# Proving & Pricing Termination Claims

In the perspective of Expert witness (quantum) and Claims Consultant

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# Speaker

- Presently working as a claims specialist, preparation, defending and evaluating construction claims
- Expert witness on quantum and delay
- Actively involved/testified in arbitrations as an expert witness in major construction disputes
- Appointed as a counsel for construction disputes/arbitration
- Professional construction contract negotiator
- Experience in the regions of UK, South Asia, and Middle East

# Note on the Presentation

- Multi-Jurisdictional  (UK, USA, Australia, UAE)
- From the view of Claims Consultant/Expert Witness
- Multiple forms of Contract (FIDIC, JCT, AIA)
- Tips for Contract Administrators, Attorneys and counsels for argument

# Presentation Outline

Key Aspects of Termination

Termination Under Common law

Termination under Contract

Owner/Contractor Heads of Damages (Quantum)

Settlement Procedure

# Circumstances of Termination

*Key Aspects and Basic Principles*

# Circumstances of Termination

## At Common Law

Where the Contract has been repudiated or there is a breach of serious term and the innocent party has elected to terminate

## Under the Contract

Right to terminate under the contract, breach or for other reasons

## Terminated due to Frustration, Illegality

## Right to terminate under the statute

## By performance of all obligations

# Right to Terminate under the Statute

- **36—Right to terminate certain domestic building work contracts**

  *(3) A building owner under a domestic building work contract may, by instrument in writing signed by the building owner and served personally on the building work contractor, or posted by certified mail addressed to the contractor, before the prescribed time, give notice to the contractor of the building owner's intention not to be bound by the contract and the contract is to be taken to have been terminated at the time the notice is served or posted in accordance with this subsection*

- Section 36, **Building Work Contractors Act 1995 ,** South Australia, Version: 4.5.2020

# Key Aspects of Termination

# Basic distinctions for termination

- Cause of Termination (Default, Convenience, Automatic)
- Where the rights and obligations related to Termination are defined
  - Contract, Statutes, regulation or by the common Law
- Which party initiated the Termination
- The relief the aggrieved party is seeking
  - Damages at Law, equitable relief or restitution

# Termination under Common Law - Breach of Contract

*Termination under common Law*

# Termination under Common Law

## Repudiation by Contractor/Owner

- What is Repudiation
- Intention not to perform
- Substantial inconsistence
- Disability of Performing
- Seriousness of the Matter
- Willingness after Authoritative exposition

## Breach of Contract

- Anticipatory breach
- Willingness and able to Perform
- Breach of Serious Term
- Cumulative effect of the breaches
- By Owner
- By Contractor

# Effect of Termination at Common Law

Relieved from Further performance, executory rights and obligations being extinguishes

Enforceability of rights acquired

Put the parties in the position the Contractor would have been in had the Contract been performed

Owners Financial remedies

Contractor Financial Remedies

The amounts which the Contractor expended in performing the Contract

Loss of profit on the remaining works

Amount earned up to the point of termination

Use pf the Contractor's plant, Equipment & Materials

# Quantum Meruit

- As an alternative to a claim for damages
- Not Made under the Contract
- The contractual limitations. Limit of Contract Price
- If the obligations are performed
- Loss of profit on the reminder of the works

# Termination Pursuant to Contractual Power

Termination under the contract

# Code of Termination - Contractor's Default

- Expressly agreed consequences with regards to the continuation or modification
- The Contract has been “determined” or “terminated”?
- Cease further payments to the Contractor
- Measure is the additional cost of completing the works
  - (a) the total cost of the remaining Work and
  - (b) the amount that would have been paid to the original contractor for completing that work under the contract.
  - The difference between those two amounts to be recoverable pursuant to an express contractual right
- Owners right to complete the works itself or by a third party
- Set off the damages
- The act of mitigation/reasonableness

# Code of Termination - Contractor's Default

- Completion of Works by owner
- Liquidated Damages
- Plant and Equipment
- Completion of the Works

# Code of Termination - Contractor's Default

- After a notice of termination under Sub-Clause 15.2 [*Termination by Employer*] has taken effect, the Employer may:
  a) proceed in accordance with Sub-Clause 2.5 [*Employer's Claims*],
  b) withhold further payments to the Contractor until the costs of execution, completion and remedying of any defects, damages for delay in completion (if any), and all other costs incurred by the Employer, have been established, and/or
  c) recover from the Contractor any losses and damages incurred by the Employer and any extra costs of completing the Works, after allowing for any sum due to the Contractor under Sub-Clause 15.3 [*Valuation at Date of Termination*]. After recovering any such losses, damages and extra costs, the Employer shall pay any balance to the Contractor.

