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**PRACTICAL GUIDE FOR SUBCONTRACTING AGREEMENTS**

Intended for industrial subcontracting and partnership exchanges\*

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UNIDO Expert

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\* The views expressed in this document are those of the author and do not necessarily reflect those of the Secretariat of the United Nations Industrial Development Organization (UNIDO). This document is a translation of an unedited original.

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## INTRODUCTION

This guide is intended for members of Subcontracting Exchanges and has the purpose of directing the thoughts of main contractors (placers of orders) and of subcontractors when they are about to initiate negotiations to define the terms of their collaboration.

The first part begins with defining the concept of subcontracting and the various forms which it may take as a result of the nature of the anticipated commercial and industrial relationship and of the economic and juridical contexts thereof.

It is of prime importance that the parties should make their identities and positions mutually clear so as to evaluate the economic environment in which the prospective commercial relationship will be conducted. It is of course obvious that the type of economy prevailing in the country, laissez-faire or planned, the convertible or non-convertible nature of the currency and the freedom of or restrictions on its movement, the tax and customs regimes, the geographical situation, the transport infrastructure and in a general way all the elements having an influence on the economy constitute factors which the future co-contractors should consider before concluding a binding agreement.

The agreement as such will result from this initial analysis and its simplicity or complexity will depend precisely on the nature of the collaboration to be instituted and of the economic climate.

Following this preliminary ratiocination, a choice should be made regarding the text of the agreement to be concluded, the aim being to choose the most simple wording provided that this imparts to the relationship between the parties the degree of precision and reliability necessary for success.

The second part of the guide is devoted to discussing the various formulations available. The importance and content of each clause together with its possible repercussions are considered in this section so as to enable each interested party to appreciate their scope and to make an informed choice of the provisions which will govern the transaction.

The third part of the document is made up of examples of order and agreement forms which apply the principles set forth in the second part, and its purpose is thus to provide main contractors and subcontractors with models which in some cases will require only supplementing and in others will call for adaptation.

Our hope is that the users of this guide will find therein first and foremost assistance in the direction of their train of thought, then a kind of glossary of the clauses to be used with their meaning and implications, and finally texts easy to use and making possible the rapid conclusion of transactions and their implementation under conditions of juridical safety.



## FIRST PART - PRE-CONTRACTUAL CONSIDERATIONS

### 1. VARIOUS TYPES OF SUBCONTRACTING

Depending upon their nature, the objectives pursued by the partners, their capacities and all the other features of the transaction being planned, the subcontracted services or supplies result in subcontracting relationships possessing varying characteristics which will have an effect on the agreements to be concluded.

The categories enumerated here are by no means exhaustive, but should assist in classifying the economic relationship involved and in identifying the commercial practice prevailing in the field to which it belongs.

#### 1.1. Classification by nature

##### A. Speciality subcontracting

The subcontractor is a specialist in a certain field of technology either because he has a particular skill which he has been able to develop and which has provided him with experience or know-how which are sought after, or because he has available specialized facilities or equipment with which special processes or products can be carried out or obtained.

The main contractor (or the owner) will look for a subcontractor in the light of this speciality and the subcontractor, if he wishes to protect his commercial position, must ensure that execution of the order accords with his reputation or even enhances it as a result of the satisfaction to be given to the main contractor.

At the legal level, the latter may of course adopt a demanding attitude to the extent that the very reason for subcontracting is recourse to a specialist, as a result of which the quality guarantees may be extremely stringent and place the subcontractor under an undisputed obligation to furnish fully satisfactory results.

The nature of the product or of the services to be supplied may be such that little or no tolerance will be allowed as regards the result, leading either to the unconditional acceptance of the product or service or to its outright refusal.

##### B. Capacity subcontracting

The main contractor may find himself faced with a transient or longer-term increase in demand, which he does not wish to meet by increasing his own production capacity.

He will therefore have a product for which he holds the specifications, workshop plans and all technical data. Handing these over to a subcontractor who happens to have underutilized production capacity will enable the latter to manufacture the product to the same quality standards as those of the main contractor himself.

Subcontracting of this kind will presuppose that the complete technical specifications will be placed at the disposal of the subcontractor and that the latter will undertake to use these specifications only for execution of the order entrusted to him.

C. Relocation subcontracting

This bears some resemblance to capacity subcontracting. A manufacturer operating in a country where production costs are high decides to relocate the production of an article or of components thereof in a country with lower production costs, usually in a place where labour is cheaper. There are today numerous examples of this in the textile, electronic and other industries.

The subcontractor is under the complete control of the main contractor who, in most cases, supplies the raw material to be processed, defines the specifications of the product and takes over the entire output thereof. In such a case a subcontractor becomes in effect an annex of the main contractor, indeed as frequently occurs he becomes a branch establishment, except that the distinction between the legal personalities is maintained in the case of subcontracting.

1.2. Classification by frequency

A. Occasional subcontracting

This is casual subcontracting within the context of a specific transaction or case. The main contractor is an entrepreneur or manufacturer and for reasons of convenience wishes to transfer to a subcontractor a certain operation, piece of work or product.

The agreement underlying the arrangement should be made to measure and should regulate the relevant factors in detail, since the parties will be unable to base themselves on a history of past cooperation. This does not mean that it will be necessary to have recourse to complex juridical formulae but only that the parties should make sure that all the factors entering into their relationship are clearly defined.

B. Habitual, possibly long-term, subcontracting

Complex industrial products frequently call for the subcontracting of their components to specialists for a long period, the period, for example, of the run of a model. Thus, motor vehicle and aircraft manufacturers etc. frequently entrust vehicle instrumentation, and even aircraft engines, to subcontractors who virtually become co-producers since the models in question are so designed as to incorporate their products.

In this case the contracts will operate on a long-term basis, their terms will be negotiated right from the outset and they will contain provisions for readjustment and for adaptation of the transaction to factors which vary with time.

These relationships may assume the aspect not of genuine subcontracting, which presupposes a hierarchically organized legal relationship between the ordering party and the party executing the order, but rather that of a

partnership in which the parties are equal and collaborate on the manufacture of a product which may, under certain circumstances, bear their trade marks or joint trade mark.

1.3. Classification implying special collaboration

A. Subcontracting based on processing of raw materials supplied by the main contractor

This arrangement can apply to any of the categories listed above. The main contractor wishes the subcontractor to supply him with an article whose characteristics correspond exactly to what he has described, and which he wishes to incorporate into an apparatus or to sell on the same conditions as if it were the article which he himself manufactures or used to manufacture.

The attention of the subcontractor should be concentrated not only on obtaining all the specifications, plans and other details necessary for production but also, during the entire period of the subcontracting arrangement, on consistency in the quality of the raw materials delivered to him for processing.

B. Subcontracting involving the provision of specialized tools by the main contractor

The subcontracted production is highly specific and can be effected only using special tooling not available in the trade or difficult to acquire, and which the main contractor has himself developed, or using moulds whose ownership normally remains with the main contractor, or, finally, using materials supplied by the main contractor.

This form of subcontracting requires that the arrangements for making available these tools should be clearly defined, as should be the training of staff, if necessary, for using the equipment in question.

This kind of subcontracting will frequently fit into a pattern of long-term subcontracting.

C. Research or service subcontracting

This type of subcontracting frequently comes within the realm of the habits and customs which govern the field to which the subcontracted assignments belong.

Thus technical, economic or organizational studies are generally awarded under engineering contracts which, as regards their form and the definition of the liabilities of the subcontractor, correspond to a very widespread and accepted practice, to which the contract should conform.

The same applies to assignments for the inspection and acceptance of manufactured articles and, in an even more prominent manner, to the transport of industrial products which, in most cases, follow their own legislation.



B. In the case of works or a service:

1. Is it an independent piece of work or, on the contrary, is the subcontracted work part of a whole, dependent upstream on what is being carried out by a third party and controlling downstream what will be effected by another third party?
2. From whom will the technical specifications originate and how will the schedule of operations be organized?
3. What will be the conditions external to the subcontracting relationship which will govern the acceptance of the work? (e.g.: hydraulic or electrical intervention)

2. LEGAL CONTEXT

The subcontracting operation will be affected by the legal context of the deal to be negotiated, and this will depend on certain factors which should be considered.

2.1. The legal personality of the main contractor

The legal status of the latter should be considered for the purpose of deciding whether a private business person, a company or a public body is involved, the financial hazards associated with these various entities not being the same.

The financial situation of the undertaking should also be checked since the main contractor is going to be responsible for the price of the subcontracted order. Businessmen are normally under an obligation to publish their accounts and this is always so in the case of private law companies. It is therefore easy to discover the financial past of the main contractor. His present situation is more difficult to estimate since the accounts published are at least six months old, although banking information can be requested and guarantees of payment can be arranged.

If the subcontracting relates to an operation whose main contractor is only one of the parties involved or is, possibly, the overall entrepreneur, then provided that the subcontracting transaction is of some significance the subcontractor may obtain information on the main contractor's capacity to pay via the owner, or final customer, and invoke any legal guarantees.

Indeed, some legal systems grant subcontractors a preferential claim on moneys due from the owner to the overall contractor, so that the subcontractor can ensure the retention of such moneys in the hands of the owner and thus ensure the recovery of the amounts owing to him, when these have been verified.

2.2. The legal personality of the subcontractor

Similar questions arise with regard to the subcontractor. It is not likely that he will be responsible for the cost of the operation but his financial situation will have an influence on his capacity to execute the order. He should be in a position to pay for his labour, raw materials, power etc. and his solvency is therefore essential for the completion of the subcontracting relationship.

If the order makes provision for a payment on account, the main contractor will be justified in wishing to ascertain that the advance he makes will be actually invested in the execution of the order, and may possibly request security for return of the payment on account and security for completion. These guarantees will be obtained by the subcontractor only if he is in a sound financial situation.

### 2.3. Nationality of the parties

If the main contractor and the subcontractor are of the same nationality, the relationship between them will be facilitated since only one legal system will be applicable. This will not be so in case of different nationalities, and the transaction will then be placed within an import-export legal framework.

### 2.4. Taxation

If the relationship is confined to one country, the fiscal situation will be the same and each party will be aware of the tax implications for the transaction and hence the influence of taxation on price. If the fiscal system also makes provision for a turnover tax, the latter will be added to the price and will be the responsibility of the main contractor. If a value-added tax (VAT) system is operated, payment thereof will be the responsibility of the final customer alone (ultimate beneficiary - owner), since intermediate VAT payments are recoverable.

Other taxes levied on an industrial or commercial activity, licence dues, energy tax, income tax etc. are normally included in the manufacturing cost price and their impact will have been taken into account when prices were compared.

In the case of an international subcontracting relationship, the situation is of course more complex.

It should be stressed at the outset that as a general rule the relationships between a free zone and the country in which it is situated amount to an import transaction for this country in exactly the same way as for a third country effecting imports from this free zone.

The questions which arise are mainly to check whether the dues normally levied in respect of an internal transaction are similarly levied in the case of an export transaction on the one hand and an import transaction on the other.

Generally, there is exemption from VAT on exports and levying of VAT on imports. In cases of turnover tax, a check must be made to determine whether it is applicable. Some countries also subsidize exports, either directly or in a disguised form through the application of preferential tariffs.

Furthermore, bilateral or regional agreements and double taxation treaties may have an impact on taxation and the mode of collecting taxes, and the organization of free zones may constitute an entirely special situation.

All these features therefore call for careful consideration by the subcontractor when calculating the cost of providing his services or supplies and by the main contractor when taking the decision whether to subcontract.

## 2.5. Customs regime

The above considerations regarding taxation also apply to customs matters, with the proviso that this item is to be taken into account only in the case of an export-import transaction.

The first step is to study the customs tariff applicable to the subcontracted goods or services, either under normal conditions if the exporting country is not bound by particular arrangements with the importing country, or under a preferential regime if a bilateral or multilateral agreement is in force.

This study of the documentation should enable both the main contractor and subcontractor to determine the impact of customs duties on the cost of the goods or services subcontracted.

Consideration of this factor can be of particular importance in cases of import of material for processing, assembly or finishing. It will then be a matter of temporary importation, the arrangements for which should be determined in the light of the applicable legal provisions.

## 2.6. Import-export licences

The import and the export of certain goods to or from certain countries may be subject to licences which have to be obtained in advance. Before concluding the subcontracting transaction, it should therefore be determined whether such transaction will be subject to licensing of this kind and, if so, whether the licences can be obtained. Refusal of a licence would constitute an impediment to the execution of the contract which would not represent a case of force majeure if the regulations in question were in existence before the conclusion of the transaction and where the exporter or importer concerned should have been aware of this.

## 2.7. Transport

In certain cases, transport may call for preliminary authorization in the case of dangerous or unhealthy goods, or also in the case of bulky items exceeding the normally permitted dimensions.

These transport operations are naturally more expensive and will therefore have an effect on the cost of the subcontracting arrangement. This is a factor which must be taken into account when negotiating the subcontracting transaction.

## INITIAL QUESTIONS UPON NEGOTIATION

1. What is the legal status of the main contractor: public body, private company, physical person (alone or supported by a team)?
2. What is his financial situation - most recent balance sheets, banking information?
3. What will be the conditions of payment for the order - are there grounds for making provision for guarantees - is the subcontracting operation part of a whole and will the conditions of payment for the principal contract have an effect on those relating to the

subcontract - has the subcontractor a preferential right to the moneys due from the owner to the principal entrepreneur?

4. What is the legal status of the subcontractor: public body, private company, physical person (alone or supported by a team)?
5. What guarantees should be provided to ensure that deposits and other advances on the price will actually be used for carrying out the order?
6. Is it a subcontracting arrangement of a purely internal nature or, on the other hand, is it an international transaction and, if so, what is the applicable legal framework - no bilateral or multilateral treaty?
7. Depending on whether the transaction is national or international, what will be the applicable tax regime - VAT - turnover tax invoiced to the purchaser - internal dues (energy, wages, licence fees, etc.) which form part of the cost price?
8. In the case of an international transaction, are there favourable terms applicable to the order - tax exemption - subsidies - other inducements to promote exports?
9. In the case of an international transaction, what will be the applicable customs duties - normal tariff or rate, or preferential tariff or rate by virtue of an agreement - temporary import regime?
10. What type of transport is contemplated - normal - dangerous goods - bulky equipment - special permits?

### 3. GEOGRAPHICAL ENVIRONMENT

The geographical environment also has an effect on the subcontracting deal since the raw materials or products to be processed must be brought to the subcontractor and the finished items must then be collected from him for delivery to the main contractor.

The proximity of an important road, a railway, a navigable waterway or a port, the means of transport to be used, the transshipments necessary, the point of customs inspection, the type of customs inspection to which the goods will be subjected, the time required for this inspection together with the incidental expenditures to be incurred - all these are factors to be taken into account since they will have an impact on both cost price and delivery times.

In this connection, the delivery conditions to be agreed will be of great importance since, depending on the arrangement selected (ex-works, minimum, free purchaser's headquarters, maximum), the transport, export and customs formalities will bear either upon the subcontractor or upon the main contractor.

It is here a matter of factual data which must be collected on the basis of the subcontractor's own experience or of experience which he has been able to elicit from colleagues or professional organizations.



## INITIAL QUESTIONS UPON NEGOTIATION

1. In the light of the geographical situation, what is the means of transport serving:  

the main contractor?  
the subcontractor?
2. What means of transport must be provided - will there be trans-shipments?
3. Is an import or export licence necessary? Is there a possibility of its being refused?
4. Where are the customs inspections carried out - are they likely to delay transport - must provision be made for incidental expenses?

## 4. THE FORM OF SUBCONTRACTING

### 4.1. Consultation

Consultation of the subcontractor by the main contractor can assume several forms:

- Either consultation via the Industrial Subcontracting and Partnership Exchange (ISPE), which will carry out the desired investigations;
- Or direct consultation with a view to placing an order by mutual agreement;
- Or consultation effected simultaneously with other potential subcontractors (e.g. through the ISPE);
- Or a private or public invitation to tender with a deadline for submission of the offer and award of the contract.

The procedure to be selected by the main contractor, whether through the ISPE or not, will govern the work of preparing the invitation to tender, the form of the latter, the negotiations for the contract and the text thereof.

In the case of direct consultation or of simultaneous consultation of several potential subcontractors, or a consultation via the ISPE, the main contractor will forward to the subcontractors to be consulted, directly or via the ISPE, an invitation to tender containing the specifications of the goods or services to be subcontracted, and will normally indicate the deadline for a reply.

Since this is an informal procedure, even in the case of intervention by the ISPE, which confines itself to bringing the parties together, bilateral contacts will be possible for the purpose of clarifying the features of the consultation and gaining an idea of the main contractor's expectations. The invitation to tender itself will usually contain all the items necessary for its evaluation, but it can be refined and supplemented in the dialogue which will ensue between the main contractor and the subcontractor consulted.

In the case of an invitation to tender with a deadline for making the award, the procedure will be much more formal and bilateral contacts will be in principle forbidden in order to afford the same opportunities for all the subcontractors consulted.

The documents will not be the same since, in this case, the subcontractor will normally have access to a list of specifications to which he must reply in a precise manner and in set terms.

The consequence of the choice of consultation procedure lies in the rigid nature of an award procedure, from which any form of negotiation is virtually excluded, while on the contrary in the case of transactions by mutual agreement, these are organized on the basis of a dialogue between the parties.

The documents relating to a mutual agreement will normally be composed of:

- An invitation to tender in the form of a letter containing specifications from an ordering party;
- An offer by the subcontractor in the form of a letter replying to the specifications, giving the price of the goods or service, the scope of the offer in the case of services and the conditions of delivery in that of goods;
- The order or contract form which confirms the order and fixes the conditions thereof.

The documents in the case of public tendering will be composed of:

- Specifications which must be obtained, sometimes against payment, from the main contractor;
- Submission of the subcontractor's offer;
- Acceptance of the offer and the order to start its execution.

It may happen that tendering is confined to a limited number of participants who may have been pre-selected by an advance qualification procedure.

#### 4.2. Signing of the contract

The form of contract will depend on the subcontracting procedure selected and on the type of subcontracting in the light of the considerations set forth in sub (1) above.

In the case of tendering, the invitations to tender making up the overall conditions will constitute the contract. They will normally be composed of:

- Specifications of the order;
- General conditions;
- Special conditions;
- The order form.

This set of documents will govern in a precise and usually very complete manner the way in which the order is to be executed.

In the case of a transaction by mutual agreement, the order will be confirmed by a document normally taking the form of a contract to which are annexed the technical specifications possibly accompanied by certain documents having constituted the invitation to tender.

In the case of a service subcontract, the form will certainly be that of a contract, since it will be a matter of a transaction forming part of the project and requiring an agreement fully adapted to the relevant circumstances.

