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Variations to contracts and changes in the law

*This guide was last updated in August 2011.*

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It is common in commercial contracts to include a provision that any changes made to a contract are ineffective unless made in writing and signed by or on behalf of both parties. This is known as a variation clause, and is intended to prevent informal or inadvertent oral variations. However, common law allows for a written contract to be changed by subsequent mutual agreement from both parties, whether oral or written. This can make the position complicated.

Similarly, changes in the relevant law can affect the way work is performed under a contract. Contractors will generally be obliged to complete the work in accordance with local building regulations and other laws. If the law changes during the term of a construction project, this can have cost implications for the contractors.

**Variations - the common law position**

As long as the law or the contract itself does not say otherwise, parties to a contract can change it by oral or written agreement.

But for this variation to be effective there must be:

* a valid agreement between the parties – mere notification by one party to the other is not effective;
* some form of consideration supporting this agreement.

This consideration could take many forms, for example:

* mutual abandonment of existing rights;
* new benefits being granted by each party to the other party;
* the parties assuming additional obligations if the contract is breached.

A concession granted by one party to the other for that party's convenience, and at its request, will not therefore constitute a variation. In the absence of such a consideration, a variation can be effected by deed.

If a contract has a clause in it which prohibits oral variations then those variations will generally be ineffective. However, this does not mean that the parties cannot change their arrangements orally even in the face of such express contractual wording. This can happen where the parties have expressly agreed to vary the term prohibiting oral variations, or if one party can show waiver or estoppel.

**Waiver** is where one party voluntarily agrees to a request by the other not to insist on the precise performance method outlined in the contract. In these circumstances, it may be said that that party has waived its right to insist on performance in that particular way. A waiver can be oral or written, or can even be inferred by conduct - so a party can waive (or be taken to have waived) its right to rely on a written variation where the way it has acted after the contract has been varied by oral agreement.

It is worth noting that where the terms of the contract include a provision which is solely for the benefit of one party, that party may waive compliance with that provision and enforce the contract as if it had been omitted. It cannot do so where the provision is intended to be for the benefit of both parties.

**Estoppel** similarly prevents a party from relying on a clause requiring any variations to the contract to be made in writing. For this to be effective there must be:

* a clear and unequivocal representation;
* on which the other party must have relied; and
* on which the other party has altered its position.

For example: in a contract for the sale of goods there is a clause stating that variations to the contract terms can only be made in writing, but the parties orally agree that the location of the delivery of the goods should be changed. If the buyer accepts delivery at the new location, it would be estopped from later suing on the basis of the unvaried term of the contract. The conduct by the buyer does not render the variation effective, but it prevents the parties from being able to rely on the original term.

The practical effect of a prohibition on oral variations will therefore depend to a great extent on the evidence available about the intention of the parties and their actual course of conduct.

An exception to this general rule is that a contract which is required by law to be made or evidenced in writing - for example, consumer credit or consumer hire agreements – can only be varied in writing.

**How construction companies deal with variations**

We have looked at how companies in general deal with changes to the work outlined in a contract. In construction, though, a distinction is made between:

* **amendments** to the contractual provisions; and
* **variations** of the actual work instructed by an employer.

Amendments to a construction contract will generally be made by written agreement between the parties and will be amendments to the contractual provisions not including the scope of work to be undertaken.

Variations on the performance of that work will, on the other hand, usually be made according to a variation procedure drafted into the contract terms. This is because construction projects will usually be so large and take such a long time to perform that it is administratively less of a burden to the parties to agree a variation procedure in advance, so that an amendment to the contract doesn't have to be made every time the scope of the work changes.

Providing the variation is made in accordance with the correct procedure, there is no need to change the actual terms of the contract. Accordingly, there is no need to prove that consideration has been provided for that amendment to be effective.

**Changes in law – the common law position**

In the absence of express provisions to the contrary, there is normally an implied term in a contract that the contractor will not complete the work in a manner which contravenes relevant building regulations or other construction laws. However, whether a contractor can recover any associated costs depends on whether:

* the work for which the contract sum is payable is defined in terms wide enough to include work which is unspecified in the contract, but necessary to comply with building regulations; and
* where the contract work is not defined in such wide terms, whether the contractor sought the employer's instructions before carrying out the unanticipated work necessary to comply with the building regulations or whether the contractor can show a promise to pay.

Where the contract is for a lump sum, the courts will tend to infer a promise on the contractor's part to provide everything necessary to complete the whole work – including everything necessary to comply with building regulations and other relevant laws.

**Construction contract approach to changes in law**

Construction contracts will generally expressly provide for how to deal with the effects of changes in law on a project.