

المركز الإقليمي للتحكيم التجاري الدولي بالقاهرة

مؤتمر التحكيم الدولي والوسائل السلمية الأخرى لحسم المنازعات

٨ إلى ١٢ إبريل ١٩٩٧

"المطالبات في عقود الفيدك وعقود التشييد"

إعداد: الدكتور المهندس / شريفه مصطفى الميجان

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Putting crime on one side, by far
the greatest bulk of the disputes
that arise in modern society
derives directly or indirectly from
contractual relationships.

J.F.PHILLIPS

Arbitration - The Revolution of the 80's
Arbitration, May 1986.

DEFINITION

Fowler's Modern English Usage (Revised by Sir Ernest Gowers):

Claim, vb. → The primary meaning of of c. is to demand recognition of a right.

- a natural extension is to use *claim* instead of say (he claims to have seen a flying saucer)

Cambridge International Dictionary of English:

- Say: to say that (something is true or is a fact although you cannot prove it & other people might not believe it → *"All parties have claimed success in yesterday's elections"*

- Demand: to ask for (something of value) because you think it belongs to you or because you think you have a right to it → *"Don't forget to claim for your traveling expenses after the interview"*

المورد: (١) يطالب بـ (٢) يستحق (٣) يدعى

"ما ضاع حق وراءه مطالب"

CLAIMS (Main Causes)

- ✿ Disputes over quantities
- ✿ New items
- ✿ Specification interpretation
- ✿ Access to Site
- ✿ Delay during the work
- ✿ Disruption
- ✿ Awaiting drawings
- ✿ Weather conditions
- ✿ Actions of a Nominated Subcontractor
- ✿ Variation Orders
- ✿ Acceleration
- ✿ Suspension
- ✿ Delay in payment

Many Contractors believe that claims provide a means by which they can solve financial troubles, even if the problems are the result of the Contractor's shortcomings.

Claims will always exist and the document permits the Contractor to present any claim he might wish and the Engineer is obliged to consider it, however unreal it might be.

If the Contractor considers he is entitled, he can not be prevented from saying so.

CLAUSES OF CONTRACTOR'S EXTRA PAYMENTS

Clause number	Clause title	Adjustment
5.2	Ambiguities	T + C
6.3 and 6.4	Engineering Drawings delay	T + C
12.2	Physical conditions	T + C
17.1	Setting out (errors based on incorrect data)	C + P
18.1	Exploratory boreholes	C + P
20.3	Repairs and Employer's Risks	C + P
27.1	Fossils, antiquities, structures	T + C
31.2	Opportunities to other Contractors	C + P
36.5	Tests	T + C
38.2	Uncovered work	C
40.2	Suspension	T + C
42.2	Employer's failure to give possession	T + C
49.3	Cost of remedying defects	C + P
50.1	Search for defects	C
52.1	Variations	C + P
52.1 and 52.2	Extra payment for Variation Orders	C + P
52.3	Fifteen per cent reduction or increase	1 C
65.3	Damage to Works by Special Risks	C + P
65.5	Increased costs arising from Special Risks	C
65.8	Termination of Contract	C and C + P
69	Defaults by Employer	T + C
70.1	Increase or decrease of cost	by formula
70.2	Changes in legislation	1 C
71	Currency and Rates of Exchange	C + P

T = time adjustment ; C = cost adjustment ; P = profit adjustment.

CLAIMS

o Potential Employers should note that the more inequitable a contract, the more tenderers must 'insure their risks' by increases in their tender price.

o The Eng. will be unable to go outside the explicit terms of the contract for rules by which to judge and settle matters in dispute.

o Contractors may correctly assume that the Eng.'s decisions on claims and on disputes are likely to be as equitable as is the contract itself

o It is reasonable to suppose that arbitrators, having a far wider range of authority will have the necessary power and judicial capability to correct grossly inequitable results, notwithstanding any inherent inequity within the contract.

o Ploys by the unscrupulous
-pricing low and claiming
-not a safe way of making business

o Early recognition of a claim or potential claim may make it possible to deal with it early & avoid bigger claims later

o Grounds for claims, main themes :

1. Concerning contract documentation
2. Concerning execution of the work
3. Concerning payment
4. Concerning prolongation
5. Concerning default

