of definition of what caused the plant's faults, after all, it was checked and tested by the Employer at the time of contract completion (plant commissioning).

Damages as a result of breach of a bond are limited to losses caused by non-performance by the promisor; punitive costs are excluded.

8.2.9.2 Guarantees

A *guarantee* is a legally enforceable promise by a *third party* (the *surety* or *guarantor*) to be answerable to a first party (the Employer) to a contract with a second party (the contractor) should the second party, having started to execute the contract, breach the contract. A guarantee may be under hand or under seal. The choice of a surety by the contractor has to receive the Employer's approval. Usually, he has to be a legal person whose financial stability is acceptable to the Employer; such legal persons are usually banks and insurance houses.

A guarantee must spell out, in clear terms, the nature, manner and maximum value of the surety's liability to the Employer in case of breach by the contractor. Because most sureties do not have the expertise to supervise and ensure physical completion of the contract, they usually restrict their liabilities to financial and not to specific performance. If the contractor fails to fulfil his obligations under the contract, the Employer sends to the surety a statement of situation together with his claims subject to the maximum amount suretied. The surety verifies and pays. This statement of situation is usually prepared by the Engineer, as an impartial arbiter.

A guarantee usually covers the contract as contained in the tender documents, that is, the original contract document. Therefore, the clauses in the contract document specifying job variations, modes of payment, programme of work and other dynamic technical details should

be carefully drafted to ensure that they do not vitiate the performance of the guarantee.

8.2.9.3 Warranty

A *warranty* is a legally enforceable written promise made by a *legal person* about his own conduct. An Employer may call for a warranty document from the contractor in order to reinforce his position in the contract; otherwise, it actually adds nothing new, since the contract covers all matters of interest to both parties.

Note the difference between a warranty and a guarantee, and between a warranty (document) and a warranty (contract term). In the first case, a warranty document is made by a second party in respect of himself to a first party, while a guarantee is made by a third party, in respect of a second party, to a first party. In the second case, a warranty document is a legal undertaking or promise, while a warranty of condition is a contract term of secondary importance to the essence of the contract.

8.2.10 Comments on the Law of Contract

The law of contracts provides guidelines by which exchanges of values between persons and groups of persons are expeditiously facilitated and disputes emanating from breaches settled. Contracting proceeds in two phases, namely, the formation and the performance phases.

During the formation phase, proposals are put forward, culminating at one point in the meeting of minds when an agreement is reached between the contracting parties. An offer must be made by one party and an acceptance must be made by the other party, while the offer is still in force. There must be exchange of values: consideration, between the parties, and so on. In short, 'OAC-CILF' must be realised at the formation phase.

The law of contracts provides sufficient rules to ensure that valid and workable contracts are formed; these are imbedded in the OAC-CILF conditions and also in the vitiating factors such as mistake, misrepresentation, duress and undue influence, which together ensure that a seemingly valid contract is indeed valid under the law. Once a valid contract is struck, the law provides adequate legal mechanism to ensure performance.

However, the law of contracts does not require parties to a contract to actually perform. This is why there are many ways to end or discharge a contract. But, if it is discharged by breach, the breaching party must pay some damages to the injured party. Several rules deal with breaches;

they include the rule of financial equivalent performance, the rule of specific performance, and the rule of quantum meruit. In fact, the obligation imposed by a contract is not to comply, but either to comply or to pay damages. Some important documents related to the formation and performance of contracts are presented in Appendix I.

8.3 Agency

An *Agency* is a contract of employment between two persons in which one is appointed to act on behalf of the other according to the terms of the contract. It is the relationship that usually results where the appointer, called the *principal*, authorises the appointee, called the *agent*, to enter into contractual relations on his behalf with third parties or persons. Here, and at law, a *person* stands for an individual or a legal entity.

Examples of agency: The chief executives of private or public sector organisations are agents of their respective Boards of directors or legislators (principals), who in turn are agents of the share holders or electorates; partners are agents of the partnership. The project manager, either for the principal or for the contractor, is an agent. However, further reference here to the principal and the project manager will be as the *Employer* and the *Engineer*, respectively. This is the common practice in engineering professional practice. On the other hand, distributors, representatives (sales, commercial, etc), stockists, and sales promoters are usually not agents.

The desired product of an agency is a contract or series of contracts between the agent and third persons for which the Employer inherits all rights and liabilities therein. This is because, at law, what one does through another he does for himself.

Agency is the usual relationship which engineers enter into when offering professional advice to their clients (as in their consultancy functions). Elements of the law of agency are therefore considered in this section.

8.3.1 Formation of Agency

Like a contract, agency formation can be oral, written or implied. However, most engineering agencies are formed in writing. Cases also exist in which the appointment of an agent must be in writing: real estate business and contracts, which require the Employer to act by an instrument under seal.

A written appointment of an agent may be by a *simple letter*, *by a formal document* or *by a formal agency contract*. The first is the simplest form of agency authorisation. It is normally issued by a person in

authority to another person who is by it authorised to act *temporarily* on behalf of the issuer in respect of actions stated therein. These actions must be within the authority of the Employer (issuer). This simple letter is called the *letter of authority*.

The *formal document* appointing an agent is called the *warrant of attorney* and the powers, which it bestows on him is known as the *power of attorney*. The power of attorney may be general or specific authorising the agent to act completely as the Employer could act, or to act on specified matters and in an explicit manner, respectively.

The *formal agency contract* is one in which a formal contract is entered into by the two parties. The Employer makes an offer (appoints the agent to act on his behalf), and the agent accepts. The contract document must have all the properties of a normal contract, including consideration and conditions of contract. This is the type of agency the Engineer enters with his Employer.

8.3.2 The Authority of the Agent

The Employer is liable on the contracts entered into by his agent on his behalf while acting within the scope of authority given by him. This is why all third parties are required to ascertain the authority of the agent before transacting with him.

The authority of the agent may be *actual, apparent, by ratification, under undisclosed agency, or by necessity*. These types of authority of the agent are now briefly presented.

8.3.2.1 The Real Authority

An *actual* or *real* authority or power of an agent may be either *express* or *implied*: An *express* authority is one in which the Employer limits the scope of the agency by specifying in precise words, oral or written, what he wants the agent to do. The instruction may be explicit and detailed, or explicit and general. In the case of explicit and general instruction, the agent is allowed to determine the details. An implied authority is one in which the Employer empowers the agent to do every thing that is reasonably necessary and fairly incidental to successfully execute the express instruction.

However, there are powers, which cannot be implied; they must be expressly given to the agent, and are known as *extraordinary* powers. They lead to acts, which might jeopardise the Employer's solvency or business. An example of such act is obtaining a loan from or selling the business shares to a third party on behalf of the Employer.

8.3.2.2 The Apparent Authority

An *apparent authority* is one in which the agent is empowered to do all the acts for which he would have had an implied authority to do under the agency, but for the secret express authority to the contrary which the Employer gave him without the third party's knowledge of this express limiting instruction. In this case, the Employer is liable to the third party on contracts within the scope of the agent's apparent authority, though outside his actual authority. That is, should the agent disregard the contrary express hidden instruction of his Employer and contracts the unauthorised contracts the Employer is liable to the third parties, his express secret instruction notwithstanding. This agency is also called an *agency estoppel*. *Exception:* The apparent authority doctrine is *not* applicable to an agency whose Employer is a *public organisation*.

8.3.2.3 The Authority by Ratification

An *authority by ratification* is one in which the agent enters into an unauthorised contract which is subsequently adopted, accepted or ratified by the Employer. Thus, the contract acquires all the characteristics of an authorised contract made by the agent on behalf of the Employer. The ratification must meet the following conditions:

- (i) it must be done by the Employer as promptly as possible after knowing about the contract, and before the third party withdraws from it;
- (ii) the Employer must have been disclosed by the agent by making the contract in his name; otherwise, the Employer may not ratify it. If the agent partly disclosed his Employer's name by telling the third party before hand, that the contract was being made on behalf of an Employer whose name he would not disclose, then the Employer may also ratify the contract;
- (iii) the Employer must, at the time of ratification, have a full knowledge of the facts of the contract; otherwise he is not bound by the contract;
- (iv) the act which the agent purported to have done on behalf of the Employer must be one within the capacity of the Employer, both at the time the agent performed it and at the time the Employer ratifies it; otherwise the Employer cannot ratify.