In the case of speciality or capacity subcontracts, if these make provision for the large-scale production of components or equipment or if they are of a longer-term nature, the subcontract could take the form of an order form setting forth the general and special conditions, possibly preceded by a framework agreement.

In the case of relocation subcontracting, complex, long-term agreements will be involved, whose wording will necessarily require to be adapted to the relevant circumstances.

#### QUESTIONS AT THE TIME OF OFFER AND ITS ACCEPTANCE

##### A. The main contractor:

1. What type of consultation should be used - public invitation to tender - consultation regarding a transaction by mutual agreement via the ISPE or directly?
2. In the case of a public invitation to tender, how to draft the overall conditions of the contract and what flexibility should be left to negotiation?
3. In the case of mutual agreement, what type of contract should be used - an agreement drafted ad hoc for full adaptation to the circumstances of the deal - order form based on general and special conditions which will permit an easy repeat of orders?
4. What is the financial status of the subcontractor?

##### B. The subcontractor:

1. With what type of consultation is the transaction being initiated and what will be the room for manoeuvre as regards negotiating conditions and price?
2. Depending on the type of consultation, what will be the strength of the competition and what will be its origin?
3. In the case of a transaction by mutual agreement, what is the most suitable type of contract for the deal anticipated and the most practical as regards its execution and repetition?

## 5. EXECUTION

Execution of the subcontract is of course essentially the business of the technicians who are going to be responsible for it.

From the juridical point of view, what are the aspects requiring particular attention?

### 5.1. The obligations of the subcontractor

Of necessity, the subcontractor depends for the execution of the order on the main contractor, whose degree of independence can vary depending on whether he is the actual owner/entrepreneur in respect of the transaction or whether he himself is only a subcontractor for a part of a whole in respect of which he depends on the actual owner.

The data originating from the main contractor will be the specifications and definitive or basic plans, upon which engineering details must be worked out.

If the case is simple and the subcontract relates to clearly-defined goods or services which are not going to change and which can possibly be executed without constant liaison with the main contractor, the situation will be relatively risk-free.

If on the contrary the case is complex because the subcontract forms part of a larger whole, the specifications are going to change and delivery times will be constantly affected by these developments and the action of other subcontractors, so that the application of the normally strict contractual provisions will need to be accompanied by very careful administration of the contract.

By this is understood a statement of the deadlines for the main contractor to carry out his obligations and the way in which he carries them out, with the result that any non-execution, any delay or any error should be recorded and if necessary notified to the main contractor.

The same attention must be paid to raw materials, and to the tools to be supplied by the main contractor if the contract so provides. It frequently happens that difficulties in executing the order result from raw materials delivered which do not precisely meet the specifications or from tools which do not possess precisely the expected effectiveness. Such factors of course give grounds for total or partial exoneration of the subcontractor's liability and the only way to be in a position to invoke them is to have them recorded and notified in time, in other words at the time when non-compliance with the contractual specifications has been determined.

Disputes may arise during execution of the contract following delay, non-execution or faulty execution of obligations by the main contractor or by the subcontractor. These disputes will normally involve disagreements regarding the execution of part of the contract, without affecting the basic contractual relationship. Such situations can usually be settled through the

intervention of an expert to be appointed jointly by the parties or by an authority named in the contract. This expert will be empowered either to settle the difficulty or to recommend solutions which the parties shall have the right either to accept or to reject.

In case of rejection of the solution offered by the expert, as also in case of a fundamental disagreement, the parties will have no alternative but to refer to the judicial or arbitration authority named in the contract.

## 5.2. The obligations of the main contractor

On the other side of the contractual relationship is the main contractor. He is normally bound by other obligations, which will usually be commercial if he is concerned directly with the transaction, or contractual if he is contractually bound with vis-à-vis an owner or is himself party to a subcontracting arrangement.

As from the time when the order is signed, the main contractor will be responsible for ensuring the proper execution thereof.

The initial concern will be to verify the capacity of the subcontractor by studying his financial status and technical ability, including a check on the material facilities at his disposal.

The next step will be to ensure that deposits and advance payments are actually invested in the execution of the order, and this can be effected by requiring security for the advance, by making payment of advances conditional on the execution of certain stages of the order, and by the provision of a guarantee of completion which will be extinguished only after the complete and satisfactory execution of the order.

These guarantees do not, however, make it unnecessary for the main contractor to undertake, if the nature of the order so justifies, inspections while execution or manufacture is under way, and to proceed to the acceptance of works on the site where they are being carried out and of manufactured goods in the maker's workshops. These controls and inspections can be carried out by the main contractor himself or by specialized firms acting on his behalf. Such controls will also be useful for the subcontractor since their carrying out will involve enhanced quality control, and will make it possible to reveal defects sufficiently long in advance to remedy them at minimum cost and with minimum loss of time.

## ESSENTIAL POINTS TO BE CONSIDERED DURING EXECUTION

### A. For the subcontractor:

1. Conformity of the equipment provided and of the raw materials with the specifications;
2. Delays in execution of his obligations on the part of the main contractor;
3. The need to record any divergence on the part of the main contractor in fulfilling his obligations when this affects the deadline or the actual execution of the order, and the need to notify such divergence in an appropriate manner.

B. For the main contractor:

1. Check on his operational capacity (staff and production facilities);
2. Check on the use of the deposits and advances made during the carrying out of the order by demanding security for them or by linking them to stages of execution of the contract;
3. Inspection on the work site or in the workshop of the progress of execution of the order and acceptance of the services or goods either directly by the main contractor or by a specialized undertaking.

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6. APPLICABLE LAW - DISPUTES

6.1. Applicable law

Execution of the order will in the first instance be subject to rules and standards - a kind of technical law which has the advantage of being international. The specifications will refer to these rules and standards, whose provisions are clear and precise and whose application can scarcely lead to differences of opinion.

Other legal provisions in force in the country of the subcontracting transaction will apply, as a minimum standard, to execution of the order, for example tests regarding pressure vessels, health regulations and, for civil engineering work, five-year or ten-year endurance guarantees as provided by most legislations.

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Whatever the contractual stipulations, these legal provisions applicable at the place of execution of the order or the place of utilization of the goods concerned will of necessity apply because they are mandatory.

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There remains the legal interpretation of the contractual obligations, in respect of which the parties have a choice between their domestic law or the law of a third country.

If the subcontracting transaction is being carried out in the same country as that of the main contractor, it is of course the domestic law of the parties which will be applicable.

If the subcontracting operation is part of a work whose execution involves a number of subcontractors, it will be in the interests of the parties to have legal uniformity applicable to the entire execution of the operation and hence to refer to the law governing the principal contract.

If the parties are not affected by such constraints, they will have the choice between the law applicable in the case of each of them or, possibly, the law of a third country which would appear not to offer advantages to either party. The legal provisions governing such matters are frequently very similar to one another and can sometimes be to the advantage of the subcontractor and sometimes to that of the main contractor, but since the nature of a future dispute cannot be foreseen, neither of the parties is in a position in advance to make a choice advantageous to himself.

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There are two recommendations that may be made here:

- Possession of at least a superficial acquaintance with the law to which the contract will refer and not choose the law of a third country simply so as not to give an advantage to either of the parties;
- If the country in question is emerging from a state of economic dirigisme and its legislation is still being developed, it is preferable to choose the law of a country already long enjoying liberal legislation and in which there is an abundance of case law.

## 6.2. Disputes

It is obvious that a dispute exists only when all the other procedures for friendly settlement of the difference have been exhausted. In case of a dispute, since the parties cannot agree, they have of necessity to entrust settlement to a third party.

The parties should then have three main concerns:

- The type of court called upon to make a settlement;
- The duration of the proceedings;
- The cost of the proceedings.

The most normal method is to resort to the court within whose jurisdiction the registered office of one of the parties is situated. This is obviously the course to take when the subcontracting operation is taking place in the same country; it is less natural when the parties are of different nationalities and the plaintiff has to plead in a country which is strange to him and where he will feel himself at a disadvantage. This state of disadvantage should, however, not be exaggerated since the parties are normally represented by lawyers of the same nationality as that of the court and therefore appear before it on a footing of equality.

This procedure is the least expensive, since it is not necessary to pay the judges as in the case of arbitration. It is perhaps the slowest procedure in that the parties may have recourse to various jurisdictional instances and thus drag out the proceedings over a period of years.

The nature of the court will depend on its capacity to judge the dispute, because it has already had the opportunity of dealing with similar disputes, on case law and also on the integrity of the judges, which varies from country to country.

Access to a court is always possible, even to a party in financial difficulties, because the sum of money to be advanced is minimal in comparison with that called for under arbitration.

The other procedure is that of arbitration, where a distinction can be made between "ad hoc" arbitration and "institutional" arbitration.

Ad hoc arbitration is organized by the parties themselves, who appoint the arbitrators directly or have them appointed by an institution selected by common agreement, and which could also be the ISPE. This method is good and effective in that the parties have agreed to entrust to private judges the task of making a settlement, which implies a will to resolve the dispute. It is the least expensive of arbitration procedures, since only the arbitrators need to be remunerated and not the institution organizing the arbitration. It is relatively short, since it will take the same time as an ordinary case before a single instance, arbitration being normally final and allowing of no appeal.

Nevertheless, the procedure implies the agreement of the parties, which of course is not always possible in the case of a dispute. In the absence of such agreement it is not possible to proceed by default and ad hoc arbitration is thus excluded.

"Institutional" arbitration is organized by a chamber of commerce or an international institution which has available a court of arbitration operating under a set of regulations. The advantage of this system is that the parties face one another in an organized encounter which may be promoted by the plaintiff alone and which is thus capable of leading to proceedings by default.

The disadvantage is its cost which involves the payment of fees to the institution in addition to the arbitrators, and the plaintiff is obliged to advance the whole of these costs in case of default by the defendant.

There are a number of arbitration institutions.

The United Nations Commission on International Trade Law (UNCITRAL) has developed conciliation and arbitration rules which leave the highest degree of independence to the parties as regards appointment of the arbitrators and of the outside authority responsible for designating them in case of default or disagreement. This settlement is very close to ad hoc arbitration and eliminates the drawback attaching to the latter by designating as authority responsible for appointments in the absence of agreements by the parties the Secretary-General of the Permanent Court of Arbitration at The Hague, a part of the International Court of Justice. It should be remembered that the International Court of Justice is itself competent only to judge disputes between States.

The best known among the other organizations concerned are the International Chamber of Commerce in Paris, the Euro-Arab Chamber of Commerce, the Stockholm Chamber of Commerce, etc.

Many professional organizations have their own chambers of arbitration and there is nothing to stop ISPEs from setting up their own arbitration and expert evaluation system, bringing this within the financial reach of their members.

Arbitration awards are generally definitive and hence not subject to appeal. However, most legal systems make provision for actions for invalidity for special reasons such as the fact that they are contrary to public policy, that the rights of the defence have been disregarded, that there exists inconsistency of reasons, that they have been obtained by fraud, etc.



It must be pointed out that there are cases where the loser alleges invalidity of the arbitral award simply in order to delay its execution until the court has taken a decision, which involves a respite of several months.

ESSENTIAL POINTS TO BE CONSIDERED AS REGARDS APPLICABLE LAW AND DISPUTES

A. As regards applicable law:

1. What are the rules and regulations governing application - are they determined by the main contractor or left to the discretion of the subcontractor - in the latter case, do these technical rules and regulations conform to those applicable in the country for which the goods or services are intended?
2. What are the mandatory legislative provisions applicable to the subcontracting transaction (safety - pollution, etc.)?
3. Does the applicable law present a problem? No, in the case of a relationship under domestic law - possibly, in the case of a relationship under international law.
4. Are the legal systems of the two countries involved different? Is there any disadvantage in accepting that of the main contractor or that of the subcontractor? If so, is it necessary to choose a third country, which one, and why?

B. As regards disputes:

1. Can jurisdictional competence be left to the ordinary court of the location of the defendant, or must a court be chosen and jurisdiction entrusted to it?
2. Would it, instead, be advisable to include in the contract an arbitration clause, and if so should the "ad hoc" or the "institutional" type of arbitration be selected? In the latter case, what institution should be chosen?

Note:

The parties should be aware of the costs of arbitration and of the need to pay them in advance, possibly in their entire amount, if the defending party refuses to meet them. These costs will finally devolve upon the losing party.

SECOND PART - CLAUSES OF THE CONTRACT

PRELIMINARY OBSERVATIONS

The contractual documents may have different names: agreement protocol, convention, contract, order form, etc. These titles have no legal significance and the agreement between the parties should be described by its content, namely by the nature and actual characteristics of the undertakings given therein.

A letter of intent which is normally not binding or weakly binding can in fact have the value of a fully effective agreement if the parties agree to fulfil certain obligations vis-à-vis one another. A contract which has the full outward appearance of one may on the other hand only be an intention if the obligations appearing in it are taken subject to a suspensive condition or even a potestative condition.

As a reminder:

- A suspensive condition makes the definitive nature of an obligation dependent on a future or uncertain event, or on an event which has actually occurred but is still unknown to the parties, for example, a financing agreement to be obtained from a banking institution;
- A potestative condition is one which renders execution of the agreement dependent on an event which it is in the power of one or other of the contracting parties to bring about or to prevent.

Sound usage of the designations of contractual documents should, however, be recommended:

The term "letter of intent" or any other title recording the agreement of the parties as regards intentions will be confined to the initial agreement in which reference is made to collaboration but on which no binding undertaking has yet been accepted, except that of considering whether the intention is feasible;

The term "protocol" will normally be confined to a preliminary agreement to be followed by other more detailed agreements or by supplementary agreements to a principal agreement binding the parties;

The term "convention" will cover a binding agreement of the parties to collaborate or the decision of one of the parties to entrust the other with a mandate to research or execute another assignment against payment or some other form of indemnity;

The term "contract" will refer to the document representing the order for goods, work or services, or the hiring of goods or services in which the synallagmatic status is complex, namely, whose execution involves more than the simple consideration of payment of the price by the project manager or main contractor;

The use of the term "order form" will designate the document placing an order for goods and services easy to define and normally of a repetitive nature.

Finally, it may be recalled that a contract is **synallagmatic** or bilateral when the parties undertake reciprocal obligations, as opposed to a unilateral contract under which one of the contracting parties is under an obligation vis-à-vis the other without there being corresponding undertakings on the part of the latter.

The choice of type of document should thus depend on the nature of the agreement involved, and in the case of subcontracting, of the subject thereof.

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## THE CLAUSES OF THE CONTRACT

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f. This chapter examines and comments on the clauses which are normally found in a contract. In order to understand their linkage and sequence, the logical and normal order of a contract is followed in this study. In cases where the documents used take the form of general and particular conditions separate from the document attesting the agreement of the parties, the order of the clauses will be different but the following comments will remain valid.

### 1. DATE

It is essential to date the contract even if the date appearing thereon is only the date of signature and not of entry into force. It is quite important to mention this point because it very frequently occurs that key documents are not dated as a result of the fact that the parties have forgotten to date them.

When a document bears no date, it then becomes necessary to refer to external factors, basically the correspondence that has taken place, in order to determine the date and that may cause difficulties.

When a document is not signed simultaneously by the parties because signature is effected by dispatch of the document to the party signing chronologically in second place, it is normally the date of the second signature which becomes that of the contract, and the party signing in second place should be asked to enter the date. It is also fully conceivable that each party dates his signature; in such case it is the later date which is the date of the contract.

The parties can quite easily agree on a date for the contract which is not the date of their signatures, since we are in the realm of the freedom to contract.

It is also helpful to indicate the place of signature because there is a legal principle called "locus regit actum", under which it is the law of the place where the document is drawn up which determines its form. This feature is less important in international trade law, but nevertheless the information may prove useful in case of a subsequent dispute.

The date should be placed either at the head of the document or at its end. Preference may perhaps be given to stating the date at the head of the document because that diminishes the risk of its being forgotten.

### 2. IDENTITY OF THE PARTIES

The parties should be identified by their precise and full names, together, in the case of a company, with an indication of their legal status, their registered office and their place of business if the latter is different, the trade register number and the VAT number if this taxation regime is applicable to the contract.

The name and attributes of the physical signatory representing the contracting party should also be stated and the nature of his powers should be indicated. It is desirable to attach to the contract evidence of his power to

commit the contracting party. Such evidence may be an authenticated power of attorney, an authenticated extract from the trade register or a certified and authenticated extract from the minutes of a board of directors. This precaution is by no means unnecessary, because it can happen that the powers of the signatory of a contract are subsequently contested by the contracting party.

In the case of regular commercial relationships, these formalities can of course be relaxed, but they should be respected during the early stages of these relationships.

Identification of the parties should also enable them to know who they are, parent company or subsidiary, since a famous name may cover a company without financial solidity established for a particular purpose.

### 3. PREAMBLE

The preamble does not enter into the operative part of the contract which becomes binding on the parties. It is the introduction to the contract and describes its framework by referring to the objectives of the parties and to the previous démarches undertaken. When official authorizations have been requested and granted, this should be mentioned so as to locate the contract in its legal framework.

The preamble is thus not essential but is useful for assessing the position of the contract and yielding a better appreciation of its scope.

#### Example of a preamble:

The main contractor has concluded a contract with the Owner ... for the construction at ... of a ... plant; this contract came into force on ... and the Work should be completed ... months after that date, i.e. on ...;

This Work has been approved by decree ... of the Government of ... and has been declared to be of public importance ...;

The Subcontractor is specialized in the manufacture of ... and has available numerous relevant references, particularly ...; the Subcontractor, after studying the specifications of the order, has stated that he is in a position to execute them under the terms of this contract;

The parties have therefore decided to conclude the present subcontracting agreement, believing that it will be of mutual profit to them.

### 4. DEFINITIONS

It is of great value to define at the start of the contract the main concepts which are going to be used. The words and expressions defined then appear in the contract with capital letters, are always used with reference to the particular concept concerned, and are never used in other senses without care being taken and, in such circumstances, always without a capital initial.

Some terms will be defined by reference to an annex which will contain their entire range, for example the technical specification, regulations and standards etc.

Apart from these terms the expressions to be defined, which will naturally vary depending on the case, cover concepts such as:

Patents and know-how;  
Trade marks, drawings and models;  
The product or service;  
The engineering component;  
Etc.

During drafting of the contract, the concepts to be defined appear by themselves, simply to avoid having to explain their meaning on each occasion.

Example of definitions:

Patent: means patent number ... registered at ... on ... and whose validity will expire on ...; this patent covers the manufacture of ...;

Engineering: means the set of studies, calculational notes, drawings and other technical documents that have to be prepared for carrying out the Work;

Work: means the ... plant to be erected on the Site;

Site: ...;

Product: means the ... which will be manufactured at the Work;

Etc.

**5. PURPOSE OF THE CONTRACT**

As in the statutes of a company, the purpose of the contract is the essential clause containing the definition of the contractual relation.

