

Introduction

The No. 1 cause of formal Construction & Engineering (**C&E**) Claims and Disputes on C&E Projects across the globe is a “*Change in Scope of Works*”.¹

Generally, the Employer will change its requirements which increases the Contractor’s “*Scope of Works*” under the C&E Contract relating to their Project and, in many instances, causes critical delay and/or disruption to the Project’s programme, which in turn causes the Contractor, Subcontractors & Engineers etc, to incur additional costs.

Consequently, if you fail to sufficiently understand and manage any change to your “*Scope of Works*”, using your C&E Contract’s variations mechanism throughout your Project’s lifecycle, it is highly likely that you will find yourself involved in a long and costly formal Dispute, with a current average value of \$98.7 million², which you will likely lose.

To assist, I discuss “*The Key Legal Strategies to Successfully Manage Changes to Your Scope of Works*” below.

I refer to FIDIC’s Design & Build Contract 1999 (**FIDIC**), NEC/3’s Engineering & Construction Contract 2005 (**NEC**), used on the High Speed 2 Project in England and JCT’s Design & Build Contract 2016 (**JCT**), together with the law of England & Wales (**E&W Law**) and the law of several countries within the Middle East (**ME Laws**).

Key Legal Strategies

[Identify Your Contract’s Governing Law](#)

Generally, each C&E Contract sets out its Governing Law which may, for a variety of reasons, be the law of a country which is different to the country in which the Project is located (**Foreign Law**). For example, your Project may be located in the Middle East e.g., State of Qatar, however, its Governing Law may be the Law of England & Wales and *vice versa*.³

In this context, the Employer may engage international companies as Contractors, Subcontractors, Engineers etc to design and construct the Project, adding to the international nature of C&E Projects across the globe, which do not originate from the country in which the Project is located.

¹ HKA “*Crux Insight 6th Annual Report, Forewarned is Forearmed...*”.

² Ibid 1.

³ If your C&E Contract is silent regarding its Governing Law then the law of the country in which the Project is located will apply.

In addition to the above, your C&E Contract will define its Governing Law, which includes a unique structure commonly known as a “*hierarchy of laws*”, comprising different categories of law, and the order in which they apply. For instance, FIDIC defines the Governing Law as all “...*legislation, statutes, ordinances and other Laws, and regulations and by-laws of any legal constituted public authority...*” (FIDIC: 1.1.6.5 and see JCT: 1.11 / NEC: See *Contract Data & 12.2*) and the Parties set out the Governing Law in FIDIC’s Appendix to Tender (FIDIC: 1.4).

[Identify & Apply Your Governing Law’s Mandatory Rules of Law](#)

Each Governing Law, whether E&W Law or ME Laws, includes its own specific “*Mandatory Rules of Law*”. These are laws that a C&E Contract may not exclude, and a Court/Arbital Tribunal must apply regardless of the C&E Contract’s terms.

The “*Mandatory Rules of Law*” are different under E&W Law and ME Laws and include the following:

[E&W Law:](#) The Construction Act 1996 (Statute) includes “*Part II Construction Contracts*” which defines a “*Construction Contract*” and provides:

“This Part applies whether or not the law of England and Wales...is otherwise the applicable law [Governing Law] in relation to the contract...” (emphasis added)

In other words, the above is a Mandatory Law and applies to all C&E Contracts for Projects located in England & Wales, even in circumstances when its Governing Law is a Foreign Law e.g., Qatar Law.

In addition, E&W Law adopts the common law legal doctrine of “*binding precedent*”, which means that decisions from high-ranking courts (House of Lords now the Supreme Court/Court of Appeal) bind lower courts in cases of a similar nature going forward and in theory the law, therefore, is consistent while evolving over time.

For example, in 1914 the House of Lords held in *Dunlop Pneumatic Tyre Company Ltd v New Garage Motor Co Ltd*, that a liquidated damages clause, which we use in C&E Contracts, must constitute a genuine pre-estimate of loss for the Employer to enforce the same - the Courts in E&W applied the same. In 2015, however, the Supreme Court’s decision in the joint appeals relating to *Cavendish Square Holdings Ltd v Talal El Makkessi* and *Parking Eye Ltd v Beavis* updated the Dunlop principle, and the E&W Courts are now bound to apply the same – demonstrating the doctrine of “*binding precedent*” and the evolution of E&W Law.

[ME Laws](#): Qatar's Civil Code 2004 (Written Code) includes Art: 711 under which a Contractor and Engineer guarantee the structural integrity of a Project (building/installation etc) for a period of 10 years and is commonly known as Decennial Liability (Bahrain: Art. 615 - 5 years only, Kuwait: Art. 692, Oman: Art. 634, UAE: Art. 880). In addition, Art: 715 of Qatar's Civil Code provides:

“Any condition [in the C&E Contract] that seeks to exclude an architect or contractor from liability [under Art: 711] or restrict it will be void”.