8.3.2.4 The Authority under Undisclosed Agency

An *authority under undisclosed agency* is one in which an agent duly authorised by the Employer to contract on his behalf, contracts in his



own name without disclosing his agency or the identity of the Employer to the third party. The undisclosed Employer may be liable on the contract when the third party discovers his identity, *unless*:

- (a) the third party elects to enforce the contract against the agent, being aware of his alternative right against the Employer;
- (b) the contract signed by the agent is a negotiable instrument (a promissory note) or is under seal. In this case, the person whose name does not appear in the contract cannot be sued;
- (c) the Employer has settled or paid the agent in respect of the contract, relying on the conduct of the third party which indicated that the agent had also settled or paid him;
- (d) the agent acted outside his authority, express, implied or apparent.

8.3.2.5 The Authority by Necessity

An *authority by necessity* is one in which a person acts to avert or prevent imminent damages, though without any authority (express or implied) so to do. To possess the authority by necessity and thus be an agent by necessity, there must be an actual or potential necessity for the creation of the authority, and the Employer's consent must be impossible to obtain at the time of the necessity.

8.3.3 Discharge of Agency

An agency may be discharged by performance, by the act of any or both parties, by the law or by breach:

- (i) If performance is ensured according to the terms of the agency, the agency is *naturally discharged*.
- (ii) The agency at *will* (an agency without fixed duration) may also be discharged by either party at any time by appropriate notice, provided that the agency is not coupled with an interest.
- (iii) The agency *coupled with interest* is discharged whenever the lien is discharged. An *agency coupled with an interest* results when the agent is also a creditor of the Employer and therefore, has acquired a lien or interest in the property that is the essence of the agency. A *lien* is the right to retain possession of another's property pending the discharge of a debt.
- (iv) Of course, an agency can be *discharged by mutual agreement* between the two parties. Whenever an agency is discharged by any or both parties, the Employer is required by law to *notify* all third parties about the termination, otherwise he will be liable for contracts concluded by the agent thereafter. For all third parties

who have had transaction with the agent, a written or an oral notice is required. However, a newspaper publication may suffice as notice to all future potential clients and the public at large.

- (iv) An agency is discharged by the *operation of the law* in the instance of *death, insanity* or *bankruptcy* of one of the two persons constituting the agency. In the case of agency held by a legal person (corporation), however, insolvency will result in the agency being transferred to the successors or the appointed trustees of the corporation. Discharge by the operation of the law does not require any notice to be given to any third party.
- (v) Discharge by *breach* is possible in an agency. A *fixed duration* agency may be terminated by breach by any of the parties before the due date, for example. In any case, the injured can sue for damages.

8.4 The Law of Property

An *ownership* is the legal right of possession. An *owner* is a person who legally possesses something or a legal possessor of something. Thus, the public can own something, and an individual can be an owner of something. Virtually everything on earth has an owner; this includes the airspace. And apart from the owner, nobody has the right of possession or use of that something. To use it, the user must obtain the owner's authority, permit or licence so to do; otherwise, he may be sued for legal trespass.

The Engineer should, therefore, always seek and obtain an owner's licence for the use of everything, which does not belong to him or his Employer. Such permit should preferably be a written authority with consideration passing hands; a receipt, which bears the date and duration of the licence should be obtained for the consideration (fee or rent).

A *property* is everything movable or immovable, tangible or intangible, which is capable of exclusive possession. Thus, the word property in this definition denotes the object itself. However, at law, *property* is the *right of ownership incident* to the *object*, and not the object itself. Three types of property are distinguished: *real, personal* and *intellectual* properties.

The rights of ownership of things, which are capable of exclusive possession (property), are regulated by the law of property. Aspects of this law are briefly presented in this section.

8.4.1 Real and Personal Property

A *real property* is the right of ownership incident to land and all that is permanently attached to it and passed to the buyer by a deed to the land. That is, every permanent structure, tree or fixture in a land, such as buildings, walls, gravels or plumbing work, is part of the land, and thus a real property. But if any of them is uprooted or detached, it ceases to be a realty (real property) and transforms into a personality (personal property) and thereafter, a deed to the land will not convey ownership on it.

A *personal property* is every movable property (a chattel). A deed to a land does not confer ownership title on a personal property. However, if the personality is permanently affixed to the land, it becomes a realty and thus, passes to the land buyer by conveyance (transfer of legal title) of the real estate, or to the lien holder on the real estate mortgage.

8.4.1.1 Transfer of Real Property

The title to land may be acquired through: *voluntary transfer* (by deed); *involuntary transfer* (by court order); *adverse possession*; *eminent domain*; *will* or *descent*; and *accretion*. These methods of land acquisition are briefly described as follows:

(i) Transfer by Deed or Voluntary Transfer

A *deed* is a document (writing), signed, sealed, delivered and acknowledged, by which a title to land is transferred from one party, called the *grantor*, to another, called the *grantee*. Two main types of deeds exist, namely, the *warranty deed* and the *quitclaim deed*. A *warranty deed* is one, which contains a warranty by the grantor stating that he has title and right to convey the land free and clear of all encumbrances except those expressly stated in the deed, and that he will defend the title against all who may lawfully claim it. On the other hand, the *quitclaim deed* passes just all the interest the grantor may have in the land to the grantee and nothing else; it is usually applied where the land owner wants to clear his title by eliminating doubtful claims and for this purpose gets the claimants to quitclaim to him.

The conveyance of title to real estate by deed demands that it must comply with a set of conditions, among which are:

- (a) the deed must be in writing and signed;
- (b) the deed must contain the names of the grantor and the grantee;

- (c) the deed must contain a granting clause which has the operative word of grant such as "grant", "sale", or "give";
- (d) the deed must accurately identify the land conveyed by descriptive words and drawings; otherwise it becomes void or voidable for uncertainty;
- (e) the deed must be acknowledged before a notary; statute prescribes the form of acknowledgement which is usually a statement by the grantor that he acknowledges the conveyance to be his free act and deed; this is done before an appropriate official who then certifies over the grantor's seal and signature that the deed was acknowledged before him;
- (f) the deed must be delivered to the grantee voluntarily by the grantor; otherwise no title to the said land has passed hands. Once the deed is delivered, title has irreversibly passed to the grantee because it is the act coupled with the intention that governs conveyance of the title, and not possession of the instrument.

Deeds must be recorded in the appropriate Office for land matters to give notice to subsequent buyers and mortgagees from the grantor that he no longer has title to the land. Otherwise, if the grantee has not taken complete possession of the property, the grantor may re-sell it to another person and if this new buyer registers his deed first, he becomes the rightful owner of the land. The only option now open to the injured is to sue the grantor for damages.

In Nigeria, conveyance by deed is widespread. The process is in line with the above description; here, the registration of deeds is done in the office of the Registrar of Deeds in the State Ministry of Lands. However, by the *Land Use Decree* of 1978, all lands in Nigeria belong to the Government of the Federal Republic of Nigeria. The Engineer should, therefore, get acquainted with the provisions of this Decree before venturing into any land deal, especially an undeveloped land.

(ii) **Transfer by Court Order or Involuntary Transfer**

The title to land may be obtained at a judicial auction resulting from a court order pursuant to a *foreclosure* (deprivation of right to redeem) of a lien against the land. The foreclosed lien may be a lien of a judgement against the land owner for a *mortgage lien*, a *tax lien*, or a *statutory lien*. In this case, the lien holder applies to the court which subsequently orders the appropriate arm of Justice

to advertise that the land of the debtor will be auctioned. The successful bidder, at the auction, obtains title to the land by a deed arising from the order of the court.