. Zimmcor argued that in another action against employer they may be found to be entitled to time extension
→ court's view: until such time as it was decided an extension was due, Zimmcor were in breach of cl.19

. Zimmcor argued that employer has not proved that delays caused delay to work as a whole → C.M.'s representative swore that his estimate was " an entirely fair & objective assessment of loss & damage which the employer was likely to incur as a result of Zimmcor's breaches "

. Zimmcor argued that there were 68 trade contractors → unlikely that all the delay to Zimmcor's work was due to their own fault

. Zimmcor argued that estimate did not take into account actions of other trade contractors or of Bovis themselves

📖 Zimmcor obliged to pay £10,245,605

Rosehaugh Stanhope (Broadgate Phase 6) plc v Redpath Dorman Long (1989)

1. Redpath Dorman Long in similar position to Zimmcor
2. They were ordered to pay two sums û £5,228,515 & £3,140,492

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Appeals against lower courts decision lodged to the Court of appeal

o Intention of the drafter → to make the trade contractor pay potentially substantial sums to the employer where delays occur → repayments to be made after the matter of extensions of time has been dealt with.

📖 Court of Appeal → trade contractors would have no obligation to pay the amount of the construction manager's estimate if they had an arguable case for being awarded an extension of time á Lord Justice Stocker in the Broadgate

ONEROUS CONDITIONS

- Construction management system û no main contractor û contracts are let by employer to specialist contractors (trade contractors) → construction manager appointed by employer
- work being the subject of separate contracts between employer and trade contractors

Beaufort House Development Ltd v Zimmcor (International) Ltd (1990)

1. Defendants to supply & erect ...
2. Bovis Construction Ltd employed to be construction managers
3. No standard conditions of contract for management contracting → conditions are drafted for each scheme
4. Clause 19(1) → requires contractors to complete within periods of completion stated in the programme...
5. Clause 19(3) → *"If the trade contractor is in breach of any of the obligations under subclause (1), he shall, without prejudice to and pending the final ascertainment or agreement between the parties as to the amount of the loss or damage suffered by the client in consequence thereof, forthwith pay or allow to the client such sum as the construction manager shall bona fide estimate as the amount of such loss or damage, such estimate to be binding and conclusive upon the trade contractor until final ascertainment or agreement..."*
6. Programme → bar chart form bound into the agreement → time allotted for Zimmcor's work : 21 weeks to end 2 / 4 / 88
7. Zimmcor contended work completed on 28 / 2 1989 → certificate of practical completion : 6 / 3 1989 → Zimmcor claimed extension of time → none was granted û estimate of loss and damage made on 26 / 4 / 1989 → Zimmcor refused to pay → employer went to court

Zimmcor's case :

. they are entitled to time extension → not in breach of clause 19(1) → court considered clause read as a whole gives rise to an obligation to pay as an interim payment based on facts that appear at time of estimate.

Influence of ICE Contract

Reasons:

- ◆ A very sophisticated and developed law of civil engineering contract exists in the English Jurisdiction
- ◆ The international language of civil engineering contracts is undoubtedly English

decision said that this view accords with commercial sense since otherwise Rosehaugh Stanhope would be in a position to enforce potentially ruinous payments by Redpath Dorman Long in circumstances in which it is later established they were under no obligation to pay.

○ Grossly unfair to take the line that the trade contractor will be assumed to be in the wrong until such time as it may be shown not to be his fault; *a case of guilty until proven innocent.*

○ The Court of Appeal decision may call for a long term thinking concerning onerous conditions:

○ The wording of the clause is clear but very onerous to the trade contractor.

○ The Court of Appeal refused to enforce it as being potentially ruinous to the trade contractor.



Can We Detect a Change of Thinking ?

- ✿ Possession of Site ⇒ definition of "site" is more concise.
- ✿ Further Drawings ⇒ a new provision in clause 7.2 for the contract to expressly provide that part of the permanent works will be designed by the contractor ⇒ Clause 6.5 of the fourth edition allows the Engineer to take into account delays caused by the contractor in submitting drawings to the Engineer.
- ✿ Programme ⇒ requires the contractor within the time stated in Part II, after acceptance of the tender, to provide a detailed cash flow estimate in quarterly periods → [14.3]
- ✿ Emp.'s risks separated into individual Sub-Clauses → [20.4]
- ✿ Interim Determination of Extension ' now considers the effect of a continuing effect → [44.3]
- ✿ Suspension ⇒ if the suspension lasts for 84 days, the contractor may give the Engineer a 28 day notice requiring permission to proceed with the works. If permission to restart is not given the contractor subject to a further notice may treat the part of the work suspended as an omission or where the suspension affects the whole works as repudiation by the Employer.