Art. 715, therefore, renders Art. 711 a Mandatory Law and it applies to a C&E Contract for a Project located in Qatar even in circumstances when its Governing Law is a Foreign Law e.g., E&W Law.

Of note is that the ME Law does not adopt the common law legal doctrine of “*binding precedent*”.

[Identify & Apply Your Governing Law's Unique Rules of Interpretation of Contracts](#)

Once you have identified and understand your C&E Contract's Governing Law and its “*Mandatory Rules of Law*” you should identify and apply its unique ““*Rules of Interpretation of Contracts*” to the C&E Contract.

Please note that each Governing Law, whether E&W Law or ME Laws, includes its own specific “*Rules of Interpretation of Contracts*”, which *must be applied* to a C&E Contract to determine its meaning, as a whole, under its Governing Law.

In this context, please note that the “*Rules of Interpretation of Contracts*” are different under E&W Law (e.g., see *Wood v Capita Insurance Services Ltd*) which adopts an “*objective*” legal analysis and ME Laws (e.g., see Bahrain: Art. 125, Kuwait: Art. 193, Oman: Art. 165, Qatar: 169 & UAE: Art. 258), which adopt a “*subjective and objective*” legal analysis in relation to the interpretation of contracts.

[Identify, Operate & Comply with Your Contract's Variation Mechanism](#)

Generally, C&E Contracts provide the Parties with a contractual mechanism, commonly known as a Variation Mechanism, to vary/change the Contractor's original scope of works such as the standard contract's below:

Table A: Unamended FIDIC / NEC / JCT: Variations Mechanism

Contract	Clause & Summary
<p>FIDIC 1999</p>	<p><u>Clause 13: Variations and Adjustments</u></p> <p>Provides the Engineer with the right to instruct the Contractor to implement a Variation or request a proposal in relation to the same (SC/13.1) and sets out the Variation Procedure the Parties are required to adopt (SC/13.3).</p> <p>The Engineer is required to provides its determination as to whether the Variation requires an adjustment to the Contract Price (SC/13.3). The Contractor is entitled to an extension to the Time for Completion subject to a Contractor’s Claim (SC/20.1), if the Variation causes a delay to the Works(SC//8.4(a)).</p>
<p>NEC/3</p>	<p><u>Clause 60: Compensation Events</u></p> <p>Variations are known as Compensation Events under Clause 60 in NEC/3. The Project Manager has a right to instruct the Contractor regarding a variation/change in the Works Information, throughout the Project’s lifecycle (SC/60.1).</p> <p>The Contractor is entitled to additional costs and time (CI/63) which is subject to the Early Warning System (CI/16).</p>
<p>JCT 2016</p>	<p><u>Section 5: Changes</u></p> <p>Under JCT, Variations are known as a Change in the Employer’s Requirements, which cause a change to the Works, which the Employer may instruct (SC/5.1.1).</p> <p>If the Employer and the Contractor fail to agree the value of the Change (SC/5.2), it must be valued in accordance with the Valuation Rules (SC/5.4) and the Contractor may be entitled to an extension of time to the completion date if the Change constitutes a Relevant Event (SC/2.26).</p>

You should of course comply strictly with your C&E Contract’s Variation Mechanism, mindful that the majority of standard form contracts are amended, including ensuring that you send any relevant Notices together with being aware of the potential consequences of your failure to comply with the same.

Conclusion & Best Strategy

In conclusion, it is vitally important that you understand what your C&E Contract's Variation Mechanism means, which is determined by applying its Governing Law including its "Mandatory Rules of Law" and its bespoke "Rules of Interpretation of Contract" and how to operate the same from your Project's outset.

Specifically, the Employer will amend the C&E Contract to its benefit, including attempting to reallocate the legal risks for its Variations to the Works, using undefined terms such as "design development" and "design change", to the Contractor.

In my experience, your best strategy is to instruct an experienced C&E Solicitor/Lawyer as soon as possible to provide formal legal advice, in relation to your Variation Mechanism's meaning and how to operate the same, to protect your position/rights and win your Claims, under its Governing Law.

If you fail to complete a detailed legal analysis your Claims for Variations will be rejected and you will find yourself in a costly formal C&E Dispute, which you will most likely lose.

I hope the above enhances your knowledge and assists in managing the above legal risks.

Specifically, I am providing Clients with the optimal strategic legal advice in relation to Variation Claims in both Common Law and Civil Law jurisdictions, and I am happy to provide you with the benefit of that experience in a **Free Online Complimentary Strategic Legal Consultation (30 minutes)**

Please email us directly on info@cels.global using **Variation Mechanism** in the subject heading to book your **Free Online Complimentary Strategic Legal Consultation.**

We look forward to hearing from you.

John Coghlan
Principal
C&E LegalSolutions



The Construction and Engineering Law
Specialists – www.cels.global