(iii) **Transfer by Adverse Possession**

An *adverse possession* is the occupation by a person under claim of right, of another's land, openly and notoriously, and adversely to the right of the true owner for the full period of the Statute of Limitations for bringing an action to eject a trespasser. In this case, the trespasser gets title to the land. This is the way the law sees it, for the land owner allowed the trespasser to wrongfully possess his land, claiming same to be his, for the long period, say 20 years, the statute granted him to seek for his ejection from the land. He is, therefore, punished by not allowing him to assert his right after the said period.

(iv) **Transfer by Eminent Domain**

An *eminent domain* is the acquisition of land by the State upon payment to the owner of the value of his real estate against his will and without his consent. This is because the rights of the public are paramount to those of the individual, and, where it is to the best interests of the public that land be taken for a public purpose, nothing prevents it. However, in Nigeria, the State purportedly found it difficult to acquire land for public purpose. This was the reason given for the promulgation of the *land use decree of 1978*, which accorded ownership of lands in Nigeria to the State. This act disfranchised the landowners, especially the peasants in the Oil producing areas of the country, of the benefits accruing from the Oil production and sales.

Now, the entire lands within the territorial boundaries of Nigeria belong to the State, and not to any individual. Individuals are only occupants who derive their rights of occupancy through the *Certificate of Occupancy (C of O)* issued to them, upon payment of an appropriate fee, by the State. Only the State Governors issue C of Os in their respective States. A land developer or buyer who has no C of O is not protected under the law.

The distribution of land-use powers between the three tiers of government is as follows:

- (a) The Federal Government of Nigeria can use land for public purpose anywhere in the country.

- (b) The State Government can use land anywhere within the State, provided it is not being used by the Federal Government.
- (c) The Local Government has right to use any land within its Area of authority, provided it is not being used by either the Federal or State Government.

The Engineer should consult the land use Decree of 1978 and the *Urban and Regional Planning Decree of 1993* for more details.

It is important to mention that a major consequence of the land use decree, promulgated by the military junta in 1978, is that people whose land contains natural resources are denied the benefits of their inherited wealth; it is a national wealth. This is the situation in the Niger Delta region of Nigeria, where the land and rivers are continuously and heavily polluted by the intensive and extensive Oil and Gas exploration and exploitation going on in the area. This region contributes over 80% of the nation's wealth, yet it is yet to enjoy any form of municipal supply of water or electricity, no transportation facilities are developed, no recreational facilities are provided, and no special programmes are in place for the education and employment of the people from this region. What is put in place, however, are machineries that will promptly and brutally crush any protests, resistance, revolt or insurrection.

(e) Transfer by Will or Descent

A *will* is a legal document or instrument in which the land owner, called the *devisor* or *testator*, freely devises his land to a named person, called the *devisee*, who acquires title to the land, under the law, when the devisor dies.

On the other hand, should the landowner die intestate (without making a will), title to all his land devolves to his heirs; such a transfer is said to be by *descent*.

(f) Transfer by Accretion

An *accretion* is the enlargement of somebody's land bordering on a stream, river or sea due to soil deposits from the water. The landowner obtains right in the accreted land by accretion.

8.4.1.2 Estates in Land

The nature of ownership of (or estate in) land differs. It may be a *fee simple estate*, a *life estate*, an *estate for years*, a *joint estate*, a *tenants by the entirety estate*, or an *easement*. A *fee simple estate* or ownership is

when the interest in land perpetually belongs to the owner. Of course, he can do anything with it, including conveying it to another person, if he is not overtaken by the eminent domain or court order. This type of estate in land is virtually absolute. A *life estate* is when the interest (ownership) terminates upon the death of the owner.

An *estate for years* is when ownership is limited to certain time period. It is created by a *lease*: an instrument by which property is conveyed to a person for a specified period usually for rent. A *joint estate* is when the land is conveyed to two or more persons jointly by the fee holder. It is created by a deed or will. The conditions governing the joint estate are expressed in the granting clause of the deed or will.

In an estate as *tenants by the entirety*, the ownership of the land is between a husband and a wife, and neither can convey his or her undivided interest separately from the other, nor can individual creditors possess the land. Finally, an *easement* is the right of use in (say, the right of way over) the land of another. It is created by a deed.

8.4.1.3 Lien

A *lien* is an interest in the property of a debtor held by his creditor as security for the payment of the debt. It is a right in one person, the creditor, in the property of another, the debtor, which is to continue as a burden on the property until the debt is paid. A lien is created by agreement between the creditor and the debtor, or by statute, in the case of a mechanics lien. Liens may be upon *personal property*, *real property*, or *mechanics lien*:

- (i) There are two types of lien on *personal property*: *informal (possessory)* lien, and *formal* lien or *chattel mortgage*:
 - (a) In a *possessory* lien, the creditor's right in the debtor's personal property is in his continued possession of the property. Therefore, should the creditor give up this possession, his lien is lost and he has no more security interest in the said property. The only course of action available to him to recover his debt is to sue under the contract law.
 - (b) In a *formal* lien, possession of the personal property continues with the debtor but the creditor's right in the debtor's personal property is paramount to the debtor's ownership of same. Note that a *chattel mortgage* is a formal lien upon a movable (or personal) property.
- (ii) Lien upon *real property* is one in which the creditor's right is in the value of the real property such as land; in this case, the debtor

(landowner) may sell or retain the land subject to the nature of the lien held by his creditor; but the land itself is always charged with the settlement of the debt. A real estate mortgage is a lien upon real property.

- (iii) A *mechanic's lien* is a right created by law to secure priority of payment of the price or value of work performed and materials furnished in the improvement of land, and this right attaches to the land and buildings erected thereon. Mechanics' liens are all created by *statute* and under them a person who expends services or materials on another's land, based on agreement, contract or consent of the owner, is entitled to a lien therein for the price; the land itself being chargeable with the payment. Many mechanics' liens exist and the Engineer is encouraged to get acquainted with them, especially the liens of the Employer and his employees, and of the contractor and his employees and subcontractors.

Apart from the mechanics' liens whose enforcement is spelt out by statute, other liens already mentioned are generally enforced, in each case, by ordering an *auction* (public sale) of the property; the amount so recovered is first used to pay the lien holder and the balance is returned to the property owner.

8.4.2 Intellectual Property

An *intellectual property* is a right, created by statute, of possession and use in product of the intellect (an idea) that is capable of commercial exploitation. Intellectual products include: engineering products such as producer and consumer goods, processes and identification icons; literally, art, audio and visual works; and computer software. The laws granting such rights are generally known as the *patent laws*. The rights so granted may be *patents*, *registered designs*, *copyrights*, or *registered trademarks*.

Generally, and at common law, intellectual products (ideas) are not regarded as a property but as a public article worthy of use by any member or group of members of the society. However, the current market situation is a battle or fierce competition between individuals, organisations and nations for leading share of the market. This leads to an unhealthy race for leadership in the commercialisation of every new technology by, if possible, denying the inventor the fruits of his creation.

Statute had to come in to protect the originators of those ideas, which often generate the unjust practices in the name of ingenious business technology. However, the statute does not protect all intellectual

products. The engineer should, therefore, get acquainted with the products protected as well as the details of the rights in them, and thus, feel free to exploit those intellectual products not protected by the law.

Five important measures have been taken by the patent laws to facilitate the acquisition of intellectual property and to ensure that the commercialisation of the product of the intellect does not endanger the creation and exploitation of ideas. These measures are that:

- (i) a prospective owner must apply to the Registrar of the appropriate intellectual property for the right of ownership;
- (ii) the owner of an intellectual property is required to issue license to genuinely interested persons to enable them use the property according to the terms specified therein subject to a consideration (fee or royalty), otherwise the courts may issue same on his behalf;
- (iii) the responsibility for enforcement of the patent laws lies with the patent right holder and *not* with the State or third parties, in the sense that he alone can prosecute the infringer for damages or account of profits, and/or an injunction;
- (iv) an intellectual property has a limited life: the right in an intellectual product has an expiring date; and
- (v) the first to apply for an intellectual property is deemed to be the genuine applicant, unless the court decides otherwise, and an employer is awarded an intellectual property, if it was originated by his technical employee.

