REGIONAL

Contractors' Claims Under The FIDIC International Civil Engineering Contract—III

by Christopher R. Seppala, Esq.

This is the third in a series of four articles on contractors' claims under the FIDIC International Civil Engineering Contract. The previous two articles appeared in the February and March issues, at page 8 and page 17, respectively. This article completes Sections III and IV. The final article will cover Sections V (Claim Notification Procedure) and VI (Conclusion).

The FIDIC International Civil Engineering Contract (FIDIC Conditions), as noted in an earlier article, contains more than 30 clauses under which the Contractor may be entitled to an additional payment or an extension of time for completion of the works, or both. The first of the three major claim areas under the FIDIC Conditions—unforeseen conditions or obstructions—was discussed in the previous article in this series. This article continues the discussion of the Contractor's major claims (Section III) with the second and third major claim areas—variations or changes in the works (Clauses 51 and 52), and delays (Clause 44 and others)—and covers other claims (Section IV).

III. The Contractor's Major Claim Areas

(B) Variations (Clauses 51 and 52)

After a construction contract is signed, circumstances may occur that make it necessary or advisable for changes to be made in the scope or nature of the work as defined in the contract. For example:

- the original design or specifications may prove inadequate;
- the Employer's initial program or budget for the project may change;
- natural events, or wholly unforeseen conditions,[49] may occur that make changes in the scope or nature of the works necessary.

For these reasons, among others, it may be desirable to modify the works as defined in the contract documents.

How is such a change to be effected? The works have been defined in the contract that the parties have signed, and a change in the contract consequently could ordinarily only be effected by mutual agreement of the parties. But the Contractor may be unwilling to give his consent or to do so at an acceptable price. In such a situation, the Contractor

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IRAN

Bloodied But Unbowed; Broke But Not Begging

by a special correspondent

The start of the new Iranian year 1366 on March 21 found the Islamic regime bloodied but unbowed, nearly broke, but with no intention to go begging.

Despite the loss of tens, perhaps hundreds of thousands of young men on the battlefield during 1365, and the death of nearly 4,000 civilians in Iraqi bombing raids, the majority of the Iranian people remain committed to continue the fight against Iraq. "We shall fight to the last house . . . and to the last drop of blood," Premier Moussavi declared last month.

A similar strength of commitment marks the Islamic Republic's battle for economic independence. Although the oil price collapse and the slide in the value of the dollar caused foreign earnings to plummet from an anticipated $18 billion to less than $6 billion during the year (while the cost of running the war increased steadily), Iranian leaders still refuse to countenance foreign borrowing.

The political determination to "go it alone" financially is creating huge problems for the domestic economy, but these problems are seen as less dangerous than a weakening in the revolutionary will and the forfeiting of independence. Only time will show whether they are, in fact, less dangerous.

Last Year's Budget Overtaken By Events

The Tehran government's financial problems are well illustrated by two budget motions debated by the Majles in March.

The first motion was an amendment to the budget for the year of 1365 (March 21, 1986 to March 20, 1987). The single-article bill, carefully worded to disguise its drastic contents as much as possible, amounted to an admission that the budget plans approved by parliament in March 1986 had been totally overtaken by events. The motion read simply: "Some figures of the 1365 Budget Act are amended as detailed below without any changes in total revenues and other sources of providing credits and expenditures and the government is authorized to enforce the said Act while observing the following tables and Note."

The details appended to this motion are pretty large for details. The approved figure of IR 1,400 billion for oil revenues is changed to IR 740 billion, and even this amount has been achieved through juggling figures and including two months' revenues from the following year ($1.00=IR 72). The amount to be borrowed from the banking system is amended from IR 390 billion to IR 1,330 billion. This massive increase in the government's debt to the banking system—which was already more than one third of GNP two years ago—creates serious problems for the internal economy since the Central Bank has to resort to printing money to cover it.

