

Top Tips for Successful EOT Claims under FIDIC, Middle East Laws and English Law

Introduction

Construction and Engineering (C&E) reports indicate that most of the C&E Projects across the globe are experiencing significant delays and/or costs overruns, due to a number of factors including COVID-19 and the War in Ukraine, which in turn is causing an increase in formal C&E Disputes.

The above, however, may constitute two of several events causing delay to existing C&E Projects. To assist, therefore, we discuss the typical grounds for an extension of time and additional costs claim (**EOT Claim**) below with reference to the 1999 FIDIC Yellow Book's sub clauses (**SC**), adopting its definitions, and Middle East (**ME**) Laws and Contracts (**ME Contracts**), together with English Law.

In addition, we provide the optimal approach to adopt within a Contractor's EOT Claim together with some key legal principles, within the law of the ME Countries and English Law, which will enhance a Contractor's prospect of success in both a Contractor's Claim and, in the worst-case scenario, a formal "...dispute...".

Grounds for an EOT Claim

Generally, a C&E Contract will set out the grounds on which a Contractor may rely to raise an EOT Claim.

FIDIC Yellow Book

The Contractor has a right to raise an EOT Claim, subject to SC/20.1 Contractor's Claims, if a specific event/s occurs and causes critical delay to the C&E Project's Time for Completion including:

- SC/8.4(a): An Engineer's instruction (SC/3.3) for a Variation (SC/13.3);
- SC/8.4(b): A "cause" within another Subclause e.g., Unforeseeable Physical Conditions (SC/4.12), Delays Caused by Authorities (SC/8.5), Suspension of Work (SC/8.8. & 8.9), Adjustments for changes in Legislation (SC/13.7) and Force Majeure (SC/19);
- SC/8.4(c): Adverse climatic conditions;
- SC/8.4(d): Epidemic or governmental actions causing unforeseeable shortages in personnel or Goods;

- SC/8.4(e): The Employer's personnel and other contractors' conduct/performance which constitute an "...impediment or [act of] prevention..." to the Contractor's performance of the Works (together the **Delay Event/s**).

SC/8.4 provides the Contractor with the right to an extension of the Time for Completion only and the Contractor's right to additional Cost or an adjustment to the Contract Price is set out within the Yellow Book's specific Subclauses. For instance;

- The Engineer has a right to instruct the Contractor to vary the Work (SC/13.1) and if the same causes critical delay to the C&E Project the Contractor has a right to an extension of time (SC/8.4(a)) and an adjustment to the Contract Price (SC/13.3); and
- The majority of Govt. across the globe categorised COVID-19 as a Force Majeure event (SC/19.1) and in these circumstances the Contractor has a right to an extension of time for any delay its causes to the C&E Project (SC/19.4(a)) and in certain circumstances additional Cost (SC/19.4(b)); and
- The War in Ukraine has caused a global shortage in C&E materials and an increase in the costs of the same. In these circumstances, SC/13.8 "Adjustments for Changes in Cost" may be extremely helpful and, if SC/13.8 applies, the "...amounts payable to the Contractor shall be adjusted for rises...in the costs of labour, Goods and other inputs to the Works..." (SC/13.8).

The Contractor should of course be mindful that it is required to notify the Engineer no later than 28 days from the date it became aware or should have become aware of the Delay Event/s, causing critical delay to the Works and an increase in Costs, failing which it loses its right to claim (CI./20.1).

ME Contracts

Generally, ME Contracts similar to the Yellow Book, will provides Contractor's with the right to claim an EOT and additional Cost if certain events occur which cause critical delay to the C&E Project's progress and the Contractor to incur additional costs.

Specifically, an ME Contract, in most instances, will provide a Contractor with the right to additional time and costs for completing a Variation, however, it may well be subject to complying with a convoluted Variation procedure and the Employer's "...sole discretion..." to provide the same.

Similarly, the Contractor may have a right to claim relief due to a Force Majeure event. However, the clause may well set out a limited number of events such as “...*War, act of foreign enemy, rebellion...*” and will not include FIDIC’s language “...*but not limited to...*”, which indicates the list of Force Majeure events is non-exhaustive and allows the Contractor to categorise other unforeseeable events outside its control, such as COVID-19, as a Force Majeure event.