8.4.2.1 Patents

A *patent* is the right granted by a government to an inventor to prevent others from making, using or selling his invention without his permission. Patents are usually granted for a duration of 20 years. Patents may be granted for a new and useful (or for a new use of a known) machine, plant, process, article of manufacture, or composition of matter. An invention is patentable provided it satisfies the following three conditions: *novelty*, *utility*, and *non-triviality*.

Here, *novelty* means that it must be the first time the intellectual product is proposed or known to be proposed. *Utility* means that it must be capable of practical and beneficial use. *Non-triviality* means that it must not be a logical consequence of the state of the art at the time of the application for a patent.

Patents may be granted upon application to the Registrar of Patents. The process of granting a patent is usually time consuming; this is because the patent searchers (experts in the field of a given invention)

require some time, say one or two years, to examine the application in detail to ensure that only a genuine application is granted. This is why as soon as an application, including a *prima-facie* evidence of the truth of the invention, is made, the applicant is protected, for a specified number of months, by granting him the right to use the phrase *Patent Applied For* on the invention. The application must contain the name and address of the applicant, and enough evidence of novelty and utility of the invention in the format required by the relevant statute.

If the application is successful, that is, if the claim for the invention is proved to be true, a *Letters Patent* is granted the patentee; it contains the *patent-date*, *official publication*, *serial patent-number*, and *claims* and *specifications* of the invention. Only a holder of the letters patent can issue licence on the invention for its exploitation by the licensee.

In *Nigeria*, the Patents and Design Act of 1970 is the statute, which grants and regulates patents. Its clauses or provisions are largely similar to those here described.

8.4.2.2 Registered Designs

A *registered design* is the right granted by a government to a designer to prevent others from producing, using or selling duplicates of his *design*. Here, *design* means the design of any aspect of the shape or configuration (internal or external) of the whole or part of an article; it must be original.

Registered design does not subsist in:

- (i) a method, principle or construction;
- (ii) features of shape or configuration, which enable the article to be fitted with another article for the performance of their individual functions or which are dependent on the appearance of another article of which the designer intended to form an integral part; and
- (iii) surface decorations.

The property right in registered designs lasts for about 15 years. However, in *Nigeria*, it lasts for 5 years in the first instance, that is, it is renewable under the provisions of the Patents and Designs Act of 1970. Application for registration is made to the *registrar of designs*.

8.4.2.3 Copyrights

A *copyright* is the right granted by a government to an author to prevent others from *copying* his *work*. Here, *work* means original literally, dramatic, musical or artistic work, sound recordings, films, broadcasts, cable programmes, or computer software, internet resources and the

typographical arrangement of published editions; and *copying* means unauthorised copying, issuing of copies, performing, showing, playing, broadcasting or cable programming of the work to/in public, or making an adaptation of the work. In effect, copyright infringement is unauthorised complete or substantial-part reproduction or copying of a copyright work.

Copying of copyright works is, however, permitted in a number of instances, some of which are:

- (i) research and private study;
- (ii) purposes of criticism, review or reporting;
- (iii) incidental inclusion in another work;
- (iv) for educational purposes, including instruction, examination and library applications;
- (v) for legislative, judicial, or presidential proceedings, and acts done under statutory authority;
- (vi) design documents and models;
- (vii) transfer of copies of works in electronic form;
- (viii) anonymous or pseudonymous works;
- (ix) public reading or recitation;
- (x) abstracts of scientific or technical articles;
- (xi) playing of sound recordings for purposes of club, society, etc.;
- (xii) free public showing or playing of broadcast or cable programme.

Application for copyright is made to the *registrar of copyrights*. Notice of copyright (copyright sign) can be placed in two main forms: the letter "c" in a circle, ©, for published-literally works such as books; or the letter "p" in a circle, for works in magnetic media such as compact disc recordings.

In Nigeria, the law governing copyrights is the Copyright Act of 1970. It grants copyright for 20 years on an author who is a legal person, and for 50 years, if the legal person is the government or a governmental organisation.

8.4.2.4 Registered Trademarks

A *registered trademark* is a property right granted by a government to a proprietor or a business organisation in a *mark* used or proposed to be used in relation to his goods for the purpose of indicating a connection, in the course of trade, between the goods and the grantee. Here, a *mark* means any distinctive name, word, symbol, or device. The purpose of a trademark is to identify its user's goods and distinguish them from those of his competitors.

Application for a registered trademark is lodged with the Registrar of Trademarks. The registration or grant of a trademark may be done in any of the two parts of the register: Part A and Part B. Part B is reserved for trademarks that are capable of distinguishing the goods, but which are not yet adapted for such purpose at the time of application for registration. A trademark registered in Part B may, however, be transferred to Part A later on when a substantial goodwill has been generated by its prolonged continuous use.

For a trademark to be registered in Part A, it must be any one of the following:

- (i) the name of an individual, company or firm represented in a special or particular manner;
- (ii) the signature of the applicant for registration or some predecessor in business;
- (iii) an invented word or words;
- (iv) a word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary specification a geographical name or surname; and
- (v) any other distinctive mark.

Registration of a trademark confers on the owner the exclusive right to use the mark in relation to the class of goods for which it is registered. This right is infringed by any person who uses a mark identical or similar to that trademark, or that is likely to deceive or cause confusion in goods identification. No infringement, however, occurs if the use is not likely to deceive or cause confusion, or to be taken as indicating a connection, in the course of trade, between the goods and the owner of the Part B mark.

The following acts do not infringe the Trademarks law:

- (i) an identical or similar mark to a trademark used in relation to goods not covered by the registered trademark;
- (ii) if the use of a trademark is reasonably necessary to indicate that the goods are adapted to form part of, or be necessary to, other goods in relation to which the trademark has been, or might be, legitimately used;
- (iii) if the user proves the continuous use of the trademark by himself, or by his predecessor in title, from a date earlier than both the date of first use by the owner of the registered trademark or by his predecessor in title and the date of its registration by the Registrar of Trademark;

- (iv) if two or more identical or similar trademarks are both on the register each of them has right to independent existence; and
- (v) a *bona fide* use, as a trademark, of one's name, place of business or name of any of his predecessors in business; where *bona fide use* means the honest use of one's name without the intention to deceive anybody or without the intention to make use of the goodwill already being enjoyed by another person.

Two other distinguishing marks are noteworthy: *certification trademarks* and *servicemarks*.

A *certification trademark* is a trademark adapted to distinguish, in the course of trade, goods certified by some person in respect of origin, material, mode of manufacture, quality, accuracy or other characteristics of the goods, from goods not so certified. It is usually registered in Part A of the register, and only by persons who do not trade in the kind of goods requiring certification, such as a standards organisation.

A *servicemark* is a mark adapted to identify its user's services and distinguish them from those of his competitors. A registered *servicemark* is a property right in the *servicemark*. However, a *servicemark* is registrable if, in addition to satisfying the requirements similar to those for registration of trademarks, the services whose registration of *servicemark* is desired, are directly charged for; that is, they must not be ancillary services.

Apart from damages or account of profits, or injunction, which the owner of a registered trademark or *servicemark* may claim from an infringer, he can also demand for the destruction or erasure of the marks on (or associated with) the infringing goods (or services).

In Nigeria, the Trademarks Act of 1965 regulates the registration and use of trademarks. Under this law, registered trademarks are valid for 7 years in the first instance, but renewable subsequently.

Before ending the subject of trademarks, the related concept of *passing off* is also worth nothing. It is a common law doctrine which forbids a person from presenting his goods or services for sale as the goods or services of a competitor. Thus, he is not permitted to use names, marks, letters or other indicia (distinguishing marks or signs), which are capable of inducing purchasers to believe that the goods or services he is selling are those of another person.

8.4.2.5 Trade Secret

Another related concept in connection with the intellectual property is the concept of a *trade secret*, which is any formula, pattern, device, compilation of information, or technology that is used in business to

create an opportunity to obtain an advantage over competitors who do not have or use it. At times trade secrets are patentable but the organisation would not want to apply for a patent because of the difficulty in policing against its infringement.