It should clearly summarize the agreement, indicate the nature of the contract (service, supply, structural work etc.), whether it is one-time or repetitive, and whether it involves an obligation of means or an obligation of result.

The obligation of means is that which is inherent in a service to be rendered, namely a service which must be carried out with skill and conscientiousness; proof of non-fulfilment is less easy since the dispute will often bear on the quality of the service or its scope.

The obligation of result is that which obliges the debtor to carry out a piece of work or to supply an item of goods which meets the stipulated

characteristics and non-fulfilment will be easily established if the result has not been achieved.

The purpose therefore confirms the agreement of the parties as to their mutual obligations under the contract and as to the nature of these obligations.

Example of purpose:

The Main Contractor entrusts the Subcontractor with the manufacture and supply of the Product intended to be incorporated in the Work.

The product will conform to the plans and specifications appearing in annex ... and will be delivered according to the procedures, within the time-limits and at the price stipulated in this contract.

**6. OBLIGATIONS OF THE MAIN CONTRACTOR**

Commercial contracts are synallagmatic contracts, that is to say the contracting parties accept mutual obligations, even if the obligation of the main contractor is limited to paying the price of the goods ordered.

In most cases, the main contractor will be called upon to fulfil obligations on which execution of the contract will depend. These may be:

- Provision of specifications and plans;
- Approval of the detailed plans within the time-limit specified;
- Provision of moulds or models of manufacture;
- Supply of specific raw materials;
- Placing of orders for the product at the intervals and in the quantities which will have been agreed;
- Undertaking inspections during manufacture;
- Taking delivery of the product and arranging for its acceptance within the time-limit specified;
- Paying the price in accordance with the agreed procedures;
- Notifying the subcontractor as soon as he is apprised of any event liable to modify execution of the contract.

This article should summarize, possibly by reference to other clauses of the contract and to its annexes, all the services which have to be furnished by the main contractor in order to permit the subcontractor to carry out his contractual obligations.

Example of clause:

The Main Contractor undertakes to:

- Deliver to the Subcontractor within the time-limits and in the manner specified in article ... the plans and specifications for the product and to examine with a view to approval the detailed plans which will be submitted to him, in accordance with the procedure described in article ...;
- Supply the models or moulds for manufacture within the time-limits specified;
- Furnish the specified raw materials;
- Proceed to inspections and acceptance of the Product in accordance with article ...;
- Notify the Subcontractor of the general layout and development of the work site in order to enable the Subcontractor to integrate his obligations therein ...

#### 7. OBLIGATIONS OF THE SUBCONTRACTOR

This article corresponds to the preceding one and lists what the subcontractor has to do in order to execute the contract.

These obligations may be to:

- Draft workshop drawings and submit them for approval within the time-limit agreed;
- Obtain and stock raw materials of the kind and within the time-limit specified;
- Permit inspections according to the agreed procedures;
- Protect the materials entrusted to him and insure them;
- Execute the work or deliver the product in accordance with the agreed procedures;
- Notify the main contractor of any event liable to affect execution of the contract.

This article will thus be a summary of all the obligations of the subcontractor elsewhere defined in the contract and, whenever necessary or expedient, care will be taken to indicate in respect of each obligation the reference to the article or annexed document where it is more extensively defined.

#### Note:

The reciprocal obligations contained in the bilateral or synallagmatic contract provide that in case of non-fulfilment of its obligations by one of the parties, the other may suspend execution of those obligations entrusted to it and which are affected by the non-fulfilment of the first party's obligations; the objection then raised is "exceptio non adimpleti contractus", i.e. the exception of non-execution of the contract.



Example of clause:

The Subcontractor undertakes to:

Submit to the Main Contractor, in accordance with the procedure set forth in article ..., the detailed drawings prepared by him and to make to such drawings, within a time-limit of ..., any modifications indicated to him by the Main Contractor;

Communicate regularly the data necessary for maintaining the general planning system, and subsequently conform to the directions ensuing therefrom;

Deliver the Product within the time-limit and in accordance with the procedures fixed in article ...;

Undertake testing of the Product with a view to verifying its characteristics guaranteed in accordance with article ...;

...

**8. DELIVERY OF THE PRODUCT**

This article should lay down the procedures governing delivery of the product.

The factors to be determined will include the following:

- The type of packaging in the case of a product requiring special protection, together with the storage conditions. It is necessary to be careful in this respect because liability may devolve upon the manufacturer if he fails to indicate that the product calls for special precautions for its storage;
- The point of delivery and the procedures for transfer of ownership. The most usual method is to use the INCOTERMS, namely the commercial terms which have been defined by the International Chamber of Commerce. The procedures involved range from "ex-works" to "free on site", via FOB (free on board), CIF (cost, insurance, freight) etc. The definition of these terms indicates up to what point the risks are incumbent upon the vendor and who is responsible for the various formalities governing shipment, particularly the obtaining of an export licence where required.

(The INCOTERMS figure in a regular publication issued by the International Chamber of Commerce.)

Example of clause:

The Product will be packaged in conformity with the provisions appearing in the technical specification, with an indication on the crate on the upper and lower sides, the word "fragile" and the directions for storage.

The Product will be delivered CIF port of ..., this term being interpreted in accordance with the INCOTERMS of the International Chamber of Commerce in Paris.'

## 9. DELIVERY TIME

The delivery time need not be binding and may be merely a simple indication. In these circumstances the liability of the subcontractor in cases of delay cannot be invoked unless he is really at fault and has been formally summoned.

In most cases the delivery time is binding, i.e. it is guaranteed and delay in delivery involves the liability of the subcontractor. This liability normally attracts penalties for delay (usually referred to as "liquidated damages").

The delivery time, however, is not always merely a date or a number of days, weeks or months as from the date of the order. Its point of origin can be another date than that of the order in cases where execution of the latter could not be started, for example, until the subcontractor was in possession of the plans. The delivery time may have to be changed if the subcontractor has to allow for factors external to the fulfilment of his own obligations, such as for example the contribution of other contractors to the execution of the work.

It frequently happens in complex work operations that the general planning system is guided by a critical path method which determines in respect of each obligation the latest date at which it must be fulfilled in order not to endanger the final date of delivery. This planning is constantly changing and each of the agencies concerned in the work should contribute his own data thereto. Liability for an overall delay, unless it is obvious, is then more of a collective phenomenon and the liquidated damages possibly imposed by the owner are shared in accordance with an agreed scheme.

### Example of clause:

The Product will be delivered, in conformity with the provisions of article 8, within ... of the date of entry into force of the order.

The above delivery time will constitute an essential component of the contract, and is guaranteed under pain of the liquidated damages laid down in article ...

or

The Product will be delivered, in conformity with the provisions of article 8, within the time which will result from the general planning directives, in whose preparation the Subcontractor shall be called upon to collaborate by notifying, within a period of two days of being so requested, all the information necessary for this purpose.

Since the delivery time relating to the order constitutes one of the essential features thereof, it shall be guaranteed under pain of the penalties laid down in article ... fixing the procedure for sharing the penalties imposed as the case may be by the Owner.

### Note on the following clauses:

The following clauses deal with situations which differ too much for it to be possible to offer examples of how to draft them. Examples can

only be resumed for the general clauses which will be considered subsequently. Thus it is on the basis of analysis thereof that the parties should draft their text.

## 10. GUARANTEES

Guarantees may be simple and refer only to the necessary conformity of the products or work subcontracted to the specifications appearing in the contract.

They may be more complex in the case of a subcontracted facility, which has to produce components meeting specifications as regards quality, quantity etc.

In such case, the guarantees could cover the following features:

- The quality of the product, guaranteed with or without tolerances as the case may be;
- The quantity produced by reference to a period of operation, a guarantee generally accompanied by tolerances;
- The output in relation to the consumption of raw materials, energy and the other factors associated with manufacture; this guarantee is normally given on the basis of a formula which takes account of all these factors, to which a cost price is assigned, and which balances out overruns and savings.

These are "guarantees of result" which are checked during tests conducted over a limited period under the supervision of the parties and possibly of their technical advisers. The securing of results guaranteed within the permitted tolerances brings about the acceptance of the subcontracted facility.

Results falling short of the guarantees which have been given constitute an obligation for the defects to be remedied and for new tests to be conducted. After the latter have been completed and the results obtained cannot be further improved, the sanctions laid down under the contract are applied. These normally consist of penalties when the results fall within a scale of tolerances, otherwise of provisional non-acceptance accompanied by the obligation to seek ways and means of remedying the basic defect resulting from the failure to obtain the guaranteed results. This may lead to the outright refusal of the facility with the obligation to dismantle it or to pay financial compensation, which may be very high.

To these "guarantees of result" is added the "guarantee of quality" of the facilities against design and manufacturing defects, which normally lasts for one year except in the case of continuous operation of the facility, when the mechanical quality guarantee may be reduced, for example, to six months.

### Note:

- First a comment should be offered on the subject of "latent defect". The manufacturer is bound by a guarantee regarding latent defects which is not limited in time. It is obvious that the passage of time

will reduce the risk of occurrence of a latent defect, but it remains a fact that such defects can appear after more than one year of use, i.e. after the expiry of the mechanical guarantee period. There is an obligation incumbent on the main contractor or the user of the product to inform the manufacturer thereof, in this case the subcontractor, as soon as the defect is discovered, on pain of being deprived of his guarantee rights. The claim under guarantee should be made by notifying all the data describing the nature of the defect which has been discovered, and the user naturally may do nothing which may worsen the condition of the product affected by the defect.

- The second comment concerns civil liability emanating from the product. This is in fact an extension of liability for a latent defect. If a product proves to be dangerous in use or, as a result of its defects, causes damage to a third party, the manufacturer's liability may come into play with consequent obligation to pay compensation which may be extremely expensive. Cases are relatively frequent in which, several months or years after their commissioning, all specimens of a particular model of motor vehicle must be returned to the workshop for modification of a dangerously defective component. If the subcontracted product may involve such liability, the subcontractor should be sure to take out insurance against this.

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11. ACCEPTANCE

This is the clause governing the procedures by which the fulfilment by the subcontractor of his contractual obligations is recognized.

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These procedures will differ in accordance with the kind of subcontracting involved, and in certain cases should form part of an overall procedure associated with a principal contract.

In the case of supply of industrial components or equipment, their acceptance will be governed by the conditions of delivery, and their conformity with the specifications will have been checked during the factory inspections or at the time of delivery. Delivery will therefore complete the contract, except as regards any possible mechanical quality guarantee, and will involve payment of the balance of the price.

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The situation will be more or less the same in the case of the provision of a service whose completion is marked by the delivery of documents, for example a final report, and this act will justify payment of the price for the service.

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In the case of structural work, an inspection thereof will determine whether they conform with the specifications and are complete. The minutes or report of the inspection will where appropriate point out what requires correction or completion before acceptance can be declared. When this has been done, acceptance will ensue with payment of the balance of the price.

Finally, in the case of a facility for which "guarantees of result" have been given, acceptance will involve tests over a period laid down in the contract, tests which will require repetition if the guarantee values are not immediately attained. When the process of checking guarantees has been com-

pleted, acceptance will follow, whether conditional or not, or alternatively refusal to accept, involving in any case a penalty on the completion of the contract.

Acceptance will then involve payment of the balance of the price or of the part of the price which is not the subject of dispute.

It may occur that acceptance of a part of a work or a facility forms part of acceptance of the entire work and that the subcontractor is thus exposed to the risk of execution of the principal contract. This situation, which is frequently found and is a complex matter, naturally calls for a careful consideration of the situation thus arising and of the risks which it involves.

It also frequently occurs that the balance of the price is not paid at the moment of acceptance but that a part thereof is retained until certain guarantee periods have expired or certain residual obligations have been fulfilled. It is normally helpful to replace these price deductions by bank guarantees which are considerably less expensive.

## 12. SANCTIONS - PENALTIES

There are certain contractual obligations which can be regarded as essential. Their total or partial non-fulfilment will therefore be considered as a serious breach of contract. Normally a serious breach of contract entitles the party having suffered from the non-fulfilment to obtain full reparation for the harm which he has suffered. Commercial practice, taking care to evaluate a priori the financial risk associated with the execution of a contract, has introduced the notion of penalty which represents a lump-sum evaluation of the damage and which is most frequently applied without checking whether the damage is actual or not.

It is normally delivery times for goods and services, even for documentation, together with completion times for execution of works which are guaranteed under pain of application of penalties, i.e. fines fixed in respect of each day or week of delay beginning with the guaranteed date extended or not by a slight tolerance. These fines apply on the basis of a daily or weekly delay for a certain period, after which, defaulting on the guarantee of delivery time is considered serious and entitles the main contractor to consider that the subcontractor is in grave breach of his obligations.

The same principle is applied in respect of "guarantees of result" as regards quality, quantity and output (according to the agreed formula).

It can happen that quality is guaranteed with no tolerance because the use of the product does not permit this. Failure to provide the guaranteed quality, when it is definitive, will therefore represent a serious breach of the contract.

Guarantees of quantity and output are generally accompanied by a certain tolerance penalized by a limit on the scale of the latter, and when the result lies below the limit of this scale it represents a grave breach.

The current practice is that a maximum should be agreed for each penalty and that a maximum penalty for the whole contract should also be stipulated,

this maximum being less than the sum of the various partial maxima. This is a matter for negotiation, it being the aim of the subcontractor to fix a maximum for the financial risk associated with the contract which he is going to conclude, for as long as the contract remains within the normal limits of execution.

When certain obligations under the contract are pronounced to be essential, it is likewise in the subcontractor's interest to have these sanctioned by penalties ("liquidated damages"). This enables him to evaluate his risk in advance and to take account of it in the calculation of his price, since he is equally in a position to evaluate the risk of delays occurring or of his not being able to fulfil the "guarantees of result" which he has given.

### 13. PRICE

In a bilateral or synallagmatic contract, the classical compensation obligation incumbent upon the main contractor is to pay the price.

#### 1. The various types of price

The price can be established in different ways:

- It may be fixed, i.e. an all-inclusive sum is assigned for the price of the supplies, service or work subcontracted. The parties then mutually accept the fixed-price risk, i.e. that the main contractor has to pay it even if it subsequently emerges that the price is very much in favour of the subcontractor, while the latter must be content with the price and carry out the obligations arising thereunder even if it turns out that this price is insufficient to cover their cost.

The fixed price, which is normally absolute, is sometimes accompanied by certain clauses which provide for its revision, particularly in cases of amendments to the order by the main contractor. These clauses lay down the procedure for revision and it is for the subcontractor to make use of it when he finds himself in circumstances where the revision clause applies.

- The price of the contract may be based on unit prices which may themselves vary depending on the number of items ordered or the scope of the subcontracting transaction. The total price will be the result of multiplying the unit prices by the number of items supplied or the scope of the services provided.
- The price can also be based on price lists, as is frequently the case in civil engineering and construction work. A list of the various assignments and supplies is drawn up and each item is assigned a price. The contract makes provision for the periodical count of the quantities furnished and the price at the periodical stages or invoicing is derived by multiplying the unit price by the quantities counted.
- The price can, finally, be based on a system of cost plus fees. Cost calculation is then effected on the basis of the costs and expenses incurred, normally with the prior agreement of the main contractor, and this "cost" is also invoiced periodically.

The payment of the subcontractor, in such cases, takes the form of a fee, a percentage of the cost added there-to, or alternatively fixed and calculated on the basis, for example, of the time required for fulfilment of the subcontract.

2. Calculation of the price to be paid

The currency in which the price is calculated may differ from the currency of payment. It frequently occurs that a national currency is used for calculation of the price and that an international currency such as the dollar is used for payment. Another example is the use within the European Community of the ECU as a money of account, whereas the currency of payment is that of one of the member countries.

The contract will normally make provision for the method of converting the money of account into the currency of payment, either by fixing the rate of exchange in the contract or by an indication of the reference rate in relation to the time and place where this rate is valid.

3. Price adjustment

The price may be fixed and hence independent of economic variations, or alternatively associated therewith.

When the price is index-linked, a formula is included in the contract referring to the wages and materials price index at the time and place of reference and whose incidence is weighted. The usual formula is as follows:

$$P(1) = P(0) ((0....) + \frac{0.... S(1)}{S(0)} + \frac{0.... M(1)}{M(0)}),$$

in which:

P(1): is the revised price;

P(0): is the price stated in the contract;

0....: is the fixed term which reduces the impact of the revision and is normally 10 per cent;

S(1): is the wage index in force at the place of reference at the time of delivery; the coefficient, whose purpose is to weight the effect of wages, is frequently 0.5;

S(0): is the wage index at the moment of calculation of the contract price;

M(1) (a, b, etc. ...): are the cost or costs of the materials at the time of their acquisition in accordance with the market price list chosen, normally at the end of the first third of the delivery time; this index can be broken down into several components which are then all weighted by a coefficient, the sum of these coefficients normally being 0.4;

M(0) (a, b, etc. ...): are this same cost or costs of materials at the time of calculation of the contract price.

N.B.: The sum of the coefficients may not be more than 1.

The revision formula is applied to the price when it is invoiced, and when the price is invoiced on a progressive basis, the formula is applied at each invoicing.

#### 14. PAYMENT OF THE PRICE

The modes of payment of the price may be numerous as a result of the commercial practices which have grown up over the centuries.

Various factors can influence them:

- The geographical situation of the parties: if they are domiciled in the same country, or even the same town, and are on a footing of mutual confidence, payment will be made in cash upon presentation of the invoice, by cheque or by bank transfer, without excluding all the other means of payment. Geographical remoteness and the absence of mutual confidence will instead be more likely to involve one of the means of payment described below;
- The wish to associate payment with execution of the contract: use of credit facilities which can be mobilized against presentation of documents is the procedure which best meets this desideratum. It is a letter of credit opened by the main contractor's bank which provides that the payment or payments will be effected against production of the shipping documents (bill of lading, clean waybill, i.e. no observations by the carrier); this system provides the main contractor with the assurance that payment will be made only upon delivery of the subcontracted goods, and the subcontractor with the assurance that he will be paid as soon as he has fulfilled his obligations and delivered the goods which have been ordered.

This letter of credit can be confirmed by the corresponding bank in the subcontractor's country, in which case the latter will have his guarantee enhanced by the security regarding completion accorded by a bank at his place of operations;

- The wish to finance execution of the order: by the issue of drafts corresponding to the dates when payments are due and capable of being discounted, which keeps in a situation of risk the drawer (sub-contractor), the drawee (main contractor) and the guarantee generally required (the bank of one of the parties or the banks of both of them);
- Financing can also be effected by the procedure of factoring, which consists of discounting invoices at a bank or a firm specialized in this type of financing, the risks of both parties being the same as in the case of discounting of drafts but without the automatic consequences associated with exchange stringency.