In addition, the clause may state that any delay caused by a Force Majeure event is an “...*excusable delay...*”, however, neither party is entitled to any “...*additional costs...*” incurred in relation to the same.

Summary and Observations

In summary, the Contractor, under the Yellow Book, has a right to claim an EOT if any or all the Delay Event/s occur (see above) during a C&E Project’s lifecycle and in addition, in certain circumstances, the Contractor may include a claim for an adjustment to the Contract Price and/or any additional Cost it incurs – e.g., Variations and Force Majeure (see above).

ME Contracts, similar to the Yellow Book, may well provide the Contractor with the right to claim additional time and costs if certain events, such as a Variation and/or a Force Majeure event, occur and cause critical delay to the C&E Project’s progress and the Contractor to incur additional costs (see above).

In practice, however, an ME Contract will be a heavily amended version of a FIDIC contract which will attempt to allocate all the legal risk, regardless of the Party best suited to assume the same, to the Contractor including the “delay risk”. Specifically, the ME Contract may well include language which will attempt to limit the Contractor’s rights/grounds on which it can rely to recover additional time and costs if delay events occur.

Consequently, the Contractor may discover that it has unwittingly assumed “delay risk” in relation to Delay Event/s for which the Yellow Book provides relief.

Common Law: Delay Analysis / Common Sense Approach

The Contractor's EOT Claim, whether it is working under an unamended Yellow Book or an ME Contract, must demonstrate that the Delay Event/s caused critical delay to the Time for Completion and the Contractor to incur additional Costs.

Generally, to satisfy the above, the Contractor's legal team will review the C&E Contract and construe the same, "as a whole", to determine its meaning as a matter of the Governing Law. Specifically, the legal team should advise on the C&E Contract's allocation of the "delay risk" between the Employer and the Contractor in relation to the Delay Event/s together with identifying the relief the Contractor may claim e.g., additional time and costs or additional time only.

Subsequently, the Contractor and its legal team should identify and instruct a credible delay expert to complete a delay analysis which sets out the Delay Event/s, demonstrates that those events impacted the C&E Project's "critical path" and caused a period of delay to the Time for Completion (**Delay Report**) which in turn caused the Contractor to incur additional Costs.

For ease, assuming an "as planned v as built" analysis, we summarise the process as follows:

- **Stage 1:** Legal Analysis: C&E Solicitor/Lawyer, working with the Contractor/Delay Expert, identifies the contract's meaning, as a matter of the Governing Law, regarding which Party is liable in relation to the specific Delay Event/s including other relevant provisions e.g., notices/any requirement to adopt a specific delay analysis methodology;
- **Stage 2:** Factual Analysis: Contractor/Delay Expert, working with the C&E Solicitor/Lawyer, identify the C&E Projects (a) total delay e.g., 1 year after initial Time for Completion and (2) the key period in which the delay occurred e.g., March – June 2020 (COVID-19);
- **Stage 3:** Factual Analysis: Contractor/Delay Expert, working with the C&E Solicitor/Lawyer, identify the potential Delay Event's for both the Employer and Contractor using the contemporaneous evidence e.g., Governmental measures pertaining to COVID-19 such as imposing travel bans, quarantining citizens, restricting social interaction and prohibiting attendance at offices.
- **Stage 4:** Factual Analysis: Contractor/Delay Expert, working with the C&E Solicitor/Lawyer, identify the C&E Project's "critical path" and the actual Delay Event's on which they rely together with demonstrating how the events impacted the "critical path" and caused delay e.g., 2 months, to the Time for Completion; and

- **Stage 5:** Legal Analysis: C&E Solicitor/Lawyer, working with the Contractor/Delay Expert, tests the Delay Report and incorporates the same in the EOT Claim which sets out the Contractor's legal arguments e.g., rights/obligations including that the Contractor has complied with the notices (see above) and any other relevant issues e.g., concurrent delay.

Of course, many of the above may be completed simultaneously, however, the objective is to sufficiently understand the position to advise the Contractor, as a matter of law, on its "prospects of success" and, if appropriate, advance its best case - one of the keys to success is maintaining clear and accurate "...contemporary records..."