Trade secrets are not protected under the law; it is at the holder's risk. A frequent means of losing a trade secret is through employees who leave the organisation for other competing ones. This can be checked by obtaining a court order that restrains former employees from divulging trade secrets to a competitor.

9

ENGINEERING CONTRACTS

The basic concepts of the private law of contracts have been presented in the last chapter. Although regulated by the law of contracts, the complexity and professional nature of engineering projects have made the practice of engineering contracts a special case of the general-purpose contracts. For example, three key players are responsible for the success of an engineering contract, namely, the Employer, the contractor and the Engineer.

The Employer is the sponsor, promoter or owner of the project who places it on a contract for implementation. The contractor is the person who assumes the responsibility under a contract with the Employer for the implementation of the project subject to a consideration. Finally, the Engineer is the agent of the Employer rendering advice and services that are intended to culminate in the successful performance of the contract.

Although the Engineer is an agent of the Employer and thus, subjected to all the terms of their agency agreement, the profession and the terms of the contract between the contractor and the Employer expressly and impliedly apportion to him other duties, responsibilities and liabilities. These include the administration of the contract and to act as an impartial quasi-arbitrator between the Employer and the contractor. This chapter, therefore, briefly outlines the structure and relationships as well as the procedures adopted for the formation and performance of engineering contracts with the Engineer at the centre of affairs.

9.1 Types of Engineering Contracts

Engineering contracts vary from project to project depending on the method through which they are negotiated, on their objectives or on the

method of execution of the works therein. Therefore, a careful analysis must be made immediately works or services are earmarked for contracting out to select suitable type of contract or contracts for the works or services.

9.1.1 Contracts based on the Method of Negotiation

Contracts that are classified based on their method of negotiation include the *fixed-price*, *lump-sum*, *bill of engineering materials*, *schedule of rate*, *cost reimbursement*, *competitive*, and *negotiated* contracts. These are briefly discussed as follows:

- i) *Fixed-Price Contract*: Here, the contract price is settled and fixed before or at the execution (signing) of the contract. All risks including inflation and under-estimates are borne by the contractor. In this case, the Employer pays higher price for this indemnity. Fixed price contracts are ideal for projects in which the Contractor is regularly engaged, or in which the Employer does not intend to be grossly involved in their implementation.
- ii) *Lump-sum Contract*: Here, the entire works based on fully detailed specifications and drawings, are carried out by the contractor for a fixed price. It is ideal for the supply and installation of mechanical, electrical and/or electronic equipment, and where substantial extras, deletions or variations are not envisaged during the implementation of the works.
- iii) *Bill of Engineering Materials Contract*: Here, the contract sum is determined based on a priced detailed bill of engineering materials, but variations in the specifications and drawings may occur and thus alter the original contract sum. This type of contract is ideal for building and civil engineering works. It is also adjudged to be the fairest and most widely used type of contract.
- iv) *Schedule of Rates Contract*: Here, rates for the items of works (not the detailed quantities) are agreed upon; there is, however, no guarantee that all the works constituting the contract will be taken up as implementation evolves. This mode of contract is ideal for situations where the extent of various works cannot be adequately assessed at the contract formation stage.
- v) *Cost Reimbursement Contract*: Here, the actual cost of materials, labour and machinery used for the works is paid for separately plus a fee which represents the contractor's benefit from the deal. Depending on how the fee is determined, the cost reimbursement contract is further classified into:

- (a) *Cost-plus-Fixed Fee Contract:* the fee is fixed;
 - (b) *Cost-plus-Fluctuating Fee Contract:* the fee fluctuates based on a fluctuating scale; and
 - (c) *Target-Cost Contract:* the fee is a function of a target completion cost which may be adjusted in respect of the actual completion cost.
- In all these three forms of the cost reimbursement contract, the fee agreed is always a function of the allowable cost of the works. *The actual cost* of the works is called the *allowable cost*.
- vi) *Competitive Contract:* Here, the contractor is chosen by competition; interested or selected contractors compete for the works.
 - vii) *Negotiated Contract:* Here, the contract is placed with the contractor after negotiation with the Employer, both sides giving up something from their original stands.

9.1.2 Contracts based on the Objectives

Contracts that are classified based on their objectives include the *package deal*, *turnkey*, *running*, *service*, and *continuation* contracts:

- i) *Package Contract:* Here, two or more related contracts are placed with one contractor. It is ideal in cases where the Employer desires continuity, fewer contractors on site, or to let some unattractive works together with others.
- ii) *Turnkey Contract:* Here, the bulk of the project, from design through commissioning, is placed on one contract. It is ideal for situations in which the Employer is interested in a product with the functional characteristics of his specifications, and for specialised or complex plants such as chemical, petroleum and power plants.
- iii) *Running Contract:* Here, the contract covers specified intervals or period of time. It is ideal for supplies of goods and services whose demand stretches over a period or intervals of time.
- iv) *Service Contract:* Here, the contract is for service or labour only. It may be for research work, design, consulting, programming, or for the supply of such services as utilities (water, electricity, etc).
- v) *Continuation Contract:* Here, the contract covers specified works and also makes room for subsequent contracts. The same contract terms of the first contract may be used for future ones. *The continuation or serial or extension contract* allows for rapid switch over of resources: labour and machinery, for the works of subsequent contracts.

9.1.3 Contracts based on the Method of Work Execution

Contracts that are classified based on the method of execution of the works include the *item rate*, *basic rates*, *day work*, *piece work*, and *daily labour* contracts:

- i) *Item Rate Contract*: Here, the contract sum is based on the rates of different items of work. The items of works together with their quantities and measurement units are usually tabulated in the unpriced *bill of engineering materials* and the contractor is asked to fill in his price for each of the items. He is paid on the measurement of the works executed at the rates he quoted. It minimizes extra works, and variations can be made in the drawings and in the quantities during contract execution. This mode of contract is ideal for many civil engineering works.
- ii) *Basic Rates Contract*: This is a modified version of the item rate contract with provision for variations. Here, the contractor is asked to quote the percentages above or below the *priced schedule of basic rates* at which he is prepared to execute the works. It is ideal for repair or/and maintenance works.
- iii) *Day Work Contract*: Here, the contract sum is made up of the total of the daily cost of materials and labour to complete the works and a percentage of this to cover the contractor's profit, statutory charges and rentals for the plants. Daily report on works done, materials consumed and labour used is kept, usually by the *supervisor of works*. It is ideal for all small works, which are incapable of accurate measurement or valuation. This mode of contract is expensive and likely to breed dispute, and therefore, should as much as possible be avoided.
- iv) *Piece Work Contract*: Here, the works for contracting are divided into parts (pieces) each of which, called piecework, is placed with a contractor. It is ideal for urgent works for which day work contract is undesirable. In most cases, the urgency of the works makes it impossible for clauses assuring performance bonds, liabilities and completion date to be entrenched in the conditions of contract.
- v) *Daily Labour Contract*: Here, labour for the works is paid for on a daily basis. The materials and equipment are supplied by the Employer. The quantity and quality of works as well as consideration from the Employer are agreed upon before the commencement of work. It is ideal for maintenance works and other small and irregular works that can be properly supervised.

9.2 Engineering Consultants

An engineering consultant is a registered engineer offering to his Employer professional advice or services in his field of specialisation and practice in an agency. In Nigeria, the consultant must be a COREN registered engineer. The qualifications and conditions for practice as an engineering consultant in Nigeria are regulated by COREN, Appendix D.

The performance of a typical engineering project requires the input from specialists from more than one engineering field of specialisation. Therefore, an Employer may require and may engage the services of various consultants for his project. In this case, the consultant with the largest role in the project is designated as the prime consultant or the Engineer. In what follows, the prime consultant is called the Engineer.

The procedure for appointment and the conditions of service for consultants are usually regulated by the relevant professional bodies. The Federal Ministry of Works and Housing, Abuja, Nigeria produced one such document in 1990, see Appendix F. It covers, among others: *Agreement, appointment of consultant, scope of services, remuneration, method of payment, care, diligence and responsibilities, professional liability, incapacity and default of consultant, alterations and modifications, progress report of works, records, ownership and copyrights, and submission to arbitration.* The sections on remuneration and reimbursable expenses have been revised, Appendix G.