Other considerations should also be taken into account:

- The party wishing to protect itself against the risk of insolvency of the other party may ask the latter to guarantee his undertakings by a third party, acting as guarantor, who undertakes jointly and severally or not, as the case may be, to make payment instead of the warantee in case the latter defaults.



In some countries it is possible to take out insurance against the risk of insolvency of a debtor with credit assurance arrangements which are frequently controlled by the State when the risk is international;

- Finally, contracts generally make provision that interest on delay in payment is owed when payments are not made when they are due, and that such interest starts to run without any formal summons being required; this interest on delay in payment is sometimes combined with a penalty clause stipulating payment of a lump sum in case of defaulting on payment not justified by a provision of the contract;
- The conditions of payment can of course be limited to the payment of the price at the moment of supply. Generally, an advance is due at the time the order is placed, and in the case of a contract involving a long delivery time, intermediate payments are likewise provided for. It will be expedient to define the conditions governing payments of invoices, either upon submission, at 30 days, at 60 days etc., and to stipulate, as indicated above, the mode of calculation and the conditions relating to the requirement of interest on delays.
- The conditions of payment may also be combined with medium- or long-term financing. These financing operations provide that only a portion of the price is paid during execution of the contract (15 to 20 per cent) and that the balance is settled over a period of three to five years or even longer in the form of periodical, quarterly, six-monthly etc. payments.

These credits are referred to as "supplier" credits when they are granted by the latter, in this case the subcontractor, who arranges re-financing by his own banks and "purchaser" credits when the banks grant the credit directly to the latter, in this case the main contractor; the supplier is paid in this situation as if there had been no financing operation.

## 15. TAXATION

The rule is that each of the parties bears the burden of the direct taxes incumbent on him and that the indirect taxes are normally paid by the purchaser, the main contractor, since they are usually added to the price and invoiced.

There are generally no exceptions to this rule when the parties are in the same country.

In the case of an international transaction, consideration must first be given to the tax regime applicable to the contract, as indicated in the first part, and on the basis of the conclusions of this examination it must be laid down in the contract how the contribution to taxation is going to be organized, i.e. which tax is borne by whom.

This matter is easily settled when dealing with works, goods and equipment. It is more difficult to decide when services are supplied in the main contractor's country and the daily rates paid for the subcontractor's

specialist staff have to be taxed as income of these experts. On the one hand these amounts do not represent only the remuneration of the actual persons but also general costs and the profit of their employer, and on the other hand expert staff taxed on their salaries in their own country are generally not prepared to accept that their foreign income should be taxed in its country of origin. The matter is therefore quite complex and is most often settled by the main contractor taking over the tax liabilities in question.

#### **16. EXPORT REGIME**

This clause settles the matter of export and import licences when the subcontract calls for obtaining them. This is of necessity a suspensive condition to the conclusion of the transaction since the refusal of a licence would prevent its execution. Obtaining the licences normally devolves upon the party which is subject to them and which should hence carry out the necessary formalities.

It should be noted that delivery conditions of the INCOTERMS type determine the party responsible for obtaining a licence and that simply looking up these provisions is enough to settle the matter.

As an example, the terms FOB (free on board) and CIF (cost, insurance, freight) leave it to the exporter to obtain the export licence whereas the term FAS (free alongside ship) renders the importer (main contractor) responsible for obtaining the export licence in the subcontractor's country.

#### **17. CONDITIONS GOVERNING MODELS, MANUFACTURING MOULDS AND SPECIAL TOOLS**

Where the main contractor places at the disposal of the subcontractor models, manufacturing moulds and special tools, the contract should specify where they are to be held and the rights relating to their use and reproduction.

At the ownership level, two solutions are possible, either that the models and tools are handed over by the main contractor to the subcontractor for use in execution of the subcontract and without obligation to return them; in this case they become the property of the subcontractor on the same footing as raw materials acquired for the same purpose; alternatively, that the models and tools should be made available exclusively for the execution of the order, with the obligation to return them at the conclusion of the operation; a deposit contract is then in force in respect of them.

In both cases the subcontractor must undertake the prudent administration of the equipment and insure it against the ordinary risks of loss, theft and accidental destruction; he is in fact responsible for the fate of the equipment and for its availability for execution of the order during the entire time that this takes.

This making available of the items in question will be conditional, i.e. the contract should clearly stipulate the purpose for which the items are made available and the degree of freedom in their use which will be granted to the subcontractor outside the execution of the order as such. It is in fact conceivable that the tools placed at his disposal may, with the permission of the main contractor, be used for other operations.

It should also be pointed out that items made over outright or placed on deposit contract may have been registered, so that their use will depend on the conditions of the licence granted by the main contractor; here it is a matter of a licence for use with a description of its purpose, duration and possibly the geographical area in which the model reproduced may be marketed.

## 18. TRADE MARKS

The subcontract may relate to the manufacture of products which are normally sold under a registered trade mark, normally belonging to the main contractor. It may nevertheless happen that the subcontractor himself has trade marks and the contract may authorize the subcontractor to place his own trade mark alongside that of the main contractor.

The law provides that a registered trade mark shall be protected for a period of 10 years in the countries where it has been formally registered, in accordance with the provisions of the various international conventions on the subject, particularly the Union of Paris convention of 20 March 1883 and the Madrid Agreement of 14 April 1891, together with their numerous revisions of which the last one was at Stockholm on 14 July 1967.

The contract should thus clearly define the conditions governing utilization of the trade mark, or non-utilization if it has been decided that the product is not sold precisely under its normal trade mark. These conditions are the following:

- Identification of the trade mark and its places of registration together with the duration of its validity (the validity granted by law for a registered trade mark is normally 10 years);
- Its conditions of use, i.e. the right to use it, the duration of such right, the presentation of the trade mark and the way in which it is affixed;
- The territory on which items manufactured under licence to use the trade mark may be sold;
- A guarantee on the part of the holder of the trade mark to protect the use thereof and to hold the subcontractor harmless for any damage in case of an action for infringement.

## 19. PATENTS AND KNOW-HOW

If the subcontracted products are covered by a patent, the rules to be applied are similar to those in the case of trade marks, namely:

- Identification of the patent, its purpose, its place of registration and its duration (the validity granted by law to a patent is normally 20 years);
- The presentation of the patented knowledge, i.e. the specific form in which it is placed at the disposal of the subcontractor;

- Its conditions of use and, in particular, the licence to use it, the period of validity of such licence, its scope (authorized quantity);
- The territory over which the sale of the patented product is authorized;
- A guarantee on the part of the patent holder to protect the use thereof and to hold the subcontractor harmless for any damage in case of an action for infringement.

It frequently occurs that technical knowledge or know-how is not patented but is considered by the main contractor or the subcontractor as his intellectual property and consequently covered by strict confidentiality. The matters to be settled in the contract will be similar to those listed in respect of the patent except, of course, those relating to the conditions of registration and the legal protection afforded.

Technical know-how is in fact not protected by law, but this does not mean that its possessor is without the possibility of recourse in cases of infringement. He cannot invoke infringement as such but if manufacturing secrets have been stolen or if the presentation of the product comes under the rules governing competition, he will frequently be entitled to bring an action for cessation of production or even for damages on the basis of the legal provisions governing trading.

Collaboration in this protection of know-how may be required of the subcontractor.

## 20. CONFIDENTIALITY

The use of manufacturing processes and secrets involves an undertaking by the subcontractor, to whom they have necessarily to be revealed, to protect the confidentiality of all the knowledge thus reaching him and to use it only for the purpose for which it has been communicated to him. This obligation to observe confidentiality also places the taker thereof under an obligation to ensure that all instances, collaborators and subcontractors, who come into possession of all or part of the knowledge in question should accept the same liability.

It frequently happens that this undertaking is accepted at the initial stage of the negotiations for the subcontract and is then repeated in the contract itself. The most helpful way to study this undertaking is to consider the terms of a model clause.

### Example of clause:

The subcontractor undertakes, vis-à-vis the main contractor, to regard as confidential all the information communicated to him with a view to studying and executing the order and to take all necessary measures to ensure that this confidential character is observed by the members of his staff and by collaborators outside his organization to whom he may have recourse.

Consequently, the subcontractor will ensure that the documentation communicated is reproduced only to the extent strictly necessary, to label it "confidential", to keep a record of the acts of communication thereof which he makes, and to secure from the recipients of these notifications an undertaking to observe secrecy on the information communicated, not to reproduce the documents themselves and to return them after use. The subcontractor himself undertakes to return the documentation after use, and to recover and to destroy all copies thereof made during execution of the contract.

This confidentiality does not cover information which the subcontractor can prove was in his possession before the negotiations with the main contractor, which came to his knowledge by other legitimate channels during implementation or which has fallen into the public domain.

## 21. FORTUITOUS CIRCUMSTANCES OR FORCE MAJEURE

There are two ways of drafting a force majeure clause: either by referring to the legal principle and leaving it to the parties to interpret it, or to follow the Anglo-American practice and list examples.

It seems that in the sphere of international relations the best solution is to combine the two approaches and that is what the following example attempts to do.

### Example of clause:

The parties shall not be mutually liable for any omission, loss or damage of whatever nature caused to the other party and resulting from circumstances beyond their control such as natural disasters, armed conflict, rebellion, sabotage, insurrections and other acts of terrorism, strikes and other social disturbances, fires, explosions, floods, government action, whether de jure or de facto, and for any other reasons admitted by the law and jurisprudence of the country in which the case of force majeure occurs and also in the country whose law governs the contract.

If such a situation arises, the affected party shall immediately notify the other party in writing, as provided in the contract, and in all cases within a maximum period of 15 days as from the occurrence of the case of force majeure, supporting its statement by an attestation issued by the competent authority. In the absence of such notification supported by the said attestation within the above time-limit, the affected party shall lose the right to avail itself of this exoneration clause except with the agreement of the other party.

If the impediment resulting from the fortuitous circumstances or case of force majeure prevents the affected party from fulfilling its contractual obligation or obligations for a period of three months at least, the parties shall consider ways and means of overcoming this impediment. If they are unable to reach agreement, each party shall be entitled to terminate the contract in accordance with the provisions thereof.

## 22. HARDSHIP CLAUSE

This clause is not always to the advantage of the parties since it accords to the affected party the right to demand revision of the contract. The use of this provision grew up out of the first oil shock which, at that time, upset economic relations to such an extent that some contracts became unfulfillable as a result.

This clause is normally drafted as follows:

### Example of clause:

If economic or commercial circumstances outside the control of the parties should modify the economics of their relationship in a manner such that if the affected party had been able to foresee that occurrence, it would not have concluded the contract under the conditions which it contains, that party shall have the right to request from the other party a revision of the contract with a view to re-establishing the balance of commercial and economic relations which existed at the time of its conclusion.

If the parties cannot agree on the amendments to be made to the contract, they shall submit their dispute to an expert to be chosen by joint agreement within 30 days of the request for revision by the affected party. The expert shall study the arguments put forward by the parties and shall endeavour to reconcile them by proposing amendments to the contract.

If the proposed amendments are not accepted or if the parties are unable to come to an agreement, each of them shall be entitled to cancel the contract in accordance with the relevant contractual provisions.

## 23. TERMINATION

At law a distinction is made between a tacit termination clause and an express termination clause. That means that even if an agreement does not contain a termination clause, there are cases where clearly one of the parties is entitled to request termination of the contract if the other party is not fulfilling its obligations ("exceptio non adimpleti contractus" in a synallagmatic contract).

It is customary in commercial law, and in particular in international commercial law, for agreements to make provision for a termination clause, i.e. to include an express termination clause.

The right to declare termination of the contract will arise in cases of persistent defaulting on its obligations by one of the parties, in case of bankruptcy or a similar situation generally rendering execution of the contract impossible, and in the cases envisaged in the contract itself, for example in cases of force majeure or of application of the hardship clause. The clause is normally drafted as follows.

### Example of clause:

Each of the parties may terminate the contract:

- In cases where the other party persistently fails to fulfil one of its contractual obligations after having received formal summons to do so within a reasonable time and having failed to take the desired action;
- In cases where the other party becomes bankrupt, requests judicial winding-up arrangements, requests a suspension of prosecution, goes into judicial or voluntary liquidation, disappears as a result of merger or take-over or, in a general way, loses control over the management of its own operations;
- In cases envisaged under the present contract and particularly in cases of impediment by force majeure or persistent fortuitous circumstances.

In such cases, the party declaring termination shall notify the other party, in the manner provided by the contract, giving reasons for its decision and proposing conditions for liquidation of the contract. The parties shall agree on the conditions of termination of the contract and, in the absence of agreement, shall settle their dispute in accordance with the clause of the contract governing the settlement of disputes.

**24. NOTIFICATIONS**

It is of value to arrange for contacts between the parties which do not concern merely the day-to-day execution of the contract but mark important stages in respect of which there should be certainty that the message has been correctly received by the party to which it has been addressed.

The usual method is by registered letter with acknowledgement of receipt. However, a check should be made during negotiation of the contract to ascertain that this procedure is fully practicable in the countries of the parties. In fact, the important aspect is the proof of receipt by the addressee, and any method which provides this proof is satisfactory as long as it is in conformity with the law of the country concerned, arbitrators being normally less formalistic.

Example of clause:

Notifications which parties require to make under this contract shall be deemed to be validly effected when addressed:

- In the case of the main contractor: .....
- In the case of the subcontractor: .....

{ (Indicate full address together with telephone, telex and telefax number)

and effected either by registered letter with acknowledgement of receipt, or by courier or messenger against acknowledgement of receipt, or by telex or telefax, the automatic identification constituting acknowledgement of receipt.

Notifications shall be deemed to have been received on the date of acknowledgment of receipt.

## 25. APPLICABLE LAW - SETTLEMENT OF DISPUTES

In the first part, the pre-contractual considerations relating to the drafting of this clause recall the factors to be taken into account. As a reminder:

- If the two parties are in the same country, it is naturally the domestic law which applies and it is normally the ordinary courts which are competent, that of the domicile of each of the parties or that chosen by the contract. This does not prevent the parties from introducing an arbitration clause by referring for example to a professional chamber of arbitration.
- If the parties are established in different countries:
  - . From the point of view of the applicable law, a check must first be made on the mandatory provisions applicable in each country to the work operation or the product, and even the provisions applicable in a third country if the work is carried out there or the product is intended therefor.
  - . For interpretation of the contract, the parties will choose between the law of one of the two countries, particularly if their legislations are closely related, or refer to the legislation of a third country because they consider that this system favours neither of the parties. This last-mentioned choice may be dangerous in the sense that the law in question may be imperfectly understood and is not necessarily advantageous since a law does not favour its nationals but, in the case in point, enhances either the rights of the purchaser or main contractor, or the obligations of the vendor or subcontractor.
- The choice of jurisdiction depends on the preference of the parties for the ordinary courts if they believe that the latter are in a position to settle any dispute with competence and justice, and this is the least expensive procedure. The parties may prefer ad hoc arbitration or institutional arbitration as explained in the first chapter in cases where they consider that this procedure is the only one practicable or the one which guarantees them the most just treatment.
- Arbitration awards frequently provide for the possibility of a conciliation procedure entrusting conciliators with the task of bringing the parties together and of working out a settlement. In case of failure, the parties take the case to arbitration and normally the conciliation negotiations cannot prejudice the parties and are regarded as not having taken place.

### Example of clause:

This contract has been drafted in accordance with Law ..... to which its interpretation is subject. This provision shall not exempt the parties from the obligation to conform with the mandatory provisions of their national legislations which may apply to this contract.



Then (either)

Any dispute regarding the interpretation of this contract shall be brought before the competent Court of the domicile of the defendant (or of the competent Court sitting in the city of .....), which shall alone be authorized to settle it.

(or)

Any dispute regarding the interpretation and execution of the contract shall be definitively settled by arbitration in accordance with the Conciliation and Arbitration Regulations of ..... by (one) or (three) arbitrator(s) appointed in accordance with the Regulations in question.

(or)

Any dispute regarding the interpretation and execution of the contract shall be settled definitively by arbitration. The arbitration tribunal shall be composed of three arbitrators, each of the parties appointing one of them and the third being chosen by the two first arbitrators and acting as chairman of the arbitration tribunal.

In case one of the parties fails to appoint its arbitrator within 15 days of the formal summons addressed to it by the other party or if the arbitrators fail to appoint the third arbitrator within 15 days of their acceptance of their mission, to which each of them shall be called upon to state his attitude within 15 days of his designation, the second or the third arbitrator shall be appointed by (the chairman of the tribunal of ..... or the president of a professional association to be designated) at the request of the most diligent party.

Arbitration shall take place at .....; the arbitrators shall adjudicate in accordance with the law applicable to the contract (or: shall have powers of amicable composition and shall adjudicate) within three months of the acceptance of his mission by the third arbitrator. They shall follow the rules of arbitration procedure applicable to the place where their tribunal is sitting. Their decision shall be final and shall be executed by the parties.

Note:

In case of arbitration the parties may exempt the arbitrators from the duty to follow the rules of the applicable law and empower them to adjudicate by amicable composition (or "et aequo et bono"), i.e. in accordance with equity. This formula in fact opens the way to conciliation under the auspices of the arbitration tribunal.

26. ENTRY INTO FORCE

This clause generally lists the conditions for entry into force of the contract, i.e. those which make the commitment of the parties dependent on the occurrence of external events such as administrative authorizations, the obtaining of credits, etc.

The contract is normally binding on the parties as from its time of signature. When it is accompanied by suspensive conditions, that means that the parties undertake to carry out the necessary measures for meeting these conditions, but that the actual execution of the contract can begin only when the suspensive conditions are fulfilled and that it is only as from that moment that the time-limit for execution will actually run.

Example of clause:

The contract shall be binding upon the parties as from its signature and the parties undertake to carry out all measures incumbent upon them with a view to its entry into force.

However, it shall not come into force until the following conditions have been fulfilled:

.....

.....

Upon fulfilment of the last of the suspensive conditions, the parties shall agree in writing on the date of entry into force, which shall be the date of commencement of the time-limit for execution.

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**27. CONTRACTUAL DOCUMENTS**

It is important to establish a list of contractual documents. These are normally the contract itself and its annexes. It may happen that a clause is added in the contract to the effect that all documents prior to the contract are null and void. This precaution may be a wise one when the negotiations have led to the production of numerous versions as regards the contractual offers and specifications and when it is important to avoid any uncertainty.

Example of clause:

The following are annexed to the present contract and form an integral part thereof:

Annex 1: .....

Annex 2: .....

etc.

To the exclusion of all other documents prior to the contract which are henceforth null and void.

**SIGNATURE**

The contract ends with the signature of the parties normally with an indication of the place of signature, the date if it has not been placed at the head of the document and the identity of the parties and their attorneys.