Contemporary Records / Contemporaneous Evidence

The Yellow Book, similar to other FIDIC contracts, places the Contractor under an obligation to "...keep such contemporary records as may be necessary to substantiate any claim..." (SC/20.1). Contemporary records constitute contemporaneous evidence of the progress of the Works as a matter of fact and carry the most "legal weight" to substantiate a Contractor's Claim under SC/20.1 and/or a formal "...dispute..." under the Yellow Book's tiered dispute resolution mechanism, which concludes with "*Arbitration*" (CI/20.6).

A recent decision in Australia reinforces this point:

- In *White Construction Pty Limited (WCL) v PBS Holding Pty Limited (PBS)* [2019] NSWSC 1166 – WCL alleged, after the works were completed, that its subcontractor's original design for a sewer was flawed and it took a significant period of time to provide a revised design which caused delay to the works. Both parties appointed delay experts and each expert adopted a separate methodology, both listed in the Society of Construction Law's Delay and Disruption Protocol 2017 and provided delay reports.
- The Court reviewed the delay reports and assessed that they were unnecessarily complex and "impenetrable" – and appointed its own delay expert. The Court appointed expert reached a similar conclusion and adopted an "open textured approach" which included reviewing the available contemporaneous evidence.
- In this context, WCL had adduced site diaries and while the diaries were clear, including referring to extensive rock excavation and inclement weather, they did not provide sufficient detail regarding WCL's claim that it was waiting for the revised sewer design. In addition, the site diaries did not refer to the specific activities which the alleged event adversely impacted. Consequently, WCL did not satisfy the burden of proof and its EOT Claim failed.

- The Judge preferred a "...common sense..." approach and concluded that "*the only appropriate method is to determine the matter by paying close attention to the facts, and assessing whether [WCL] has proved, on the [balance of] probabilities, that [the] delay ... delayed the project as a whole and, if so, by how much.*"

The above is not of course authority in England, however, the recent decision in *Fluor Ltd v Shanghai Zhenhua Heavy Industries Ltd [2018]*, includes a good discussion on the fact that different forms of delay analysis may provide different outcomes. In addition, see *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd (1999)*, a leading case on delay.

In any event, the proper inference to draw from the Common Law cases is that the importance of "...contemporary records..." and a "...common sense..." approach to an EOT Claim cannot be overstated.

Conclusion and Complimentary Strategic Legal Consultation

In conclusion, the Contractor's rights to raise an EOT Claim will depend on the Contract being used and its Governing Law.

Specifically, ME Countries do not adopt the Common Law doctrine of "binding precedent", however, if a ME Law governs your contract, it will include Mandatory Laws, which a C&E Contract may not amend/exclude, and Non-Mandatory Laws, which will enhance a Contractor's EOT Claim.

In this context, the Contractor could rely on and apply several legal principles under ME Laws including, but not limited to, the following: **(1)** Contract Interpretation **(2)** Good Faith, **(3)** Variations, **(4)** Force Majeure, **(5)** Exceptional and Unforeseeable Events to formulate a robust EOT Claim and/or advance a claim as a matter of the relevant ME Governing Law only.

Similarly, in England and other Common Law jurisdictions the Contractor will benefit from understanding and identifying the authorities which apply to its EOT claim, including the above, to enhance its prospects of success.

In fact, we are providing Clients with optimal strategic legal advice in relation to preparing and submitting the strongest EOT Claims on Projects across the globe.

And would be delighted to provide you with the benefit of that experience in a **Complimentary Strategic Legal Consultation (30 minutes)**, which will:

- **Enhance** your ability to assess, under your C&E Contract and/or its Governing Law, whether the right/grounds exist to raise an EOT Claim;
- **Increase** your knowledge of the best approach to “particularise and substantiate” your EOT Claim;
- **Explain** the difference between our “legal advice” and the “legal argument” we would set out in your EOT Claim; and
- **Significantly improve** your EOT Claim’s prospects of success and your ability to recover any Additional Time and Costs.

Please email us directly on info@cels.global using **EOT Complimentary Consultation** in the subject heading to book your Complimentary Strategic Legal Consultation (30 minutes).

I look forward to hearing from you.

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