The *consultancy fees* in the Nigerian construction industry are based on the sliding-scale of fees, Appendix G. Payment of the consultancy fees is made in three stages. The first stage payment covers the conceptual and preliminary design phases of the project. The second stage payment covers the detailed design and full documentation, including preparation of the tender package and tender administration. The third and final stage payment covers the implementation (construction) phase of the project, which usually involves supervision of the works.

The first stage payment is 25% of the total fees payable, which is determined based on the *estimated total cost* (ETC) of the project. The second stage payment is 50% of the total fees payable based on the ETC of the project. The third (final) stage payment is 25% of the total fees payable, but is determined based on the *total construction sum* (TCS) of the project. Note that the ETC is usually known before the time of award of the contract. However, the TCS is known only towards (or at) the end of the project construction; thus, the TCS may be less than, equal to or

greater than the ETC, which is only an estimate that was made prior to the actual realisation of the project.

Note immediately that the recommended scale of fees for the engineering consultants in the Nigerian construction industry, Appendix G, focuses mainly on civil engineers (structural, building, road, water and sewerage engineers). Other engineers, such as the mechanical, electrical, electronic, chemical, and petroleum engineers do not seem to have anything to do with the Nigerian construction Industry. Of course, the definition of the term *construction industry* is suspect. Apparently, it is defined in Appendix G in relation to the business sphere of the Ministry of Works and Housing, that is, with respect to the building (or construction) and maintenance of buildings and roads in Nigeria.

Obviously, the design, construction and operation of a power station is one of the main concerns of a mechanical engineer, who becomes the Engineer for the purpose of Appendix G; the chemical engineer is the Engineer when it comes to the design, construction and operation of a petrochemical plant; and the electrical engineer is the main actor in the design, construction and operation of a power transmission and distribution system. The design, construction and operation of a radio, television or telecommunication system belong to the electronic engineer. Finally, the petroleum engineer is in charge of the design, construction and operation of a drilling rig. Construction is, therefore, an inherent function of every field of engineering.

The structural engineer, therefore, does not play any over bearing role outside the civil engineering-related projects. Thus, for non-civil engineering-related projects, the provisions of Appendix G, sections 26-30 are not applicable. The engineers who take the positions provided in these sections will depend on their relative importance (or contribution) in the given construction project. For example, in the construction of a thermal power station where the mechanical engineer is the Engineer (prime consultant), the electrical engineer takes the place reserved for the structural engineer in Table 9 of Appendix G; the architect, structural or civil engineer takes the place reserved for the mechanical or electrical engineer in Table 10 of the same Appendix. In such cases, Table 12 cannot be applied, except where the role of the structural engineer is adjudged to warrant its application.

9.2.1 The Engineer

The Engineer assumes all the duties, responsibilities and liabilities to the Employer, the contract and the profession, upon engagement. These duties, responsibilities and liabilities include:

- (i) *Under the Agency with the Employer:*
 - (a) Design works, preparation of engineering drawings and specifications;
 - (b) preparation of estimate of the works (bill of engineering materials);
 - (c) preparation of tender documents and tender administration; and
 - (d) contract supervision.
- (ii) *Under the Contractor-Employer Contract:*
 - (a) express and implied authority;
 - (b) supervision and delegation;
 - (c) reasonable care and diligence; and
 - (d) statutory obligations.
- (iii) *Under the Engineering Profession::*
 - (a) membership of NSE plus COREN registration;
 - (b) compliance with the engineers ethics and code of conduct;
 - (c) compliance with the professional scale of fees; and
 - (d) impartiality in quasi-arbitrating disputes between the Employer and the contractor.

All the duties, responsibilities and liabilities of the Engineer are derived from the relevant documents, expressly or impliedly. For example, the Engineer's Instructions are the express authority of the Engineer under the contract. They pertain to his orders in respect of the contract bills (of engineering materials), specifications, drawings, variations or extras, defects (patent and latent), postponements, prime cost and provisional sums, etc. If his duties also involve the design work and preparation of drawings, the procedures prescribed in the relevant chapters of this book are applicable.

9.2.2 The Engineer's Assistants

The Engineer does not act alone in the performance of his duties and responsibilities. He usually works with other engineering consultants or personnel appointed by him or his Employer to carry out specific duties. For example, the Engineer does not have to visit the site of work on a daily basis. Therefore, to facilitate supervision, a *resident engineer* is appointed; he acts as the *Engineer's representative* on site for the works prescribed in the *conditions of contract*, which also stipulate his powers and limitations.

The *supervisor of works* (also called the *clerk of works* in building and civil engineering contracts) is another assistant to the Engineer.

Though the supervisor of works reports to the Engineer, he is appointed by the Employer and serves as his eye in the performance of the works. His duties and limitations are stipulated in the conditions of contract. He supervises the works on a day-to-day basis and also serves as a time and record keeper. All other engineering consultants engaged on specific aspects of the works take instructions from the Engineer.

9.3 The Contract Documents

The contract documents are all the documents, which together bind the Employer and the contractor in a valid contract. They include the *Agreement, general conditions of contract, special conditions of contract* (if any), *specifications, schedules or bills, drawings, appendix*, etc. If not specifically mentioned, the term "*conditions of contract*" is used here to embrace all these documents, except the Agreement. Appendix H is a typical example, which was proposed by the Federal Ministry of Works and Housing, Abuja, Nigeria. It deserves to be carefully studied.

The drafting of the conditions of contract and Agreement is a crucial step of the contract formation stage. Although verbal and implied contracts can be made, to take full advantage of the enforcement powers of the law, fully detailed and comprehensively written statements, which stipulate, in clear and unambiguous terms, the *duties, responsibilities and rights* of both parties to the contract, including methods for settlement of disputes (composition of and procedure for submission to arbitration panel) should be provided in the conditions of contract. The main aims of the conditions of contract are to assist in the preparation of tender documents, to provide guidance in contract performance, and to provide adequate protection of the interests of both parties to the contract.

The preparation of tenders by contractors is based on the conditions of contract as follows: the bill of engineering materials (quantities) allows the contractors to assess the scope of works required and also to put value on the works; the various clauses in the conditions of contract also assist the prospective contractors (tenderers) in building up their tender price. Restrictive clauses or conditions reduce their freedom of action and profit, and thus, lead to higher contract sum. Therefore, restrictive clauses should as much as possible be avoided.

The performance of a contract is directed, controlled and regulated by the *contract specifications*, which stipulate *what* works, *when* and *how* they will be done as well as the quality of works expected. Therefore, it should be comprehensive, precise and specific. It should state exactly what is required without missing out any essential detail,

because the contractor is expected to do exactly what the specifications stipulate. It should contain sufficient information to leave no doubt as to what is required. The bills and drawings are read together with the specifications.

The *Appendix* is a set of specific information related to the conditions of contract, which for convenience is usually placed at the end of the document and read together with the relevant sections of the conditions of contract. The information that is best provided in the Appendix includes: *commencement and completion dates, values of works or milestones for interim certificates, percentage and limit of retention fund, period of honouring certificates, period of final measurement and valuation, defects liability period, and liquidated damages.*

Clauses for the protection of the interests of both parties are included in the conditions of contract by specifying actions to take and the liabilities of each of the parties in every foreseeable case of breach of the contract by any of the parties. Although the Employer or his representative (the Engineer) drafts the conditions of contract, the contractor's interests are required to be equitably protected. The conditions of contract should contain sufficient clauses aimed at mutual settlement of disputes. The procedure to be adopted for settlement of serious disputes submitted to arbitration, including method of appointment of the arbitrator(s), should be clearly specified.

The conditions of contract should also include the following clauses: identities; description of works (specifications and drawings); engineering materials (bills); obligations of the contractor and of the Employer; and safeguards for the contractor and for the Employer.