Clause 15.4 Payment after Termination – *FIDIC 1999 Conditions of Contract for Construction (First Ed. 1999). For Building and Engineering Works designed by the Employer. General conditions*

# Code of Termination - Contractor's Default

If the Employer terminates the Contractor's employment under this Clause, he shall not be liable to pay to the Contractor any further amount (including damages) in respect of the Contract until the expiration of the Defects Liability Period and thereafter until the costs of execution, completion and remedying of any defects, damages for delay in completion (if any) and all other expenses incurred by the Employer have been ascertained and the amount thereof certified by the Engineer. The Contractor shall then be entitled to receive only such sum (if any) as the Engineer may certify would have been payable to him upon due completion by him after deducting the said amount. If such amount exceeds the sum which would have been payable to the Contractor on due completion by him, then the Contractor shall, upon demand, pay to the Employer the amount of such excess and it shall be deemed a debt due by the Contractor to the Employer and shall be recoverable accordingly.

Clause 63.3 - Payment after Termination – *Conditions of Contract for Works of Civil Engineering Construction (4th Edit. 1987 reprinted 2011, reprinted 1988 with editorial amendments, reprinted 1992 with further amendments)*

# Code of Termination - Contractor's Default

.3 no further sum shall become due to the Contractor under this Contract other than any amount that may become due to him under clause 8.7.5 or 8.8.2 and the Employer need not pay any sum that has already become due either:

.1 insofar as the Employer has given or gives a Pay Less Notice under clause 4.11.5; or

.2 if the Contractor, after the last date upon which such notice could have been given by the Employer in respect of that sum, has become insolvent within the meaning of clauses 8.1.1 to 8.1.3;

.4 following the completion of the Works and the making good of defects in them (or of instructions otherwise, as referred to in clause 2.38), an account of the following shall within 3 months thereafter be set out in a certificate issued by the Architect/Contract Administrator or a statement prepared by the Employer:

.1 the amount of expenses properly incurred by the Employer, including those incurred pursuant to clause 8.7.1 and, where applicable, clause 8.5.3.3, and of any direct loss and/or damage caused to the Employer and for which the Contractor is liable, whether arising as a result of the termination or otherwise;

.2 the amount of payments made to the Contractor; and

.3 the total amount which would have been payable for the Works in accordance with this Contract;

Consequence of Termination under Clause 8.4 to Clause 8.6 – SBC/Q 2016 Standard Building Contract with Quantities 2016

# Code of Termination - Fixed Price Contract/Re-measurement

- Valuation at the date of Termination
- Balance works price from the BQ amount
- Bid value of the replacement contractor
- Actual account of Remaining Works
- Extra Works, variations

# Owners Basic Head of Damages

Termination Claim from the Owners perspective

# Code of Termination

- Measure of recovery
- Cost of Correction
- Owners Extended Duration & Overhead Costs
- Owners Loss of Use
- Owners Lost of Profits
- Owners Liquidated Damages
- Special Liquidated Damages issues
- Liquidated Damages vs Actual Damages

# Termination for Default from the Contractor's View Point

- 16.4 Payment on Termination
- After a notice of termination under Sub-Clause 16.2 [Termination by Contractor] has taken effect, the Employer shall promptly
- (a) return the Performance Security to the Contractor,
- (b) pay the Contractor in accordance with Sub-Clause 19.6 [Optional Termination, Payment and Release], and
  - *the amounts payable for any work carried out for which a price is stated in the Contract;*
  - *the Cost of Plant and Materials ordered for the Works which have been delivered to the Contractor, or of which the Contractor is liable to accept delivery: this Plant and Materials shall become the property of (and be at the risk of) the Employer when paid for by the Employer, and the Contractor shall place the same at the Employer's disposal;*
  - *any other Cost or liability which in the circumstances was reasonably incurred by the Contractor in the expectation of completing the Works;*
  - *the Cost of removal of Temporary Works and Contractor's Equipment from the Site and the return of these items to the Contractor's works in his country (or to any other destination at no greater cost); and*
  - *the Cost of repatriation of the Contractor's staff and labor employed wholly in connection with the Works at the date of termination.*
- (c) pay to the Contractor the amount of any loss of profit or other loss or damage sustained by the Contractor as a result of this termination

- Clause 16.4 Payment after Termination and Clause 19.6 Optional Termination combined– *FIDIC 1999 Conditions of Contract for Construction (First Ed. 1999). For Building and Engineering Works designed by the Employer. General conditions*