2

Example

In witness whereof the parties have signed this contract in ... copies in the ... language, at ....., (on the date indicated at the head of this document) or (on .....), each of the parties acknowledging receipt of one of the copies of the contract and (the other copies being intended for .....)

For the main contractor: \_\_\_\_\_

Identity:

Authority:

For the subcontractor: \_\_\_\_\_

Identity:

Authority:

**CONCLUSION**

This commentary and the listing of clauses is obviously not exhaustive. It does not exempt the parties from anticipating all the aspects of the relationship to be established by the contract, but is intended to assist and guide them in their thoughts on the subject.

**THIRD PART - MODEL TEXTS**

1. **CONTRACT FOR THE SUPPLY OF COMPONENTS OR ITEMS OF EQUIPMENT**
2. **ORDER FORM COMPRISING:**
  - The order;
  - General conditions;
  - Particular conditions.
3. **CONTRACT FOR A WORK OR A SERVICE**
4. **DOCUMENTS FOR A PUBLIC INVITATION TO TENDER**
  - Invitation to tender (main contractor);
  - Offer (subcontractor);
  - Order;
  - General and particular conditions.

1. CONTRACT FOR THE SUPPLY OF COMPONENTS OR ITEMS OF EQUIPMENT

On ..... of the month of ..... 199....,

BETWEEN:

(Name and legal form)

(Address of the registered office and possibly of the place of business with which negotiations are conducted)

(Name and status of the representative of the firm)

hereinafter called the "Main Contractor",

on the one hand,

AND

(Name and legal form)

(Address of the headquarters and possibly of the place of business with which negotiations are conducted)

(Name and status of the representative of the firm)

hereinafter called the "Subcontractor",

on the other hand,

WHEREAS:

The Main Contractor wishes to subcontract the manufacture of ..... intended for ..... which are to be manufactured according to the specifications contained in this contract and to be delivered in the quantities and within the time-limits specified below;

The Subcontractor has available the production capacity and the technical know-how necessary to execute the order of the Main Contractor in the manner stipulated in this contract;

IT HAS CONSEQUENTLY BEEN AGREED AS FOLLOWS:

ARTICLE 1. Definitions

In this contract, the terms defined below shall have the following meaning:

Patent: Patent No. ...., registered at ....., under No. .... and valid until .....

Documentation: All plans, drawings, models, specifications, calculational notes, handbooks, sketches, diagrams and other documents necessary and adequate for the manufacture and delivery of the items;

Licence: The right of the Subcontractor to use the patents, models and other intellectual property protected;

Model: Model No. ...., registered at ....., under No. .... and valid until .....

Mould: The mould or moulds which the Main Contractor places at the disposal of the Subcontractor for the manufacture of the components;

Process: The body of technical knowledge involving in particular the patent and used for the manufacture of the components;

Rules and Standards: The rules and standards applicable to the manufacture of the components and to which the specification refers;

Planning: The timetable for delivery of the components;

Components: The items forming the object of the subcontracting transaction;

Specification: The technical annex embodying the technical specification of the components and stating the nomenclature of the documentation containing them.

...

Note:

It is for the drafter of the contract to judge the terms which have to be defined; the latter should not be too numerous but must include the basic concepts concerned in the provisions of the contract.

**ARTICLE 2. Purpose**

The Main Contractor places an order with the Subcontractor, who accepts it, under the conditions specified in this contract, for the manufacture of Components in accordance with the Specifications contained in Annex 1, and with the Norms and Standards therein stipulated, in the quantities, at the price and according to the conditions of delivery defined below.

**ARTICLE 3. Obligations of the Main Contractor**

The Obligations of the Main Contractor, as stated in the various clauses of this contract, are essentially the following:

- Provision, within the time-limit stated, of the Documentation associated with the Specifications;
- Provision, within the time-limit stated, of Moulds and Models;
- Supply of specific raw materials according to the Specifications and in the quantities and within the time-limits therein stipulated;
- Inspection of the manufacture of Components at the times and in the manner stipulated in the contract;
- Effecting of payments in accordance with the provisions of the contract.

#### ARTICLE 4. Obligations of the Subcontractor

The obligations of the Subcontractor, as stated in the various clauses of this contract, are essentially the following:

- Installation of Moulds and Models and organization of his facilities for their use;
- Storage of raw materials in accordance with the Specifications and marking of these for identification purposes;
- Organization of the production of the Components so as to manufacture the quantities ordered and deliver them in accordance with the Planning System;
- (Carrying out of tests and) organization of quality control as provided by the Specifications and facilitation of inspections by the Main Contractor;
- Storage of Components and packaging according to the Specifications;
- Delivery of the Components in accordance with the Planning System and with the procedures laid down in the contract;
- Fulfilment of the guarantee obligations provided in the contract.

#### ARTICLE 5. Organization of manufacture

The Moulds and Models, which normally remain the property of the Main Contractor, shall be placed at the disposal of the Subcontractor, free his workshops, within the time-limits laid down in the Planning System.

The Subcontractor is under an obligation to install them in his workshops according to the directions of the Specifications, and to use them exclusively for the manufacture of the Components and to keep and maintain them as a prudent administrator. They shall be returned to the Main Contractor, in good condition, with allowance for fair wear and tear, upon completion of the contract.

The specific raw materials necessary for manufacture of the Components will often be placed by the Main Contractor at the disposal of the Subcontractor, free his workshops, in the quantities and qualities laid down in the Specifications, and also at the dates provided in the Planning System; they may be used only for manufacture of the Components.

The Subcontractor shall store the raw materials in a specially selected place which will conform with the relevant provisions stated in the Specifications and he shall ensure that these materials, which remain the property of the Main Contractor, are distinctly identifiable from other property belonging to the Subcontractor.

The Subcontractor shall strictly respect the quality control procedure provided in the Specifications and shall ensure completion of the accounting forms, and shall communicate them to, or at least hold them at the disposal of, the Main Contractor. The Subcontractor shall also facilitate the

inspections which the Main Contractor wishes to carry out during the course of manufacture and which he will notify in advance to the Subcontractor.

The Components manufactured shall be subject to a final check and to acceptance in the workshop. Components which conform to the Specifications shall be stored and then packaged in the manner therein stipulated; rejected components shall be destroyed and their materials recycled where possible.

#### ARTICLE 6. Planning System

The Planning System associated with the contract as annex 2 shall determine the dates upon which the Models and Moulds and the raw materials, in their respective quantities, shall be placed at the disposal of the Subcontractor by the Main Contractor.

The Planning System shall similarly determine the delivery dates for the Components in accordance with the quantities ordered for delivery.

In cases where the Main Contractor does not respect the dates provided in the Planning System for fulfilment of his obligations, the Subcontractor shall have the right not only to an equivalent extension of the delivery time for the Components but also to a review of the timetable for manufacture if he can prove that the delay on the part of the Main Contractor involves an extension of the timetable for manufacture.

In cases where the Subcontractor does not deliver the Components in the quantities and at the dates provided in the Planning System, he shall be liable to a penalty for delay fixed at ... per cent of the unit price of the Components per week of delay and per Component missing.

#### ARTICLE 7. Delivery

(Either)

The Components are delivered "packaged, free workshop of the Subcontractor".

The Main Contractor is thus under an obligation to take delivery on the dates stipulated. In case of delay in taking delivery exceeding ....., the Main Contractor shall be under an obligation to compensate the Subcontractor by paying him storage fees fixed on an inclusive basis at ..... per day of delay.

In case of delay on the part of the Subcontractor in delivering the Components, he shall be under an obligation to recompense the Main Contractor for the demurrage demanded by the carrier, without prejudice to the possible application of the penalties for delay provided in article 6.

(Or)

The Components shall be delivered "packaged FOB, port of ....."

(or) "packaged free frontier (point to be designated)"

(or) "packaged free workshops of the Main Contractor".



The term ..... is understood according to the INCOTERMS 1990 definition which stipulates the respective obligations of the vendor (Subcontractor) and of the purchaser (Main Contractor) regarding transport, risks and the formalities to be complied with.

**ARTICLE 8. Guarantee**

The Subcontractor guarantees that the Components delivered are in strict conformity with the Specifications. Components which do not so conform shall be rejected if detected before delivery or replaced free of charge if detected subsequently thereto.

Similarly, the Subcontractor guarantees the Components delivered against all defects in quality of manufacture for a period of ... months as from their delivery. In case of detection of such a defect during the guarantee period and provided that liability for this defect lies with the Subcontractor, the latter shall be under an obligation to replace free of charge the defective components in accordance with the delivery procedures laid down in article 7.

**ARTICLE 9. Price and terms of payment**

**9.1. Fixing of price and conditions of payment**

(Either)

The unit price of the components is fixed at .....

The price to be invoiced for each delivery shall thus correspond to the unit price multiplied by the number of pieces delivered.

Invoices shall be paid

(Either)

- Upon presentation and at the latest within ... days thereof;

(Or)

- At (thirty or sixty days etc., possibly "end of the month") following their presentation;

(Or)

- By credit facilities (possibly "confirmed") opened with the .... bank against submission of the invoices accompanied by the shipping documentation.

**9.2. Price adjustment**

(Either)

The price fixed in article 9.1 shall be reviewed every ... months and adjusted by common agreement to the trend in the economic conjuncture.

(Or)

The price is linked to the wage and raw materials indexes in force on the date of conclusion of the contract.

Upon each invoicing, the price shall be adjusted to the movement of the indexes by application of the following formula:

$$P(1) = P(0) \left( (0.1) + \frac{(0.2)Ma(1)}{Ma(0)} + \frac{(0.1)Mb(1)}{Mb(0)} + \frac{(0.2)Mc(1)}{Mc(0)} + \frac{(0.4)S(1)}{S(0)} \right),$$

in which:

P(1): is the revised invoiced price;

P(0): is the price stated in the contract;

0.1: is the the part of the price not subject to revision;

S(1): is the wage index applicable to the Subcontractor's labour at the date of invoicing;

S(0): is the same wage index in force at the reference date, i.e. ....;

M(1) a, b or c: (for example for steel, zinc and copper sheet) the cost of materials (at the end of the first third of the delivery time - at the time of invoicing etc.) according to the market price list of materials published by ..... at .....

M(0) a, b or c: are the same material costs in force at the reference date .....

N.B.: The sum of the coefficients should be equal to 1.

**ARTICLE 10. Taxation and import regime**

Each of the parties shall deal with the taxes and duties chargeable to it in its own country, it being understood that the indirect taxes (to be specified) will be invoiced to the Main Contractor.

Import and export licences required under the legislations of the countries to which the parties belong shall be obtained by each of the parties in its own country.

**ARTICLE 11. Licence to use moulds, patents and trade marks**

The Main Contractor shall grant the Subcontractor the right to use the Moulds, Models, Patents, Trade Marks and other technical know-how for execution of this contract only.

The Subcontractor consequently renounces the use of the said Moulds, Models, Trade Marks, Patents and other technical know-how for any other manufacturing process except by prior written agreement of the Main Contractor.

## ARTICLE 12. Confidentiality

All technical information communicated by the parties shall remain confidential and shall be used only for the manufacture of the Components under the conditions of this contract and its annexes.

The Subcontractor shall therefore take care to control the movement and reproduction of documents marked "Confidential" or "All rights of reproduction reserved" and shall ensure that they are returned after use. He shall return them himself to the Main Contractor upon completion of this contract.

Confidentiality does not extend to technical knowledge already in possession of the Subcontractor at the time of conclusion of the contract, nor to such knowledge acquired through other legitimate channels or which lie within or fall within the public domain.

## ARTICLE 13. Fortuitous circumstances or force majeure

The parties shall not be mutually liable for any omission, loss or damage of whatever nature caused to the other party and resulting from circumstances beyond their control, such as natural disasters, armed conflict, rebellion, sabotage, insurrections and other acts of terrorism, strikes and other social disturbances, fires, explosions, floods, government action whether de jure or de facto and for any other reasons admitted by the law and jurisprudence of the country in which the case of force majeure occurs and also in the country whose law governs the contract.

If such a situation arises, the affected party shall immediately notify the other party in writing, as provided in the contract, and in all cases within a maximum period of 15 days following the occurrence of the case of force majeure, supporting its statement by an attestation issued by the competent authority. In the absence of such notification supported by the said attestation within the above time-limit, the affected party shall lose the right to avail itself of this exoneration clause except with the agreement of the other party.

If the impediment resulting from the fortuitous circumstances or case of force majeure prevents the affected party from fulfilling its contractual obligation or obligations for a period of three months at least, the parties shall consider ways and means of overcoming this impediment. If they are unable to reach agreement, each party shall be entitled to declare cancellation of the contract in accordance with the provisions thereof.

## ARTICLE 14. Termination

Each of the parties may terminate the contract:

- In cases where the other party persistently fails to fulfil one of its contractual obligations after having received formal summons to do so within a reasonable time and having failed to take the desired action;
- In cases where the other party becomes bankrupt, requests a judicial winding-up arrangement, requests a suspension of prosecution, goes into judicial or voluntary liquidation, disappears as a result of merger or take-over, or in a general way loses control over the management of its own affairs;

- In cases envisaged under this present contract and particularly in cases of impediment by force majeure or persistent fortuitous circumstances.

In such cases the party declaring termination shall notify the other party in the manner provided in the contract, giving reasons for its decision and proposing conditions for liquidation of the contract and, failing this, shall settle their dispute in accordance with article 16, Settlement of disputes.

**ARTICLE 15. Notifications**

Notifications which the parties require to make under this contract shall be deemed to be validly effected when addressed:

- In respect of the Main Contractor: .....
- In respect of the Subcontractor: .....

(indicate full address together with telephone, telefax and telex numbers)

and effected by registered letter with acknowledgement of receipt, or by courier or messenger against acknowledgement of receipt or by telex or telefax, the automatic identification constituting acknowledgement of receipt.

Notifications shall be deemed to have been received on the date of acknowledgement of receipt.

**ARTICLE 16. Applicable law - Settlement of conflicts**

**16.1. Applicable law**

This contract is drafted in accordance with Law ..... to which its interpretation is subject. This provision shall not exempt the parties from the obligation to conform with the mandatory provisions of their national legislations which may apply to this contract.

**16.2. Settlement of disputes**

(Either)

The parties agree to submit any disputes regarding the interpretation or execution of this contract to the competent courts sitting at .....

(Or)

Any dispute regarding interpretation and execution of the contract shall be definitively settled by arbitration. The arbitration tribunal shall be composed of three arbitrators, each of the parties appointing one of them and the third being chosen by the two first arbitrators and acting as chairman of the arbitration tribunal.

In case one of the parties fails to appoint its arbitrator within 15 days of the formal summons addressed to it by the other party or if the arbitrators

fail to appoint the third arbitrator within 15 days of their own acceptance of their mission, to which each of them shall be called upon to state his attitude within 15 days of his designation, the second or the third arbitrator shall be appointed by ..... at the request of the most diligent party.

Arbitration will take place at .....; the arbitrators shall adjudicate in accordance with the law applicable to the contract within three months of the acceptance of his mission by the third arbitrator. They shall follow the rules of arbitration procedure applicable to the place where their tribunal is sitting. Their decision shall be final and shall be executed by the parties.

In cases of disputes of a technical nature, the parties shall choose an expert who shall be commissioned to give an opinion on the solution of the dispute. This expert shall be chosen by common agreement within 15 days of the request made by the more diligent party and, in default of agreement within this period, the expert shall be appointed by .....; likewise at the request of the most diligent party.

**ARTICLE 17. Entry in force**

The contract shall be binding upon the parties as from its signature and the parties undertake to carry out all measures incumbent on them with a view to its entry into force.

However, it shall come into force only when the following conditions have been fulfilled:

...

...

Upon fulfilment of the last of the suspensive conditions, the parties shall agree in writing on the date of entry into force which shall be the date of commencement of the time-limit for execution provided in the Planning System.

**ARTICLE 18. Contractual documents**

The following documents are annexed to this contract and form an integral part thereof:

- Annex 1: Technical specifications (with drawings, conditions of contract, standards, etc.);
- Annex 2: Planning System;

...

to the exclusion of all other documents prior to the contract which are henceforth null and void.

In witness whereof the parties have signed this contract in two original copies in the [English] language at ....., on the date indicated at the head of this document, each party acknowledging receipt of one of the copies of the contract.

For the Main Contractor:

\_\_\_\_\_

Identity:

Authority:

For the Subcontractor:

\_\_\_\_\_

Identity:

Authority:

2. ORDER FORM

The order

(1) DATE:

\_\_\_\_\_

(2) MAIN CONTRACTOR:

Corporate name:  
Legal form:  
Registered office:

Place of business:

Tel.:

Fax:

\_\_\_\_\_

(3) SUBCONTRACTOR:

Corporate name:  
Legal form:  
Registered office:

Place of business:

Tel.:

Fax:

\_\_\_\_\_

(4) PURPOSE OF THE ORDER:

Specification	Standards	Number	Unit price	Total price
...	...	...	...	...
...	...	...	...	...
Total price:				...

\_\_\_\_\_

(5) PLACE OF DELIVERY:

PROCEDURES:

Ex works: ... FOB ... Delivered at site: ... Cleared through customs:  
FOR ... Other: ...

\_\_\_\_\_

(6) DELIVERY TIME:

\_\_\_\_\_

(7) TERMS OF PAYMENT:

- (a) Initial advance:
- (b) Interim payment:
- (c) Balance on delivery within ... days of invoicing:

\_\_\_\_\_

(8) PROCEDURE FOR ACCEPTANCE:

- (a) Acceptance: at works ... upon delivery ...  
by the firm ...
- (b) Marking:
- (c) Packaging:
- (d) Storage recommendations:
- (e) Other matters:

\_\_\_\_\_

(9) OBSERVATIONS:

\_\_\_\_\_

SIGNATURES:

Main Contractor: ..... Subcontractor:.....

\_\_\_\_\_

GENERAL CONDITIONS

1. Validity - Entry into force

(a) The order form shall commit the parties as soon as it has been dated and signed.

(b) In case payment of an initial advance is stipulated, manufacture shall start only after receipt of this advance by the subcontractor.

2. Delivery time

The delivery time shall run as from the date of signature of the order form, unless an initial advance has been arranged, in which case the delivery time shall begin to run as from the receipt of the advance.

3. Procedure governing execution of the order - Acceptance - Claims - Guarantee

(a) The components ordered shall conform to the specifications and standards stipulated. They shall be manufactured following the best practice and shall be exempt from material or manufacturing defects. Failure to conform shall involve the non-fulfilment of the order.

(b) The components ordered shall be received either at the works or upon delivery, in accordance with the practices normally applied. Rejected components shall be replaced free of charge and delivered as soon as possible and on the same conditions as the others.

(c) Any claim by the main contractor in respect of failure to conform with the specifications or of manufacturing defects shall be entered as soon as it is discovered.