Identities are the basic information as to the who, what, where and when of the contract, *definitions* and *abbreviations* used in the document, scope of the contract in general terms and other basic information of a general nature. The description of works is the detailed description of the works that are required, including a general description of how they are to be done and the standards required. This is usually given, in adequate details, in the specifications and drawings constituting part of the contract document. The engineering materials are a detailed breakdown of the amount of works to be done and materials used; they may be approximate values. These are usually given in the bills of engineering materials.

The obligations of the contractor are the specific conditions with which the contractor must comply while the obligations of the Employer are those things which the Employer undertakes to do including the consideration: details of payments and how they will be made as

contained in the *schedule of payments*. The safeguards for the contractor include the Employer's obligations and details of arbitration procedures in the event of a dispute while those for the Employer include the contractor's liabilities and procedures for dealing with unsatisfactory performance, which may include: a *performance bond*; indemnification of the Employer against accident and fire; and assurance of health, safety and workers welfare in line with the appropriate statutory provisions.

The central position, which the conditions of contract occupy in engineering contracts, has led to the standardisation of their content and form. Standard formats for the conditions of contract are provided or adapted by most engineering professional organisations. Public and private organisations also have their own variants of the conditions of contract. Furthermore, the conditions of contract are contract dependent; each contract type has its own unique format, so also is every contract of a given type.

Therefore, the standard conditions of contract provided by the various sources are more or less guidelines, which should be customised to suit specific application. However, the conditions of contract for building and civil engineering contracts appear to be the most standardised, apparently because of the predominantly one-off nature of their projects. Some of the more popular in this regard are those conditions of contract and Agreements by the: JCT (Joint Contract Tribunal); ICE (Institute of Civil Engineers); ACE (Association of Consulting Engineers); FIDIC (Federation Internationale des Ingenieurs Conseils or International Federation of Engineering Councils); and the Federal Ministry of Works and Housing (FMWH) for the Nigerian construction industry.

Each of these standard documents provides adequate clauses that cover all the contents of the general conditions of contract and Agreement in great details. Therefore, the engineer should consult some of them when faced with the task of drafting the conditions of contract and Agreement. Appendix H is part of the conditions of contract and Agreement of the FMWH.

9.4 Estimates

An *estimate* is the expected cost of the works to be placed on contract. It is the value prepared in advance of tendering which approximates the average contract sum of the tenders received. It represents the *expected direct cost* (cost of materials, equipment and labour plus the contractor's profit) for the execution of the works, or the *contract sum*. The Engineer

is in charge of preparing the estimate. However, he may do this through the quantity surveyor.

A contract estimate is required before tendering as it helps the Employer in reaching a decision on resource mobilisation and allocation and in dealing with tendering and tenders. Therefore, under- or over-estimate is a veritable source of dispute between the Employer and the Engineer; under-estimate may lead to total abandonment of the project. However, the variability in things: project demands (materials, plants and labour) and their market values, makes an estimate to always be at variance with the contract sum, and estimating to be a very difficult task for the Engineer.

To commence, the Engineer uses the data contained in the *bill of quantities* or *bill of engineering materials* (in the case of engineering projects in Nigeria) and the *schedule of rates*.

The typical formats of the bills and rates are shown in Figure 9.1. The *schedule of rates* is a list of items of works with their current market rates; the rate for each item covers the *cost of material, labour, delivery, profit, VAT (value-added tax)*, etc. It is usually compiled and updated yearly by the Employer.

In building up the estimate, the Engineer includes the *prime costs, provisional sums and contingencies* in addition to other cost items. The *prime cost* is the amount for the payment of works and services of the nominated subcontractors and subsuppliers, including the contractor's overhead and profits for the works and services executed by them. The *provisional sums* are the amount for works and services that

| Bill of Engineering Materials | | | | | |
|-------------------------------|-----------|----------|-----------------------|----------|---------------|
| S/No | Part Name | Quantity | Size* (S.I.) t w l | Material | Rate [N/unit] |
| 1 | | | | | |
| 2 | | | | | |
| 3 | | | | | |
| n | | | | | |

* t = thickness; w = width; l = length; S.I. = SI Units of measurement

| Bill of Quantity | | | | | |
|------------------|------------------|--------------|----------|---------------|------------|
| S/No | Item Description | Units (S.I.) | Quantity | Rate [N/unit] | Amount [N] |
| 1 | | | | | |
| 2 | | | | | |
| 3 | | | | | |
| n | | | | | |

Total

| Schedule of Rates | | | | | |
|-------------------|------------------|--------------|---------------|------------|--|
| S/No | Item Description | Units (S.I.) | Rate [N/unit] | Amount [N] | |
| 1 | | | | | |
| 2 | | | | | |
| 3 | | | | | |
| n | | | | | |

Total

Figure 9.1 The Bills and Schedule of Rates

are incapable of proper valuation at the time of estimating. *Contingencies* are the sum set aside to cover minor items which are overlooked or unforeseen at the time of estimating; this sum does not include anticipated inflation or rise in cost due to budgetary provisions; 10% of the cost of the project is usually appropriate as contingencies.

The contractor usually places parts of the works on subcontract with a third party or parties. Such works and the procedure for subcontracting them are regulated by the conditions of contract between the Employer and the contractor. There are three types of subcontractors: the *nominated subcontractors* (or sub-suppliers), who are nominated by the Employer for the contractor to employ and must employ; the *preferred subcontractors* (or subsuppliers), who the Employer prefers and recommends to the contractor, but whose employment the contractor is not compelled to oblige; and the *domestic subcontractors* (or subsuppliers), who are chosen by the contractor and sent to the Employer for approval.

There are many methods available for estimating. However, the Engineer must approach each with caution. It is good practice to generate estimates using different methods and accepting their average or median as the final estimate. This final estimate is also subject to improvement as more information becomes available.

9.5 Tendering

A *tender* is a formal offer by a contractor in which he states, in adequate detail, what he would do for the Employer, and the consideration he would receive from the Employer should he accept the offer. To the Employer, the purpose of any tendering procedure is to select a suitable contractor, at a time appropriate to the circumstance, and to obtain from him at the proper time an acceptable tender (offer) upon which a contract can be let. Tendering is an expensive business; it costs the Employer money and time to administer, and the contractor commits much money and effort to prepare and submit a tender for a contract he is not even sure of winning.

To cut down on cost on both sides and to aid tender analysis, tendering procedure for engineering contracts are more or less standardised in such a manner that it is independent of the type of contract a tender is addressing. The tendering procedure involves the processes of: preparation of the *tender list* and *tender package*; *receipt of tenders*; *analysis of tenders*; and *communication of tender result*. These processes are described here, after a brief comment on the *tendering*

systems. Note that the duty for preparation and administration of the tendering process rests on the contract manager, and this is the Engineer. The Employer usually delegates him so to act.

9.5.1 The Tendering Systems

Three tendering systems are in common use; they are *the negotiated single tendering*, the *open tendering* and the *selective tendering*. The last two are also known as *competitive tendering*.

9.5.1.1 Negotiated Single Tendering

Under the negotiated single tendering, one Contractor or a small group of contractors is invited to tender for the contract and subsequently negotiation is commenced based on the tender.

The main advantage of this system is its short response time, and thus minimum tendering cost and project duration. Here, the costs associated with sending tender packages to many contractors and tender collection and analysis are eliminated. The time for the tender process is also minimised resulting in contract execution commencing without delay. Thus, the negotiated single tendering is ideal for *urgent projects* and for a contractor whose performance records are well known and are satisfactory to the Employer. The main disadvantage of the negotiated tendering is that it may turn out to be more expensive, since competition is absent.

9.5.1.2 Open Tendering

Open tendering is one in which an Employer gives opportunity to tender to the world at large through publicly advertised invitation, say, in the national dailies or technical periodicals.

The main advantage of the open tendering is that it allows for free and extensive competition, and thus better bargain in terms of contract price. Public sector projects, as a rule, are based on open tendering. This is expected to ensure adequate accountability of public funds.