# Termination for Default from the Contractor's View Point

- Contract price less cost of completion (as above)
- Profit the Contractor would have made?
- The proportion of the contract price equal to the proportion of the project
- The issue of untested rate of profit

# Termination for Default from the Contractor's View Point

- Loss Contracts
- Interests
- Home office overheads
- Reasonable Post Termination Costs
- Winding up Costs
- Delay Disruption and Acceleration Damages
- Damages for loss of goodwill

# Offset Against the Contractor

1. Payments already made
2. Value of materials on hand
3. Costs that the contractor unreasonably incurred
4. The contractor’s profit

# Code of Termination – Notice Procedures

- **49.102 Notice of termination**

*(a) General.*

- *The contracting officer shall terminate contracts for convenience or default only by a written notice to the contractor. The notice of termination may be expedited by means of electronic communication capable of providing confirmation of receipt by the contractor. When the notice is mailed, it shall be sent by certified mail, return receipt requested. When the contracting office arranges for hand delivery of the notice, a written acknowledgment shall be obtained from the contractor. The notice shall state;*

  *(1) That the contract is being terminated for the convenience of the Owner (or for default) under the contract clause authorizing the termination;*

  *(2) The effective date of termination;*

  *(3) The extent of termination;*

  *(4) Any special instructions; and*

  *(5) The steps the contractor should take to minimize the impact on personnel if the termination, together with all other outstanding terminations, will result in a significant reduction in the contractor's work force.*

*[48 FR 42447, Sept. 19, 1983, as amended at 55 FR 52797, Dec. 21, 1990; 56 FR 67134, Dec. 27, 1991]*

# Termination for convenience/Frustration

## Convenience

- § 14.4 Termination by the Owner for Convenience

§ 14.4.1 The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.

§ 14.4.2 Upon receipt of notice from the Owner of such termination for the Owner's convenience, the Contractor shall

1 cease operations as directed by the Owner in the notice;

2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and

3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders

*AIA Document A-201 – 2017, General Conditions of Contract, Section 14.4*

## Frustration

**Clause 19.7, Release from Performance under the Law**

Notwithstanding any other provision of this Clause, if any event or circumstance outside the control of the Parties (including, but not limited to, Force Majeure) arises which makes it impossible or unlawful for either or both Parties to fulfil its or their contractual obligations or which, under the law governing the Contract, entitles the Parties to be released from further performance of the Contract, then upon notice by either Party to the other Party of such event or circumstance:

(a) the Parties shall be discharged from further performance, without prejudice to the rights of either Party in respect of any previous breach of the Contract, and

(b) the sum payable by the Employer to the Contractor shall be the same as would have been payable under Sub-Clause 19.6 [Optional Termination, Payment and Release] if the Contract had been terminated under Sub-Clause 19.6.

Clause 19.7 of *FIDIC 1999 Conditions of Contract for Construction (First Ed. 1999). For Building and Engineering Works designed by the Employer. General conditions*

# Termination Due to Force Majeure/ Termination for convenience

- Upon such termination, the Engineer shall determine the value of the work done and issue a Payment Certificate which shall include:
  - the amounts payable for any work carried out for which a price is stated in the Contract;
  - the Cost of Plant and Materials ordered for the Works which have been delivered to the Contractor, or of which the Contractor is liable to accept delivery: this Plant and Materials shall become the property of (and be at the risk of) the Employer when paid for by the Employer, and the Contractor shall place the same at the Employer's disposal;
  - any other Cost or liability which in the circumstances was reasonably incurred by the Contractor in the expectation of completing the Works;
  - the Cost of removal of Temporary Works and Contractor's Equipment from the Site and the return of these items to the Contractor's works in his country (or to any other destination at no greater cost); and
  - the Cost of repatriation of the Contractor's staff and labor employed wholly in connection with the Works at the date of termination.

Clause 19.6 Optional Termination, Payment and Release– *FIDIC 1999 Conditions of Contract for Construction (First Ed. 1999). For Building and Engineering Works designed by the Employer. General conditions*

# Settlement Procedures

*Termination Claim from Contract Administrator's perspective*

# Settlement Procedures

- Negotiated agreement (provisions for side agreements)
- Determination by the Engineer, Employer's Representative
- Determination by Tribunal / Competent court on the basis of *Quantum Meruit*
- Costing-out based on accounts and ledgers (ex; Cost reimbursement contracts) or
- A combination of these methods

# Records

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