3rd & 4th Editions

(Comparison)

- ① *Brings the Employer much more into prominence during the period of construction.*
 - ② *Marked improvement in clarity and precision of some terms.*
 - ③ *The Engineer :*
 - *has to consult Emp. & Contractor before making certain decisions (e.g. extra payment and extra time).*
 - *required to act impartially in decision-making.*
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- ✿ Disappearance of the word “International”
- ✿ Emp. no longer has the right to change Eng. simply by advising Contractor of this happening → Clause [1.1(a)(iv)]
- ✿ Appointment of Eng.'s Rep. is sole duty of Eng → [2.2]
- ✿ Eng. expressly required to exercise his authority with impartiality → [2.6]
- ✿ Contract Documents ➡ includes a revised list of contract documents and places them in an order of priority when ambiguities or discrepancies arise [5.2]

CONTRACT PRICE : PURE LUMP SUM

An agreement to complete a whole work for a lump sum à In law this is an undertaking to get a certain result for a fixed sum of money. The contractor is entitled to that sum only, however difficult it may unexpectedly turn out to be to get the result.

⌚ Pure lump sum contract to lay the San Paulo Railway from terminus A to terminus B. As a result of errors in the engineer's plan almost twice the quantities of excavation originally estimated were needed to complete the line.

📖 Held : The contractor was entitled to no extra payment beyond the lump sum price in his tender.

And no work indispensably necessary to get the result is an extra:

⌚ In a lump sum contract to build a house, flooring was omitted from the specifications.

📖 Held: The contractor must put it in without extra payment, as it was clearly indispensably necessary to complete the house.

Therefore in a pure lump sum contract the contract price will be altered only where the plans, etc, are varied by the employer because he decides that a change is preferable, although it is not absolutely necessary; not where the change is necessary to complete the project:

⌚ Pure lump sum contract to build a bridge. If it is found that the piling specified cannot support the superstructure, the contractor must change it without extra payment so far as necessary to complete the works. If the piles will support the superstructure but the engineer decides that a change is preferable to improve on the original scheme, he must give a variation order and the contractor will be entitled to extra payment for any additional work (Of course, this principle works both ways. An

- ❁ Limit to Variations ⇒ 15 %
- ❁ Eng. not permitted to make a Variation whereby omitted work is carried out by the Emp → [51.1(b)]
- ❁ Contractor obliged to give notice of his intention to seek more money within 14 days.... before commencement of the varied work and not " as soon as is practical " → [52.2]
- ❁ New extremely clear Claim procedure included → [53]
- ❁ Specific arrangements for release of Retention Monies → [60.3]
- ❁ Emp. liable to pay a fixed rate of interest if late in making payment [69.1(a)]
- ❁ Settlement of Disputes ⇔ new requirement to attempt to settle amicably [67.2]

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employer has no right to make a deduction from a pure lump sum contract price merely because the quantities are less than he expected)
A contractor who agrees to a pure lump sum contract for work that is uncertain and unforeseeable in extent will be considered by the courts simply to have taken a voluntary gamble, and will be bound by the contract.

The attitude of the judges in the early cases which settled the law was clearly influenced by the feeling that an employer obtains a tender and fixes a contract price for work in order to know what he is in for, and that any relaxation of these rules would destroy the whole object of getting a tender. This, of course, ignores the difficult in extent and difficulties between large-scale engineering works and the ordinary relatively simple building work. Nevertheless, following from this attitude the courts hold that in inviting a tender there is no implied guarantee by the employer that the plans, bill of quantities or specifications supplied to tenders are accurate, or that the work can be carried out in accordance with them:

🕒 By the plans to build Blackfriars Bridge the foundations were to be put in with caissons. The contractors found this impossible and eventually had to abandon the attempt and complete the bridge in accordance with altered plans.

📖 Held: While they were entitled to the contract payments for the original work actually completed and, under the particular form of contract, to extra for the work in the new plans, they were not entitled to damage for the added expense and delay in trying to do the original work.