(d) The components delivered shall be guaranteed against any manufacturing defect for a period of one year as from the date of their delivery.

4. Delivery

(a) Delivery shall be made at the place and in accordance with the procedure agreed. The commercial terms shall be interpreted in accordance with the definition given in the INCOTERMS 1990 of the International Chamber of Commerce. Failure to respect this provision shall be equivalent to non-delivery.

(b) Marking shall be in accordance with the specifications.

(c) Packaging shall be in accordance with the specifications and with good practice in the field in question.

(d) The storage recommendations are intended as a guide only and do not exonerate the main contractor from taking the usual precautions in this respect.



5. Delivery times

The delivery times specified are mandatory.

Any delay involves the liability of the subcontractor.

Separate conditions specify the applicable penalties for delay.

Otherwise, the penalty due for delay shall be calculated in accordance with the rules of law, i.e.: actual damage (loss of goods or loss of profit), damage foreseeable by the subcontractor at the time of the order, amount of the order.

6. Payment of the price

The price shall be paid in accordance with the procedures set forth in the order form.

In case of default on payment, the amounts due shall bear interest automatically and without formal summons to pay at the rate of ... points above the cash credit rates practised by the banks at the place where the subcontractor has his registered office.

7. Drawings - Models - Plans - Special tools

The drawings, models, plans and special tools made available to a subcontractor by the main contractor shall remain the property of the latter and shall be returned to him upon completion of the order.

The subcontractor is only the holder of these items and is therefore not responsible for their loss by force majeure provided that he has taken the usual precautions to protect and safeguard them.

8. Force majeure - Unforeseeable circumstances

(a) The parties are not liable for the consequences of non-fulfilment of their obligations if they are impeded by fortuitous circumstances or force majeure.

Exoneration from liability is valid for the duration of the impediment and of its consequences and in respect of the obligation or obligations which it affects.

(b) If the economic, political or social circumstances change to the extent that if the party affected by them had been aware of them it would not have negotiated or would have negotiated on substantially different terms, the party concerned may demand revision of the conditions of the order and, if such revision is impossible, demand its cancellation.

The party concerned shall be under an obligation, in accordance with ordinary law, to endeavour to minimize the damage caused to the other party as a result of its demand for revision or cancellation.

9. Cancellation

(a) The main contractor shall be entitled to cancel the order:

- In case of delivery not in conformity with the agreed conditions and specifications;
- In case of delay in delivery exceeding the maximum tolerable delay laid down in the special conditions and subject to a prior summons;
- In the case envisaged in article 8 b;
- In case of bankruptcy of the subcontractor or of an equivalent financial situation.

(b) The subcontractor shall be entitled to cancel the order:

- In case of non-payment of the price, after receipt of formal summons;
- In case of failure by the main contractor to carry out an obligation essential to execution of the order;
- In the case envisaged in article 8 b;
- In case of bankruptcy of the main contractor or of an equivalent situation.

10. Applicable law - Settlement of disputes

The applicable law shall be that of the country of which the subcontractor is a national.

The competent courts shall be those within whose area of jurisdiction the subcontractor has the place of business where the order is being carried out.

Disputes of a technical nature shall be settled by an expert appointed by the parties or, in default thereof, by the Subcontracting Exchange.

SPECIAL CONDITIONS

1. Manufacture

Models:

Special conditions of use:

Certificates relating to materials:

2. Delivery

Special tests:

Special packaging:

Storage conditions or recommendations:

3. Price

Guarantee of payment: (letter of credit)

Revision in order to adjust to changes in the price index:

- Frequency:

- Formula:

$$P_1 = P_0 \times 0..... + 0..... \frac{S_1}{S_0} + 0..... \frac{M_1}{M_0}$$

P<sub>1</sub> = revised price;

P<sub>0</sub> = price stipulated in the order form;

0..... = fixed factor (optional);

S<sub>0</sub> = wage index on the date of fixing of the price;

S<sub>1</sub> = wage index on the date of revision;

M<sub>0</sub> = price index of one or more materials (M(a), M(b), etc.) on the date of fixation of the price;

M<sub>1</sub> = price index of one or more materials on the date of revision of the price.

The factors multiplying S and M are weighting factors.

The sum of the three factors is equal to 1.

4. Protection of plans and models
5. Confidentiality
6. Other matters

SIGNATURES:

DATE:

Main Contractor: \_\_\_\_\_

Subcontractor: \_\_\_\_\_

3. CONTRACT FOR A WORK OR A SERVICE

The ..... of the month of ..... 199....

BETWEEN:

(corporate name and legal form);

(address of head office and as appropriate of the place of business with which negotiations are being conducted)

(name and status of the representative of the firm)

hereinafter called "the Main Contractor",

on the one hand,

AND

(corporate name and legal form)

(address of head office and as appropriate of the place of business with which negotiations are being conducted)

(name and status of the representative of the firm)

hereinafter called "the Subcontractor",

on the other hand,

WHEREAS:

The Main Contractor has concluded a Contract with ..... Owner, for the execution of the Work ....., on the ..... site; this Work, whose execution has started, should be completed in ... working days as from the .....

Within the context of the Work, the unit of xxx (hereinafter called the Unit) is to be manufactured; this unit applies a patented manufacturing process (hereinafter referred to as the Process), with which the Subcontractor is acquainted;

The Subcontractor is specialized in the manufacture of facilities handling this type of product, has experience of the Process and the capacity to realize it, and wishes to manufacture the Unit under the conditions of this Contract;

IT HAS CONSEQUENTLY BEEN AGREED AS FOLLOWS.

ARTICLE 1. Definitions

In this Contract, the terms defined below shall have the following meaning:

**Patent:** Patent No. ...., registered at ..... under No. .... and whose validity extends until .....

**Contract:** The agreement by which the Owner has placed an order with the Main Contractor;

**Documentation:** All plans, calculating notes, sketches, diagrams, handbooks and other documents produced by the Engineering Department, necessary and adequate for construction of the Unit, its commissioning and operation;

**Engineering:** The body of studies to be carried out for the construction and commissioning of the Unit;

**Licence:** The right accorded to the Subcontractor to use the Process;

**Owner:** ....., who has ordered the Work by concluding the Contract with the Main Contractor;

**Process:** The body of technical knowledge involving in particular the Patent and used for the manufacture of the Unit;

**Planning:** A system of planning based on the critical path method, adopted for execution of the Work, within the time-limits laid down in the Contract;

**Product:** The result of production of the Unit;

**Unit:** The facility manufacturing the Product forming the purpose of this Contract, and defined in the technical specification attached to this Contract as annex 1.

## ARTICLE 2. Purpose

The Main Contractor orders from the Subcontractor, in accordance with the conditions of this Contract, the Unit as precisely defined in annex 1, to be executed in the Work of which the Main Contractor is in charge in accordance with the provisions of the Contract, whose stipulations affecting this subcontracting transaction are contained in annex 2.

The Subcontractor accepts this order under the conditions of this Contract, after having acknowledged that the Unit to be manufactured is a part of the Work and after having studied the provisions of the Contract contained in annex 2.

## ARTICLE 3. Obligations of the Main Contractor

The obligations of the Main Contractor as set forth in the various clauses of this Contract are essentially the following:

- Delivery to the Subcontractor of all the Technical Documentation associated with the Contract, to the extent that it concerns the Unit;
- Inspection and approval within agreed time-limits of the Documentation prepared by the Subcontractor and requiring verification by him;

- Management of the Planning system and reporting to the Subcontractor on the progress of planning;
- Notification to the Subcontractor of any event liable to affect execution of the order;
- Carrying out of tests and issue of acceptance certificates in accordance with the provisions of this Contract;
- Settlement of payments in accordance with the provisions of this Contract.

#### ARTICLE 4. Obligations of the Subcontractor

The obligations of the Subcontractor as set forth in the various clauses of this Contract are essentially the following:

- Execution of the engineering work and request to the Main Contractor for all information and supplementary Documentation, provided that it is available, for the carrying out of studies;
- Delivery for checking and approval to the Main Contractor of the Documentation to be verified by him, within the time-limits set by the Planning system;
- Management of the Planning system with the Main Contractor by communicating to him all necessary information and by managing the data received from Planning in order to keep the particular scheduling for the Unit up to date;
- Notification to the Main Contractor of any external event liable to affect execution of this Contract;
- Carrying out of tests and demonstration of the achievement of performance guarantees;
- Delivery of the Unit within the time-limit specified in the Contract.

#### ARTICLE 5. Delivery

Delivery of the Unit shall take place after checking and obtaining the performance guarantees stipulated in article 7.

As soon as the Subcontractor considers that the Unit is in a state to undergo the tests to verify the guarantees, he shall notify the Main Contractor following the procedure described in the article on Notification, and the Main Contractor, within eight days and following the same procedure, shall indicate to him the date when the tests can begin.

The tests shall have a duration of ... days during which the Unit will be brought up to its industrial operating capacity and the results as regards quality, quantity and consumption will be measured. This measurement will be carried out in accordance with the procedure described in annex 3.

If the tests indicate that the Unit attains the guaranteed performance, its acceptance shall be declared and the Subcontractor shall be regarded as having delivered the Unit ordered.

If the tests do not yield satisfactory results, they may be repeated after corrections to be undertaken by the Subcontractor and a new exchange of notifications as indicated above.

If at the termination of this second test the guaranteed results are not always attained but fall within a range of tolerances subject to penalty, acceptance shall nevertheless be declared with application of the sanctions provided in article 7, the Subcontractor being then regarded as having delivered the Unit ordered.

If the results lie outside the penalized tolerances, the Subcontractor shall be regarded as not having fulfilled his obligations to deliver the Unit ordered and the parties shall agree on the conditions of liquidation of the Contract or, in default of this, shall refer the matter to the competent Court for settlement of disputes.

#### ARTICLE 6. Delivery time

The time-limit for execution of this Contract, covering engineering, construction of the Unit and its operation until the guaranteed results are obtained, shall be ... working days as from the date of entry into force of this Contract.

The Planning system shall determine the way in which the days making up the time-limit shall be utilized, in order to take account of other subcontracting contracts involved in execution of the Work.

Since the delivery time is one of the essential features of the Contract, the Subcontractor shall pay the Main Contractor a penalty equal to ... per cent of the price per day of delay beyond a penalty-free tolerance of ... days.

The penalty for delay shall not exceed ... per cent of the value of the Contract, this penalty corresponding to a maximum period subject to penalty of ... days.

If the delay should exceed this maximum delay subject to penalty, the Subcontractor shall be deemed to be defaulting on executing one of the essential obligations of the Contract.

#### ARTICLE 7. Performance guarantees - Mechanical operation guarantee

##### 1. Performance guarantees

The Subcontractor guarantees that the performance of the Unit shall be as follows:

Quality: ...

(either)

Quality is agreed with no tolerances.



(or)

A penalty of ... per cent of the price shall be due per per cent of the content of ... missing. Under a content of ... per cent, the guaranteed quality shall be regarded as not having been achieved.

Quantity: ...

A penalty of ... per cent of the price shall be due per percentage missing. Under ... per cent of the quantity guaranteed, the latter shall be regarded as not having been achieved.

Efficiency: ...

(Compensatory clause combining the different consumption factors and yielding a guaranteed mean cost price).

A penalty of ... per cent of the price shall be due per per cent of the cost price exceeding the guaranteed price. Above an excess of ... per cent, the guaranteed efficiency shall be regarded as not having been achieved.

The combined penalties in respect of guarantees not achieved shall not exceed ... per cent of the value of the Contract.

2. Mechanical operation guarantee

The operation of the Unit is guaranteed against any defect of design, materials or construction for a period of one year as from the date of its acceptance.

During this period, the Subcontractor shall be under an obligation as soon as possible to remedy any defect discovered, either in the form of repair or of replacement of the defective components. In case of replacement a new guarantee of one year in respect of the component replaced shall run as from the date of its commissioning.

After expiration of the one-year guarantee, the Subcontractor shall be bound only by the hidden defect guarantee in accordance with ordinary law.

Where claims are made under the guarantees defined in this paragraph, the Main Contractor shall be under obligation to inform the Subcontractor as soon as the defect is discovered, and to take all the protective measures necessary to avoid aggravation of the damage and to communicate all relevant technical data to enable the Subcontractor to evaluate the validity or otherwise of the guarantee claim.

Failure to respect this provision on the part of the Main Contractor shall involve annulment of the guarantee in the case considered.

ARTICLE 8. Price

1. Amount and terms of payment

(either)

The price per Unit is fixed at .....

This price shall be payable by transfer to the Subcontractor's account at the ..... Bank in the following manner:

... per cent, i.e. .... upon signature of this Contract as an advance (and against the securing of a bank guarantee for return of the advance valid until acceptance of the Unit).

This payment shall be one of the conditions for entry into force of the Contract.

... per cent, i.e. .... as an interim payment at the time of completion of .....

... per cent, i.e. ....

the balance upon delivery following issue of the report and against the securing of a bank guarantee of completion equivalent to 10 per cent of the value of the Contract and valid for one year to cover the mechanical guarantee period.

(or)

The price per Unit shall be based on the quantities put into production and the other assignments and services carried out in accordance with the price-lists appearing in annex 4, which also show the procedure for calculating the various invoicings.

This price shall be paid as follows:

... per cent, i.e. .... as an advance (against the securing of a bank guarantee to restore the advance whose validity shall extend until acceptance of the Unit).

This payment shall constitute one of the conditions for entry into force of this Contract.

Monthly, against submission of the statement of work carried out and invoiced in accordance with the provisions of annex 4. These statements shall be submitted to the Main Contractor within the first week of each month in respect of the preceding month and shall be verified by him. The Main Contractor may ask for further details or carry out checks within a period which shall not exceed one week as from his receipt of the statement. Upon the expiration of this period, the Main Contractor shall pay the invoice stated, and in case of dispute at least the part thereof which is not contested.

Note:

Numerous formulae for payment exist, including payment against shipping documents or credit facilities as pointed out in the second part of this Guide. The contract must of necessity adopt one procedure.

2. Price adjustment

The price shall be linked to the wages and raw material indexes in force at the date of acceptance of the offer by the Main Contractor, i.e. ....

At the presentation of each invoice, the price shall be adjusted to the trend in these indexes by application of the following formula:

$$P(i) = P(0) \left( (0.1) + \frac{0.2 Ma(1)}{Ma(0)} + \frac{(0.1) Mb(1)}{Mb(0)} + \frac{0.2 Mc(1)}{Mc(0)} + \frac{0.4 S(1)}{S(0)} \right),$$

in which:

- P(1): is the revised invoice price;
- P(0): is the price stated in the Contract;
- 0.1: is the part of the price not subject to revision;
- S(1): is the wage index applicable to the Subcontractor's labour on the date of invoicing;
- S(0): is the same wages index in force on the reference date, i.e. the .....
- M(1) a, b or c: (for example: for steel, zinc and copper sheet) the cost of materials (at the end of the first third of the delivery time - at the time of invoicing, etc. ...) according to the market price-list for materials published by ... at ...;
- M(0) a, b or c: are the same material costs in force on the reference date ...

ARTICLE 9. Taxation and import regime

Each party shall deal with the taxes and duties chargeable in its own country, it being understood that the indirect taxes (to be specified) will be invoiced to the Main Contractor.

The Main Contractor shall pay the taxes relating to remuneration of the Subcontractor's staff and due in the Main Contractor's country.

Import and export licences required under the legislations of the countries to which the parties belong shall be obtained by each of the parties in its own country.

ARTICLE 10. Patents and trade marks - Technical know-how

The Subcontractor has obtained from the Process patent holder licences to use the Patent necessary for the manufacture and operation of the Unit.

This licence, issued to the Owner, will enable him to operate the Unit and sell its output without any restriction except for the provisions laid down in annex 5.

The Subcontractor guarantees the Main Contractor and the Owner against any action for infringement of patent or claim for compensation entered by a third party and based on use of the patent. In cases of actions for infringement or any other action brought against the Main Contractor or the Owner, the latter shall immediately inform the Subcontractor thereof who shall at once take the necessary measures of defence, the Main Contractor and the Owner bringing their stance into line with that of the Subcontractor.

#### ARTICLE 11. Confidentiality

All technical information communicated by the parties and in particular by the Subcontractor shall remain confidential and shall be used only for the manufacture and operation of the Unit under the conditions of this Contract and its annexes.

The parties shall therefore take care to control the movement of the documents and their reproduction by placing thereon the words "Confidential" and "Reproduction prohibited" or alternatively "All rights reserved" and ensuring the return of these documents after use.

Confidentiality does not extend to technical knowledge already in possession of one of the parties at the time of conclusion of this Contract, nor to such knowledge acquired through other legitimate channels or which lies within or falls within the public domain.

#### ARTICLE 12. Fortuitous circumstances or force majeure

The parties shall not be mutually liable for any omission, loss or damage of whatever nature caused to the other party and resulting from circumstances beyond their control such as natural disasters, armed conflict, rebellion, sabotage, insurrections and other acts of terrorism, strikes and other social disturbances, fires, explosions, floods, government action whether de jure or de facto and for any other reasons admitted by the law and jurisprudence of the country in which the case of force majeure occurs and in the country whose law governs the Contract.

If such a situation arises, the affected party shall immediately notify the other party in writing, as provided in the Contract and in all cases within a maximum period of 15 days following the occurrence of the case of force majeure, supporting its statement by an attestation issued by the competent authority. In the absence of such notification supported by the said attestation within the above time-limit, the affected party shall lose the right to avail itself of this exoneration clause except with the agreement of the other party.

If the impediment resulting from the fortuitous circumstances or case of force majeure prevents the affected party from fulfilling its contractual obligation or obligations for a period of three months at least, the parties shall consider ways and means of overcoming this impediment. If they are unable to reach agreement, each party shall be entitled to declare cancellation of the Contract in accordance with the provisions thereof.

#### ARTICLE 13. Termination

Each of the parties may terminate the Contract:

- In cases where the other party persistently fails to fulfil one of its contractual obligations after having received formal summons to do so within a reasonable time and having failed to take the desired action;
- In cases where the other party becomes bankrupt, requests a judicial winding-up arrangement, requests a suspension of prosecution, goes into judicial or voluntary liquidation, disappears as a result of merger or take-over or, in a general way, loses control over the management of its own affairs;
- In cases envisaged under this Contract and particularly in cases of impediment by force majeure or persistent fortuitous circumstances;
- In cases of termination of the Contract by the Owner without any fault on the part of the Main Contractor.

In such cases, the party declaring termination shall notify the other party in the manner provided in the Contract, giving reasons for its decision and proposing conditions for liquidation of the Contract. The parties shall agree on the conditions of termination of the Contract and, in cases of failure to do so, shall settle their dispute in accordance with article 15, Settlement of disputes.