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would have certain bargaining advantages since he would be executing the main contract works and have possession of the site.

To obviate the need for renegotiation with the Contractor each time a change becomes necessary—and the difficulties this might entail—construction contracts in the United Kingdom and the United States ordinarily contain a provision that authorizes the Employer, or more often his agent, an engineer or architect, to change the works during the course of construction.[50]

(a) The Engineer's Power to Change the Works. Clause 51 of the FIDIC Conditions, in common with Anglo-American practice, authorizes the Engineer, acting in effect as the Employer's agent, to change, or "vary," the works (not the contract). The Contractor must comply with the Engineer's instructions in this respect, as in other matters concerning the works.[51]

Under the FIDIC Conditions, the Engineer's powers to change the works are extremely wide. Clause 51(1) provides, as follows:

> The Engineer shall make any variation of the form, quality or quantity of the Works or any part thereof that may, in his opinion, be necessary and for that purpose, or if for any other reason it shall, in his opinion, be desirable, he shall have power to order the Contractor to do and the Contractor shall do any of the following:
> (a) increase or decrease the quantity of any work included in the Contract,
> (b) omit any such work,
> (c) change the character or quality or kind of any such work,
> (d) change the levels, lines, position and dimensions of any part of the Works, and
> (e) execute additional work of any kind necessary for the completion of the Works and no such variation shall in any way vitiate or invalidate the Contract, but the value, if any, of all such variations shall be taken into account in ascertaining the amount of the Contract Price.

The Engineer's powers are not unlimited, however. In the case of a contract to build a hotel, for example, the Engineer may have the power to order the Contractor to add a garage or parking lot, but he would not, under English law, have power under Clause 51 to order him to build a second hotel. The Engineer's power to order extras is held, by implication,[52] to be limited by the type and value of the main contract works. Additional work ordered, if any, beyond these limits, will not be governed by the terms of the contract.[53]

The power to issue variations is also limited in time. If extra work is ordered after the contract work is completed (*e.g.*, during the Period of Maintenance, which is normally one year after completion), this, too, may be outside the contract.[54]

(b) Two Types of Variations. From the Contractor's point of view, the FIDIC Conditions contemplate two types of variation orders in relation to extra or additional work:[55]

- Type 1: the Engineer orders the Contractor to do work involving a variation in fact, which the Engineer acknowledges to involve a variation; and
- Type 2: the Engineer orders the Contractor to do work involving a variation in fact, which the Engineer does not acknowledge to involve a variation.

Clauses 51 and 52 purport by their terms to deal only with the first type of change (type 1). They are drafted on the assumption that the Engineer will—unfailingly—recognize and order a variation in respect of the works whenever it is required. They do not contemplate that he could order extra or additional work and yet not acknowledge it to involve a variation entitling the Contractor to additional payment.

But, for reasons explained below, the Engineer's interpretation of whether or not an instruction he has given constitutes a variation order is not final and binding on the Contractor.[56] Consequently, there is, in effect, a second type of variation order; that is, an order by the Engineer to do work involving a variation in fact, which the Engineer does not acknowledge to involve a variation (type 2).[57]

While a type 2 variation is more relevant to the subject of Contractor's claims, the discussion below will begin with type 1 as it is the only one dealt with overtly in Clauses 51 and 52 and as the elements of a type 2 variation are basically the same as for type 1.

(1) *Variation Acknowledged by the Engineer.*

(i) Requirement of an Order in Writing. Clause 51(2) requires that the Engineer order any variation in writing. It provides:

> No such variations shall be made by the Contractor without an order in writing of the Engineer.

As a consequence, a written order from the Engineer is ordinarily a condition precedent to payment for extra work as a variation.

Clause 51, however, does not require the written order to be in any particular form. It may suffice if the Engineer signs a drawing or the minutes of a meeting at which he participated. The order may also initially be given "verbally," that is, orally, by the Engineer, if it is confirmed in writing by the Engineer either before or after the carrying out of the order,[58] *e.g.*, by the Engineer's interim certificate authorizing payment for varied work.