However, the disadvantage of the open tendering is that it provides for frivolous tenders and produces a large number of tenders with the resultant complexity in tender analysis. It should be noted that when large tenders are involved, the Employer spends a lot of money to send out, collect and analyse tender documents. The Contractors also commit large sums, time and effort to their tenders, which in the end, at best, only one of them wins the contract. Thus, restrictive tendering is always preferred in the private sector.

9.5.1.3 Selective Tendering

Selective tendering involves a limited number of contractors who are selected from a tender list and invited to tender by the Employer. It affords the Employer the opportunity to invite only capable contractors. The tender list may be drawn from the list of *registered contractors* or from a list of *pre-qualified contractors*:

(i) *Registered Contractors:*

Usually, the Employer maintains a register of contractors, classified in terms of the nature of works and services they are specialised to do; for example, building, highway, structural, water resources, mechanical, power plant, electrical, electronic, chemical, mining, petroleum, and agricultural services and supplies. In each class, the contractors are ranked in terms of their resource capabilities (financial, material, labour and management) and track records.

Such register is therefore a veritable source for the selection of potential tenderers by following an internally laid down procedure. The result is a *provisional tender list*. The registered-contractor option is less expensive.

(ii) *Pre-qualified Contractors:*

The Employer may elect to invite contractors to pre-qualify for tendering. Depending on the size of the contract, the Employer may reach the contractors through newspaper advertisement or by placing notice on the notice boards. Brief description of the project, estimated range of contract price and fee for pre-qualification form are some of the information to be included in the notice.

The pre-qualification form has the objective of assessing the suitability or otherwise of the contractors wishing to tender for the contract, in terms of their resource capabilities, statutory requirements and the key conditions of contract. The pre-qualification forms are completed and returned to the Employer on or before the stated date. They are analysed and a provisional tender list drawn from the successful candidates. The main advantage of this option is that it offers new entrants the opportunity to compete.

9.5.2 The Tender List

With the provisional tender list now available, the Employer forms a final *tender list*. He does this by first seeking confirmation from those listed in the provisional tender list of their intention to tender for the contract. He can issue the *intention to tender* (ITT) forms to them; this

way he is saved the embarrassment of receiving insufficient number of tenders, which may lead to starting a new tendering process. A contractor may decline an invitation to tender because his resources are at the moment committed to other contracts, or for some other reason. Thus, it is a good practice to confirm from him before sending out the Invitation to Tender.

The ITT form should briefly describe the size, price range and type of contract; a statement requiring the contractor to confirm or decline his intention to tender. Reasons for declining may also be sought. The ITT forms should be completed and returned on or before the stated date; say two weeks from date of issue. The tender list is then drawn which is made up of those contractors who confirmed their intention to tender through the ITT forms. The tender package is then sent to those listed in the tender list.

9.5.3 The Tender Package

The *tender package* is the set of documents the Employer sends to a tenderer. Upon receipt of this package, the tenderer provides answers to all the questions raised and packages the documents back to the Employer on or before the date and time stated. The contents of the package include:

- (i) Letter of Invitation
- (ii) Instructions for Tendering
- (iii) Forms of Tender (two copies)
- (iv) Bond Form
- (v) Agreement Form
- (vi) Conditions of Contract
- (vii) Specifications
- (viii) Schedules or Bills
- (ix) Drawings
- (x) Supplementary Schedules.

The last six documents would transform, unaltered, into contract document if the tenderer became successful; the two parties need only formalise the contract by signing the Agreement form. Some of these forms are shown in Appendix I.

The *letter of invitation* is a document formally inviting the tenderer to tender for the contract. The document: *instructions for tendering*, serves as a guide to the *tender package*, as well as a questionnaire. This makes it possible for the Employer to get the information he requires to

enable him undertake a consistent and fair tender analysis. A typical instruction for tendering should contain the following instructions, among others:

- (i) Place, date and time for submission of tender (the name of tenderer must not appear on the envelope).
- (ii) Guide to completing the tender documents.
- (iii) Inspection of contract site, if applicable.
- (iv) Conditions for acceptance of tender.
- (v) Tenderer's expenses: the Employer is usually not liable.
- (vi) The lowest tender: the Employer is not bound to accept.
- (vii) Additions to the Tender Package: the Employer may send a supplementary schedule.
- (viii) Tenderer to supply information on his programme of work, plant and equipment, technical and management staff, past and on-going contracts, statutory standing, etc.
- (ix) Tenderer to provide Declaration of Bona-fide Tender, Tender Bond and Guarantee of Due Performance.

The *form of tender* is the formal letter of offer, which the tenderer sends to the Employer. It should state, among other things, the *contract price* and *period of completion* of the works. The *bond form* gives the Employer guarantee in respect of the subject matter. The Employer may require in addition to the bond or guarantee from the contractor assuring due performance of the works placed on contract, a *warranty* or *deposit* assuring that the tenderer will enter into contract with him if his tender is accepted. This *deposit* forms part of the retention fund if the contractor wins the contract. The retention fund is another safeguard for the Employer, which may be used to *offset liquidated damages* and *making good patent defects*, etc.

The *Agreement form* is the proposed legal undertaking that would be entered into between the Employer and the contractor when both affix their common seals on it. The *conditions of contract* (general and special) define in clear and unambiguous terms the mode of execution of the contract and the relationship between the Employer and the contractor, the powers and limitations of the Engineer, the Engineer's representative and the contractor's agent.

The *Specifications* are the detailed descriptions of all works to be executed including the quality of the materials used, the workmanship expected and the programme and stages of work or milestones. The *schedules or bills* are the list containing items of works and their rates.

They include the *schedule of basic rates*: list of controlling (basic) materials for the works with their current market rates or prices, the *bill of engineering materials*: list of items of works or materials (culled from the drawings) with their descriptions, units of measurement, quantities, rates and prices, and the *day-work schedule*: list of daily rates for the labour, material and equipment used for the works which are not covered in the bill of engineering materials. The *Drawings* are the graphical model of the works for which the contract is meant. It shows, among other things, the layout and relative positions of the structures on site, etc, for construction works, or the items and their forms, dimensions, relative positions, manufacturing and assembling requirements or methods for manufacturing works. The *supplementary schedules* are the additional schedules sent to the contractors by the Employer before the close of tendering.

9.5.4 Tender Analysis and Award of Contract

Sealed tenders are received on the specified closing date for tendering at the Employer's office. These tenders are opened at a specified date, time and venue with all the tenderers in attendance and the Employer or the Engineer presiding. This is followed by the *tender analysis*, which is a selection process in which the Engineer attempts to select the tenderer with the most favourable tender. The method applied for this selection may be specific to the organisation or the Engineer may use the dominance tableau approach to rank the tenders with respect to some appropriately selected attributes such as the contract sum, contractor's programme of work, completion date and/or reputation of the contractor.

The selected tender with details of method of selection is sent to the Employer for final approval. His choice may not necessarily be the same as the one presented; he may have other considerations. In this case, if the Engineer is not satisfied with his decision, the same and the consequences thereof must be made known to him. At the Employer's approval, a *letter of acceptance* is sent to the successful tenderer and date fixed for the execution (signing) of the contract agreement. The unsuccessful tenderers are also sent letters of *Thank You*; this politely recognises the expenditures they incurred in tendering. All tender deposits made by the unsuccessful tenderers are promptly refunded.

9.6 Contract Supervision

The Engineer's duties at the performance stage of the contract include: assuring a successful site take over by the contractor, supervision of the progress of the works, the inspection of the quantity and quality of works, conducting site meetings, issuing of instructions such as variations, demolitions, postponements, interim certificates, certificate of practical completion and final certificate, Appendix J.

All the Engineer's duties, responsibilities and liabilities are specified in the conditions of contract. Appendix H should be studied carefully as it pertains to the duties, responsibilities and liabilities of the Engineer in the administration (supervision) of contract.

The Engineer should note that he has no authority to issue variation on anything concerning the contract terms. However, he can issue variations on items under the contract specifications; that is, he can alter the content, materials, methods or timing of the works emanating from the contract as long as the limits are stipulated in the conditions of contract. The Engineer must be prudent, impartial, and not wasteful in granting and assessing variations. Variation of contract specifications is usually a sure route to dispute and delays.