**ARTICLE 14. Notifications**

Notifications which the parties are required to make under this Contract shall be deemed to be validly effected when addressed:

- In respect of the Main Contractor: ... ..;
- In respect of the Subcontractor: ... ..;

(indicate full address together with telephone, telefax and telex numbers)

and effected by registered letter with acknowledgement of receipt or by courier or messenger against acknowledgement of receipt or by telex or telefax, the automatic identification constituting acknowledgement of receipt.

Notifications shall be deemed to have been received on the date of acknowledgement of receipt.

**ARTICLE 15. Applicable law - Settlement of disputes**

**1. Applicable law**

This Contract is drafted in accordance with Law ....., to which its interpretation is subject. This provision shall not exempt the parties from the obligation to conform with the mandatory provisions of their national legislations which may apply to this Contract.

**2. Settlement of disputes**

Any dispute regarding interpretation and execution of the Contract shall be definitively settled by arbitration. The arbitration tribunal shall be

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composed of three arbitrators, each of the parties appointing one of them and a third being chosen by the two first arbitrators and acting as chairman of the arbitration tribunal.

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In case one of the parties fails to appoint its arbitrator within 15 days of a formal summons addressed to it by the other party or if the arbitrators fail to appoint the third arbitrator within 15 days of their own acceptance of their mission, to which each of them shall be called upon to state his attitude within 15 days of his designation, the second or the third arbitrator shall be appointed by ..... at the request of the most diligent party.

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Arbitration shall take place at .....; the arbitrators shall adjudicate in accordance with the law applicable to the Contract within three months of the acceptance of his mission by the third arbitrator. They shall follow the rules of arbitration procedure applicable to the place where their tribunal is sitting. Their decision shall be final and shall be executed by the parties.

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In cases of disputes of a technical nature, the parties shall choose an expert who shall be commissioned to give an opinion on the solution of the dispute. This expert shall be chosen by common agreement within 15 days of the request made by the more diligent party and, in default of agreement within this period, the expert shall be appointed by ....., likewise at the request of the more diligent party.

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**ARTICLE 16. Entry into force**

..;

The Contract shall be binding upon the parties as from its signature and the parties undertake to carry out all the measures incumbent on them with a view to its entry into force.

..;

However, it shall come into force only when the following suspensive conditions have been fulfilled:

- Payment of the initial advance in accordance with article ...;
- .....
- .....

it.

Upon fulfilment of the last of the suspensive conditions, the parties shall agree in writing on the date of entry into force which shall be the date of commencement of the time-limit for execution of the Contract provided in article 6.

**ARTICLE 17. Contractual documents**

The following documents are annexed to this Contract and form an integral part thereof:

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- Annex 1: Technical specification;
- Annex 2: Clauses of the Contract between the Main Contractor and the Owner applicable to this Contract;
- Annex 3: Testing procedure;
- Annex 4: Price slips and procedure for calculation of price and for invoicing;
- Annex 5: Licence under the Patent

to the exclusion of all other documents prior to the Contract which are henceforth null and void.

In witness whereof the parties have signed this Contract in two original copies in the [English] language at ....., on the date indicated at the head of this document, each party acknowledging receipt of one of the copies of the Contract.

For the Main Contractor: \_\_\_\_\_

Identity:

Authority:

For the Subcontractor: \_\_\_\_\_

Identity:

Authority:

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4. DOCUMENTS FOR A PUBLIC INVITATION TO TENDER

1. Invitation to tender (main contractor)
2. Offer (subcontractor)
3. Order
4. General and special conditions

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These documents are extracted from the report by Mr. M. Souhaité, legal and taxation consultant of UNIDO, and dealing with legal, taxation and customs matters connected with subcontracting.



FORM OF INVITATION TO TENDER  
(For use by the ordering party)

- Name of the principal contractor inviting tenders and indication of his representative: .....
- Name of the sub-contractor to whom the present invitation is addressed: .....
- Subject-matter of the present invitation to tender:
  - Description of the work to be sub-contracted: .....
  - The work that is the subject of the present invitation to tender is described in article 2 of the Special Conditions annexed hereto.
- References to the principal contract:
  - Name of the principal: .....
  - Indication of the principal contract and reference to the specifications applicable to it: .....
  - Place of execution of the work: .....
  - Deadline for execution of the principal contract: .....
  - Date for opening of the tenders by the principal: .....

OR

- Date of order by the principal: .....
- Sub-contracting conditions:

Article 1:

The General and Special Sub-contracting Conditions annexed hereto and the conditions of the present invitation to tender shall be applied to the present agreement.

Article 2: TRANSMISSION OF THE DRAWINGS AND COST ESTIMATES AS WELL AS OF ALL OTHER TECHNICAL DOCUMENTS

- List: .....

OR

Indication of the place at which the drawings and the cost estimates and all the other technical documents relevant to the sub-contracting agreement can be consulted:

- Address: .....
- List of drawings and estimates to be consulted: .....

Article 3: STANDARDS AND TECHNICAL SPECIFICATIONS APPLICABLE

- List: .....

Article 4: VARIANTS OR SUGGESTIONS

- No variants or suggestions shall be allowed.

OR

- Variants or suggestions are authorized for all the parts of the work sub-contracted/for the following parts of the work sub-contracted: .....  
.....  
(Specify)

OR

- The following variants are required: .....  
..... (Specify)

Variants not accompanied by a tender for the basic solution will not be accepted.

No account will be taken of variants freely proposed by the sub-contractor when the provisions of the principal contract have excluded them.

Article 5: PRICES

The transaction is concluded on the basis of:

- An all-inclusive lump-sum price;
- Unit prices;
- An all-inclusive and lump-sum price and unit prices as specified in the list of items annexed hereto;
- Actual costs incurred;
- Verification of expenditure.

However determined, the prices shall be understood as being net of VAT.

Article 6: MEASUREMENT METHOD OR CODE

(Indication of the method or code reference used).

Article 7: PRICE VARIATIONS

The agreement is concluded on the basis of firm and non-revisable prices.

OR

Price variations shall be subject to the conditions and the formula indicated below:

- Structure of the formula: .....
- Value and explanation of the indices and parameters chosen: .....
- Publication of changes in such indices: .....

Article 8: PERIOD FOR EXECUTION OF THE WORK

The period is to be agreed.

OR

The period shall be fixed in article 7.2 of the Special Conditions.

Article 9: ATTESTATIONS TO BE ATTACHED TO THE TENDER

The sub-contractor must attach to his tender evidence of his professional qualifications or occupational classification for the work sub-contracted and an attestation that he has met his fiscal and social security obligations.

Article 10: OTHER CONDITIONS

.....

Article 11: SUBMISSION OF THE TENDER

The sub-contractor must submit his tender in .....  
copies not later than .....

The sub-contractor is bound by his tender:

- For a period of ..... days as from .....  
(date or event)
- Until the following date: .....

Article 12: CONCLUSION OF THE AGREEMENT

Tenders have/have not been invited from more than one sub-contractor in respect of the work referred to in the present invitation to tender.

Article 13: ALTERATIONS TO THE WORK TO BE SUB-CONTRACTED

.....

If, during the period of validity of the sub-contractor's tender, alterations are made to the principal contract that affect the work envisaged in the present invitation to tender, the principal contractor must immediately notify the sub-contractor(s) consulted thereof; after having noted such alterations, the latter shall undertake to inform the principal contractor without delay of the new conditions that he demands/they demand.

The present invitation to tender and the tender shall become null and void if the parties fail to agree on such new conditions.

Article 14: LAPSE OF THE INVITATION TO TENDER

The present invitation to tender is issued without obligation. The principal contractor reserves the right to withdraw it at any time, but he undertakes in that case to make immediate notification of such withdrawal to the sub-contractor consulted.

Article 15: VERIFICATION OF QUANTITIES

The sub-contractor shall/shall be not required to verify the quantities in the quantitative estimate.

.....

(Signature of the principal contractor and date).

FORM FOR SUBMISSION OF TENDER  
(For use by the sub-contractor)

- Name of the sub-contractor submitting the tender:  
.....
- Name of the principal contractor to whom the tender is addressed: .....  
.....

• Form of undertaking by the sub-contractor:

The undersigned undertakes to execute the work referred to in the invitation to tender of ..... (date); in conformity with the conditions thereof and the General and Special Sub-contracting Conditions, against payment of:

- An all-inclusive lump-sum price;
- Unit prices according to the list of unit prices annexed hereto;
- An all-inclusive and lump-sum price and unit prices according to the list of unit prices annexed hereto;
- Actual costs incurred;
- Verification of expenditure according to the following payment arrangements:  
.....

Value-added tax shall be paid on such amounts at the rate in force at the time of the operation that attracts VAT and according to the normal legal system.

The present tender shall be valid for the period fixed in the invitation to tender.

The present tender has been prepared in the light of the results of the sub-contractor's calculations and findings based on the drawings and the cost estimates and after a visit to the site.

The following errors have been discovered: ..... (List)

- In conformity with the invitation to tender, the sub-contractor has/has not verified the quantities in the quantitative estimate.
- Variants or suggestions: .....
- Price variations:
  - Declaration by the sub-contractor accepting the formula proposed by the principal contractor: .....

OR

- Alternative formula proposed by the sub-contractor:  
.....
- Other conditions stipulated by the sub-contractor:  
.....

• Annexes:

1. Detailed cost estimates for the work, signed by the sub-contractor.
2. Other documents required under the terms of the invitation to tender: .  
(List) .....  
(Signature of the sub-contractor and date).



SPECIAL AND GENERAL SUB-CONTRACTING CONDITIONS

A. SPECIAL CONDITIONS

Article 1: THE PARTIES

- Name or designation of the principal contractor and of the sub-contracting enterprise:
  - 1. Principal contractor: .....
  - 2. Sub-contractor: .....
- Addresses or registered offices:
  - 1. ....
  - 2. ....
- Commercial register:
  - 1. ....
  - 2. ....
- Social security and VAT registration:
  - 1. ....
  - 2. ....
- Affiliation with the body awarding or verifying professional qualifications and indication of qualifications:
  - 1. ....
  - 2. ....
- Affiliation with professional association:
  - 1. ....
  - 2. ....
- Names and titles of representatives of the parties:
  - 1. ....
  - 2. ....

Article 2: SUBJECT-MATTER OF THE AGREEMENT AND DESIGNATION OF THE WORK

- Work that is the subject-matter of the present agreement:  
.....  
(Concise description of the work entrusted to the sub-contractor).
- Place of execution of the work: .....
- References to the principal contract:
  - Name of the principal: .....
  - Name of the principal contractor or of the architect: .....
  - Indication of the principal contract and references to the specifications applicable thereto: .....
  - Overall completion date for the general contract: .....
  - Date of opening of tenders: .....

OR

Date of the order: .....

Article 3: CONTRACTUAL DOCUMENTS

3.1 The General Conditions below as well as the drawings, estimates, technical documents, standards and technical specifications mentioned in articles 3.2 and 3.3 below shall be applicable to the present agreement.

The correspondence exchanged prior to the signature of the present document, in particular the invitation to tender of the principal contractor, shall have no contractual significance and shall be replaced by the present Special and General Conditions.

OR

The invitation to tender of the principal contractor, the tender of the sub-contractor and the order of the principal contractor shall be part of the agreement.

3.2 Transmission of the drawings, estimates and other technical documents:

- List of drawings, estimates and other technical documents: .....
- Indication of the place at which the drawings, estimates and technical documents relative to the sub-contracting agreement can be consulted: .....

3.3 Standards and technical specifications applicable: ..... (List)

Article 4: CONCLUSION OF THE AGREEMENT

The agreement is concluded:

4.2 Definitively

OR

4.3 Subject to the suspensive condition of the conclusion of the principal contract and/or of the approval of the sub-contractor by the principal.

Article 5: GUARANTEE OR SECURITY

5.1 The sub-contractor shall not be required to provide any security or guarantee.

OR

5.2 Pursuant to article 5.2 of the General Conditions, the sub-contractor shall be required to provide a guarantee in respect of ..... per cent of the work sub-contracted.

OR

5.3 Pursuant to article 5.3 of the General Conditions, the sub-contractor shall be required to provide security of a value equal to ..... per cent of the amount of the work sub-contracted, to be deposited with ..... (designation of the third party or agency). The security shall take the form of cash/stock.

5.4 The duration of the security or guarantee commitment shall be that fixed in article 5.4 of the General Conditions.

OR

The duration of the guarantee commitment is fixed at: .....

**Article 7: COMMENCEMENT OF THE WORK, PERIOD OF EXECUTION AND WORK SCHEDULE**

**7.1 Commencement of the work:**

- Within a period of ..... calendar days from the placement of the order, at the request of the principal contractor.

OR

- On the ..... day of the general work schedule.

OR

- On ..... (date).

**7.2 Period for execution of the work:**

- 7.2.1 The period for execution of the work sub-contracted is fixed at ..... calendar days.

OR

- 7.2.2 With reference to article 7.2.2 of the General Conditions, the period for execution of the work sub-contracted is fixed at ..... working days.

Any day during which work has been rendered impossible owing to adverse weather conditions or their consequences for a period of ..... hours shall not be considered as a working day.

OR

- 7.2.3 The work sub-contracted must be completed on ..... (indicate the precise date), work having commenced in that case not later than ..... (indicate the precise date).

**7.3 Work schedule:**

- 7.3.1 The general work schedule of the principal contract can be consulted at ..... (indicate the place).

- 7.3.2 No detailed schedule for execution of the work shall be established between the parties.

**Article 8: PENALTIES FOR FAILURE TO OBSERVE TIME-LIMITS AND THE WORK SCHEDULE**

- 8.1 When the contractual time-limit for execution of the work is exceeded through fault of the sub-contractor, a penalty shall be imposed on him amounting to:

- ..... francs per calendar day of delay.

OR

- ..... (formula).

- 8.2 In the event of failure to observe the detailed work schedule or, in the absence of a detailed work schedule, of the general work schedule, a penalty shall be imposed on the sub-contractor amounting to:

- ..... francs per calendar day of delay.

OR

- ..... (formula).

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Article 10: ALTERATIONS TO THE WORK SUB-CONTRACTED

10.1 Pursuant to the provisions of article 10.1 of the General Conditions, the sub-contractor must execute supplementary work, the volume of which shall not exceed a total amount of .....(indicate the amount and the currency).

10.2 If the alterations to the work sub-contracted involve a reduction greater than:

- ..... per cent of the total amount of the present agreement (indicate the percentage)

OR

- the amount of ..... (indicate the amount and the currency),

the clause provided for under article 10.2 of the General Conditions shall be applied.

Article 11: CONTRACTUAL PRICE

The work referred to in article 2 of the present Special Conditions shall be executed against payment of:

- An all-inclusive lump-sum price of: ..... (Indication of the price),
- The unit prices specified in the list of unit prices annexed hereto;
- The all-inclusive and lump-sum prices and the unit prices specified in the list annexed hereto;
- Actual costs incurred;
- Reimbursement, according to the following payment arrangements: .....

Article 12: VAT

These prices are to be understood as net of VAT. On the date of the conclusion of the contract, the rate of VAT is ..... (indication of the rate).

Article 13: PAYMENT ARRANGEMENTS

13.1 The contract shall give rise to a single payment on acceptance of the work.

OR

The work executed shall be paid for in monthly instalments, and a balance shall be paid on acceptance of the work.

OR

The work shall be paid for in tranches of ..... francs pari passu with its execution.

OR

The work shall be paid for according to its degree of completion at the following stages: .....

13.2 Payments shall be made within ..... days counting from receipt by the principal contractor of the sub-contractor's invoice accompanied by a progress report on the work.

When a balance is due, the final account shall be drawn up within ..... days after acceptance of the work (cf article 27.1 of the General Conditions).

This final account shall be verified and the amount shall be paid within ..... days following its receipt.

Article 14: CURRENCY OF ACCOUNT AND CURRENCY OF PAYMENT

14.1 The currencies of account and payment shall be those stipulated in article 14.1 of the General Conditions.

OR

14.2 The currencies of account and payment shall be as follows:

- Currency of account: .....
- Currency of payment: .....

14.3 All payments shall be made at ..... (indicate the place).

Article 15: PRICE VARIATIONS

15.1 The parties agree to submit contract prices to the following variation formula:

- 15.1.1 Structure of the formula: .....
- 15.1.2 Value and explanation of the indices and parameters chosen: .....
- 15.1.3 Publication of variations in these indices: .....

OR

15.2 The contract is concluded on the basis of firm and non-revisable prices.

Article 16: ADVANCES

16.1 Amount of the advance: .....

16.2 Date of payment: The advance shall be paid: ..... (indicate the precise date).

OR

The advance shall be paid on request by the sub-contractor, giving ..... days' notice.

16.3 Recovery arrangements:

- 16.3.1 Recovery in full out of the next payment.
- 16.3.2 Recovery in tranches of ..... per cent out of successive payments.
- 16.3.3 Other arrangements: .....

16.4 Advances shall be subject to revision pursuant to the provisions of article 15 above.

OR

Advances shall not be subject to revisions.

16.6 The sub-contractor shall/shall not be required to provide a guarantee to ensure the repayment of advances.

Article 17: RATE OF INTEREST APPLICABLE TO ARREARS IN PAYMENT

..... per cent.

Article 18: PRO RATA EXPENSE ALLOCATION ACCOUNT

18.1 No pro rata expense allocation account shall be kept in respect of common services expenditure on the site.

OR

18.2 A pro rata expense allocation account shall be kept in respect of the common services expenditure on the site referred to in article 18 of the General Conditions as well as for the following expenditure: ..... (list).

The monthly statements of the pro rata expense allocation account shall be submitted for approval to a committee consisting of the following persons: ..... (list).

18.3 Contribution of the sub-contractor to the pro rata account:

18.3.1.1 Lump-sum contribution of ..... francs.

18.3.1.2 The contribution is fixed at ..... per cent, representing the proportional value of the work sub-contracted to the whole volume of work carried out for the principal.

18.3.1.3 The contribution is fixed at the proportion of man/hours of services rendered by the enterprises present on the site.

18.3.2 Ceiling of contribution to the pro rata account: The sub-contractor's contribution to the pro rata account shall in all cases be limited to ..... per cent of the final amount of the contract for work that is sub-contracted to him.

18.4 Management of the pro rata account.

The pro rata account shall be managed by the principal contractor.

OR

The pro rata account shall be managed by Mr. .... (name), who shall be designated by the principal contractor.

Article 22: INSURANCE

22.2 In addition to the insurance referred to in article 22 of the General Conditions, the sub-contractor shall be required to take out the following special insurance: .....

Article 23: LIABILITY

23.2 Special guarantee clauses: ..... (Indication of the special guarantees formulated by the principal or by the principal contractor by reason of a provision in the principal contract).

Article 28: LIABILITY FOR LATENT DEFECTS

28.1 Notwithstanding the provisions of article 28.1 of the General Conditions, the period of liability of the sub-contractor for latent defects is fixed at .....

Article 29: AUTOMATIC MEASURES

The automatic measures applicable shall be those stipulated in article 29 of the General Conditions.

OR

The automatic measures specified below are expressly agreed: .....

Article 30: CANCELLATION OF THE CONTRACT

30.2.2 Notwithstanding the provisions of article 30.2.2 of the General Conditions, if one of the parties ceases independent operations as a legal person - for example through merger or absorption - the other shall be entitled to cancel the agreement.

In that event, no compensation shall be due from either party.

Article 32: SETTLEMENT OF DISPUTES

The parties agree to submit disputes between them:

- To the arbitration provided for under article 32 of the General Conditions:  
OR
- To arbitration by the following persons: ..... (names).

Article 33: LAW APPLICABLE

The law applicable shall be that specified in article 33 of the General Conditions.

OR

Notwithstanding the provisions of article 33 of the General Conditions, the following law shall be applicable: .....

(Delete where inapplicable)

B. GENERAL CONDITIONS

Article 3: CONTRACTUAL DOCUMENTS

3.4 With respect to the interpretation of the agreement, the contract documents shall prevail in the following order:

- (a) The Special Conditions;
- (b) The conditions contained and accepted in the invitation to tender of the principal contractor, in the tender of the sub-contractor and in the order of the principal contractor in cases in which the Special Conditions have stipulated the application of these documents.
- (c) The General Conditions.

3.5 In the event of conflict, the provisions of the tender shall prevail over those of the invitation to tender when the former have been accepted without reservation by the principal contractor. In the event of conflict, the conditions of the order shall prevail over the provisions of the sub-contractor's tender when the sub-contractor has accepted the order or executed the work without reservation.

The drawings, estimates and technical provisions relative to the work sub-contracted shall prevail over the standards and technical specifications to which the present agreement refers except when such standards and technical specifications are mandatory at the location of the works.

When a list of drawings, estimates or technical documents is transmitted as stipulated in article 3.2 of the Special Conditions, such drawings, estimates and technical documents shall prevail in the order of their enumeration.

Article 5: GUARANTEE AND SECURITY

The guarantee or security ensures the correct execution of the work sub-contracted.

- 5.2 When a guarantee is required from the sub-contractor, the guarantor must be a banking or financial institution.
- 5.3 When security is required from the sub-contractor, such security must be deposited with the person or agency designated in the Special Conditions.
- 5.4 Unless the Special Conditions provide otherwise, the guarantor shall be released from his commitment or the security deposit shall be released on expiration of one year after acceptance of the work.
- 5.5 Proof of the provision of the guarantee or security must be furnished to the principal contractor within 30 days from the formulation of a request by the latter.

Proof of the provision of the guarantee or security shall be furnished by handing over an original of the contract of guarantee, or the receipt for the deposit of cash or stock issued by the third party or agency, in the case of security.

In the event of failure of the sub-contractor to furnish proof of the provision of this guarantee or security within this time-limit, the principal contractor may, after unsuccessful service of notice, either withhold from the payments due to the sub-contractor an amount equal to the

guarantee money or security or apply the automatic measures referred to in article 29 below.

- 5.6 It is expressly agreed that the provision of a guarantee or security covers the completion and proper performance of all the work that is the subject-matter of the agreement, including the alterations or supplementary work entrusted to the sub-contractor in the course of the agreement.

#### Article 6: ATTESTATIONS

At the request of the principal contractor, the sub-contractor shall, during the period of validity of the present agreement:

- 6.1 Furnish evidence of his professional qualifications or occupational classification for the work that is the subject-matter of the agreement;
- 6.2 Prove that he has fulfilled his obligations in fiscal, salary and social security respects and furnish all attestations in this regard.

#### Article 7: COMMENCEMENT OF WORK, TIME-LIMITS AND WORK SCHEDULE

##### 7.1 Commencement of work

Except in cases in which the commencement of work is fixed at a specific date, the order for commencement of the work shall be given in writing by the principal contractor to the sub-contractor.

When it has not been possible to give the order for commencement of the work by the date envisaged in the Special Conditions, the parties shall agree thereon without prejudice to their rights.

##### 7.2 Time-limits

All the time-limits mentioned in the present General Conditions other than the time-limit for completion referred to below, shall be expressed in calendar days.

7.2.1 When the time-limit for completion is fixed in calendar days, weeks, months or years or on a specific final date, all days without exception shall be considered in calculating the time-limit.

7.2.2 When the time-limit for completion of the work is fixed in working days, days during which work is not authorized by laws and regulations or during which the enterprises cannot work owing to the provisions of collective agreements applicable to the location at which the work sub-contracted is executed, or days during which, as recognized by the principal contractor, work has been rendered impossible owing to adverse weather conditions or their consequences for the number of hours fixed in article 7.2.2 of the Special Conditions shall not be considered as working days.

##### 7.3 Work schedule

7.3.1 The sub-contractor must conform to the provisions of the general work schedule imposed by the principal on the principal contractor, or approved by the former. The principal contractor shall notify the sub-contractor of all the alterations that are made to this work schedule by the principal that influence the execution of the work sub-contracted.

7.3.2 The Special Conditions may provide that a detailed work schedule be applicable to the work sub-contracted. In that event, the work schedule shall be established and, if appropriate, altered by mutual agreement between the parties.

7.3.3 Disruption of the sub-contractor's work schedule owing to alteration of the general work schedule shall give rise to compensation.

Article 8: PENALTIES FOR FAILURE TO COMPLY WITH TIME-LIMITS AND THE WORK SCHEDULE

- 8.1 The amount of penalties for exceeding the contractual time-limit by the fault of the sub-contractor shall be fixed in the Special Conditions. These penalties shall fall due after service of written notice by the principal contractor on the sub-contractor.
- 8.2 The amount of penalties for failure on the part of the sub-contractor to comply with the detailed work schedule, or, failing such detailed work schedule, the general work schedule, shall be fixed in the Special Conditions. Arrears with respect to the work schedule shall be assessed on the date of preparing financial statements in respect of the work covered by the work schedule that the sub-contractor has failed to comply with. The penalties shall fall due after service of written notice by the principal contractor on the sub-contractor.
- 8.3 The penalties shall be deducted in making the corresponding payments for work done. However, when the sub-contractor makes arrears good without causing a time-lag or additional expenditure in the work of the other enterprises on the site, the amount of the penalty shall be reimbursed on the occasion of the next subsequent payment. In the opposite case, the amount shall be added to that of the penalties for exceeding the contractual time-limit.

Article 10: ALTERATIONS TO THE WORK SUB-CONTRACTED

- 10.1 All alterations to the work sub-contracted that are imposed by the principal contractor must be executed by the sub-contractor. Major alterations shall be the subject of an endorsement accepted by the parties. In particular, this refers to alterations that necessitate the determination of a new price, that leads to a change in the time-limit for completion or that disrupt the work schedule for the work sub-contracted.

The sub-contractor is not obliged to execute new work that is outside the scope of his enterprise nor work whose volume exceeds the amount fixed in article 10.1 of the Special Conditions.

- 10.2 If alterations to the work sub-contracted lead to a decrease in the amount of the present agreement greater than the limits fixed in article 10.2 of the Special Conditions, a general revision of the price conditions of the agreement shall be negotiated between the principal contractor and the sub-contractor.

Article 11: PRICES UNDER THE AGREEMENT

Except in the case of sub-contracting agreements of a low amount or limited duration, payments shall be made in instalments, with payment of a final balance in accordance with the timing stipulated in the Special Conditions.

When payment is to be made in weekly or monthly instalments, such instalments shall be paid only in respect of the work carried out by the end of such periods. When the price is payable in tranches, payment shall fall due from the time at which the value of the work carried out reaches the amount of each tranche. When the payment must be made according to the completion of stages of the work, for example, when foundations have been laid, when the roof is completed, and on final acceptance, the corresponding payments shall fall due from

the moment at which the work comprised in the stage in question has been completed.

In all circumstances, the instalments indicated above may be set off only against the total amount under the agreement, which shall be determined at the time of drawing up the final accounts.

Article 12: VAT

However prices are fixed, they shall be understood as being net of VAT.

The parties must inform themselves in good time of the rates of VAT applicable, the operations that attract the tax, and the time-limits within which and the party by whom the tax must be paid.

When VAT is payable by the sub-contractor, the price fixed in article 11 of the Special Conditions shall be increased by the amount of the tax.

The rate of VAT indicated in the Special Conditions is that in force at the date of the agreement and is quoted merely as an indication.

Article 13: PAYMENT ARRANGEMENTS

13.2 The payment periods shall be fixed in the Special Conditions.

Article 14: CURRENCY OF ACCOUNT AND CURRENCY OF PAYMENT

14.1 Both in the case of instalments and of the final balance due, statements of receivables and invoices addressed by the sub-contractor to the principal contractor shall be expressed in the currency of account in force in relations between the principal contractor and the principal.

Payments by the principal contractor to his sub-contractor shall be made in the currency of payment used by the principal.

14.2 However, if the sub-contractor demands payment for his services in a currency different from the currency of payment of the principal contract, the exchange transaction shall take place at the rate in force on the date of payment. In that event, the sub-contractor shall bear the risks and the costs of the exchange transaction and currency fluctuations, the principal contractor being excluded.

14.3 All payments shall be made at the place fixed in the Special Conditions.

Article 15: PRICE VARIATIONS

15.1 The Special Conditions or the accepted provisions of the invitations to tender, the tender or the order, when these documents are part of the agreement, shall specify whether there shall be any variation in prices and the relevant arrangements for any such variation.

Article 16: ADVANCES

16.3 When advances are paid by the principal contractor to the sub-contractor, such amounts shall be recovered either by deduction from the subsequent instalment or by percentage deduction from all the instalments paid in execution of the agreement or according to the arrangements provided in the Special Conditions.

16.4 Unless article 16.4 of the Special Conditions provides otherwise, advances shall not be subject to revision. In this case they shall be deducted from the instalments before the revision formula is applied to the latter.





- 16.5 When advances are not paid by the principal contractor on the dates stipulated in the Special Conditions, they shall attract interest on arrears at the rate fixed in article 17 of the Special Conditions, after due service of notice.
- 16.6 The Special Conditions may stipulate a guarantee, at the expense of the sub-contractor, to ensure the reimbursement of advances.

Article 17: INTEREST ON ARREARS OF PAYMENT

All sums due in execution of the present agreement that are paid in arrears shall attract the interest stipulated in the Special Conditions, as from the date of service of written notice on the principal contractor.

The stipulation of interest on arrears of payment mentioned in the Special Conditions shall not constitute an obstacle to the right of the sub-contractor to additional compensation covering the loss actually suffered, provided, however, that the national legislation applicable to the agreement does not forbid this.

Article 18: PRO RATA ACCOUNT

- 18.2 When there is provision for a pro rata account intended to finance expenditure on common services chargeable to all the enterprises on the site, a monthly statement thereof shall be kept and a copy of that statement shall be transmitted to the sub-contractor. The pro rata account shall be submitted for approval to a committee appointed pursuant to the Special Conditions.

This pro rata account shall cover the following items of expenditure, in addition to those stipulated in the Special Conditions:

- Consumption of water, power and lighting necessary for the work;
- The provision, assembly, dismantling and maintenance of fences and security barriers;
- Guarding, regular sweeping and cleaning of the site;
- Temporary charges for road use;
- The utilization and maintenance of lifting gear and access to the site;
- Costs for the installation, removal, rental and operation of telephones.

- 18.4 Unless article 18.4 of the Special Conditions provides otherwise, the pro rata account shall be managed by the principal contractor.

Article 21: LABOUR MATTERS

The sub-contractor has sole responsibility for complying with collective agreements and legal provisions and regulations on social security matters.

If, after service of notice, the sub-contractor has not duly regulated matters, the principal contractor may take all appropriate automatic measures, including those stipulated in article 29 of the General Conditions, to compel the sub-contractor to comply with collective agreements and legal provisions and regulations of a social nature (wages, social security costs, insurance, working hours, safety and health, etc.) which the sub-contractor is bound to observe.

In any case, the sub-contractor shall guarantee the principal contractor against any proceedings against him arising out of an infringement of the above provisions.

Article 22: INSURANCE

- 22.1 The sub-contractor must take out adequate insurance to cover his third party liability as well as his liability in respect of work accidents of his staff.
- 22.2 The Special Conditions shall mention as appropriate any other types of insurance required by the principal contractor.
- 22.3 The sub-contractor must produce all these insurance policies on request and without delay for inspection by the principal contractor.

Article 23: LIABILITY

- 23.1 The liability of the parties results from the obligations incumbent on them by reason of the contractual provisions agreed between them and by reason of the law applicable to the agreement.
- 23.2 The special guarantees required from the sub-contractor are indicated in the Special Conditions.
- 23.3 The principal contractor and the sub-contractor are each liable for any criminal or quasi-criminal fault and shall hold their fellow contractors harmless, and shall undertake, if applicable, to guarantee them from any proceedings.

Article 24: INTELLECTUAL RIGHTS

If, in the course of the work that is the subject of the present agreement, the principal contractor or the sub-contractor obtains knowledge of manufacturing processes, operations, utilization procedures, etc., he may not appropriate them to himself, use them for his own profit or communicate them to third parties.

Article 25: MUTUAL INFORMATION OBLIGATION

The parties undertake to inform each other immediately of any difficulty arising in the course of execution of the work that would be of such a nature as to disrupt punctual and harmonious performance.

In particular, the principal contractor and the sub-contractor undertake to exchange all information of a technical nature that is in their possession or that comes to their knowledge and on which the execution of the work under the principal contract and the sub-contracting agreement depends.

The principal contractor must also inform his sub-contractor of all payments received from the principal that are related to the work sub-contracted.

Article 26: UNFORESEEABLE CIRCUMSTANCES

In the event of any fortuitous act, act of State, act by third parties or other act constituting force majeure, the parties declare that they will be guided by the solutions allowed by the law applicable to the agreement, but without prejudice to more advantageous provisions of the principal contract, which shall also be applied to the present agreement.

The principal contractor shall communicate to the sub-contractor the provisions of the principal contract related to such circumstances.

However, the sub-contractor may not claim application of such more favourable provisions if the principal contractor has not been able to benefit by them. The principal contractor must initiate all action vis-à-vis the principal for this purpose.

Article 27: ACCEPTANCE OF THE WORK SUB-CONTRACTED

27.1 The acceptance of the work sub-contracted shall take place in principle on the expiration of the contractual period for completion of the work sub-contracted and at the earliest on the date of completion of that work, according to the following arrangements:

- Acceptance must be requested in a letter from the sub-contractor to the principal contractor or his agent;
- Within 15 days of the request, the principal contractor or his agent must inspect the work, and a written report shall be drawn up thereon. In 15 days from drawing up the written report, the principal contractor must indicate to the sub-contractor the acceptance or refusal of acceptance of the work;
- Failing the drawing up of a written report or notification of acceptance or refusal of acceptance of the work within the above time-limits, the work shall be considered as accepted;
- In all cases and failing any contrary stipulation in the notification, acceptance shall take effect retroactively to the day of completion of the work indicated by the sub-contractor in his request.

27.2 Acceptance by their principal contractor shall have the following effects:

- The transfer of risks;
- Coverage in respect of apparent defects;
- Cessation of penalties for arrears;
- Drawing up of the final account. Article 13.2 of the Special Conditions shall stipulate the period within which the final account shall be drawn up. In the absence of such stipulation, a period of three months shall apply.
- The reversal of the onus of proof for defects;
- The commencement of the guarantee period.

Article 28: LIABILITY FOR LATENT DEFECTS

28.1 Unless article 28.1 of the Special Conditions provides otherwise and without prejudice to the provisions of article 27.2 of the General Conditions, the sub-contractor shall remain liable for latent defects during the same periods and under the same conditions as the principal contractor vis-à-vis the principal.

During that period, the sub-contractor must carry out all the repairs made necessary by a latent defect, even of a minor nature, with regard to which he is at fault. Unless the sub-contractor carries out the repairs, the principal contractor may, after serving written notice, apply in respect of the expenses and risks of the sub-contractor at fault the automatic measures mentioned in article 29 of the present General Conditions.

Article 29: AUTOMATIC MEASURES

29.1 Except in cases in which a specific sanction is stipulated in the Special Conditions or the other conditions of the present General Conditions, any serious infringement of the agreement shall give rise, after unsuccessful service of notice, to one of the following measures:

29.1.1 Cancellation of the agreement:

When cancellation takes place for the benefit of the principal contractor, the guarantor must fulfil his commitment, without prejudice to compensation due from the sub-contractor:

The sub-contractor must, at the request of the principal contractor, place at the latter's disposal the provisional works, the essential equipment and the materials provided on the site or in the factory or in store and essential for the continuation of the work;

29.1.2 The conclusion of an agreement with a third party for the account and at the expense of the sub-contractor at fault.

29.2 Independently of the interest on arrears mentioned in article 17 of the General Conditions, arrears of payment by the principal contractor exceeding 90 days shall authorize the sub-contractor to interrupt his work. If service of notice has had no effect after 30 days, the sub-contractor may unilaterally cancel the agreement at the expense of the principal contractor.

29.3 Whatever the action taken, the party at fault shall be notified in writing of the decision to take automatic measures. In all cases, an inventory of the work shall be drawn up jointly.

#### Article 30: TERMINATING THE CONTRACT

30.1 The principal contractor may terminate the present agreement when the principal contract is itself terminated without any fault on his part. In this case, the sub-contractor shall be entitled to payment for the work done and shall receive compensation up to the amount of the loss that he has incurred; such compensation shall be due from the principal.

The present agreement shall also be terminated ipso jure when the principal contract is terminated for fault of the principal contractor, who must in that case make good any loss incurred by the sub-contractor.

30.2

30.2.1 When the agreement is concluded with a physical person, the decease of the latter - whether of the principal contractor or the sub-contractor - shall entitle the other contracting party to opt between the dissolution and continuation of the agreement. Such other contracting party must exercise the option within a short period after the decease.

In such cases, no compensation shall be due from either party.

30.2.2 Unless the Special Conditions provide otherwise, this same option shall not be open to the principal contractor or the sub-contractor, as the case may be, when the other contracting party is a legal person who ceases independent operations, for example, by merger with or absorption by a third party.

#### Article 31: PERSONAL EXECUTION OF THE WORK

The sub-contractor may not cede, assign or further sub-contract all or part of the work that is the subject of the present agreement without the prior authorization of the principal contractor in writing.

#### Article 32: SETTLEMENT OF DISPUTES

#### Article 33: LAW APPLICABLE

Unless the Special Conditions provide otherwise, the law applicable to the sub-contracting agreement shall be the law of the country in which the work of the principal contract is executed.