But the Engineer's oral order does not have to be confirmed in writing by the Engineer himself in every case. If, within seven days of the oral order, the Contractor confirms it in writing to the Engineer and such confirmation is not contradicted in writing within 14 days by the Engineer, then the oral order is deemed to be an order in writing of the Engineer.[59] Thus, a letter from the Contractor to the Engineer may, in appropriate circumstances, be sufficient to satisfy the requirement of an order in writing.

(ii) Valuation. Clause 52 establishes the general principle that extra work is to be valued on the basis of the rates and prices in the bill of quantities, if any, attached to the contract to the extent that the same are, in the opinion of the Engineer, applicable. If the contract does not contain applicable rates and prices, this clause provides that, failing agreement thereon between the Engineer and the Contrac-

tor, the Engineer must then fix the rates and prices to be applied to extra work.

The rates and prices used will ordinarily include profit. For this reason, it is advantageous for the Contractor to claim under Clauses 51 and 52 as compared to clauses that award only "cost" and hence may be interpreted to exclude profit, *e.g.*, Clause 12.

Extra work ordered by the Engineer may, if it prevents the Contractor from completing the works by the completion date, also entitle the Contractor to claim an extension of time[60] as well as financial compensation for being obliged to work longer on the site than originally foreseen by the contract.

(2) *Variation Not Acknowledged by the Engineer.* Clause 67 (Settlement of Disputes), which provides for the settlement of disputes ultimately by international arbitration, provides that, in the event of arbitration:

> The said arbitrator/s shall have full power to open up, revise and review any decision, opinion, direction, certificate or valuation of the Engineer.

It follows from this provision that where, during the course of the work, the Engineer orders the Contractor in writing to do certain work but, at the same time, refuses to acknowledge that his order constitutes a variation, the Engineer's opinion or decision in this respect (like his other decisions, opinions, etc.) is subject to being opened up, revised and reviewed in arbitration.

By Clause 67, the arbitrators are made the ultimate interpreters of the contract and, in their award, will finally determine whether or not the Engineer's order was a variation order (or will, at the Employer's request, determine that a variation order interpreted as such by the Engineer was in fact not a variation order). If the arbitrators determine that, upon a true construction of the contract, the work ordered by the Engineer fell outside the contract and thus constituted a variation in fact, the Contractor will be entitled to payment for the work upon the same basis as if the Engineer had originally acknowledged it to be a variation under Clause 51.

Where the Contractor requests a written variation order but the Engineer refuses to issue one, and extra work is in fact involved, there may be a question whether the Contractor can claim in arbitration under Clause 51 as no order in writing from the Engineer will exist. Under English law, where there is a broad arbitration clause (as in the case of Clause 67 of the FIDIC Conditions), arbitrators can in such circumstances award payment despite the absence of a written order.[61]

In practice, if the arbitrators determine that the work concerned fell outside the contract, there will often be a letter or other written communication from the Engineer, or a document signed by the Engineer, or an uncontradicted written confirmation by the Contractor of an oral order of the Engineer, which is susceptible to interpretation as the necessary written order.

Nevertheless, whenever there is a dispute with the Engineer during the execution of the works about whether an instruction constitutes a variation order, it is essential for the Contractor to notify the Engineer (or the Engineer's Representative) promptly of his intention to claim, as well as to identify, at least in general terms, the additional work alleged to have been done.[62] Failure to give such prompt written notice may bar the claim.

A practical difficulty with a claim for a variation not acknowledged by the Engineer is that the value of the claim, together with all other claims in dispute, may be insufficient to justify the expense and time of going to arbitration to have the Engineer's views rectified. This difficulty inheres to all claims not accepted by the Engineer and underlines, again, the importance for a contract based on the FIDIC Conditions to be administered by an Engineer who is truly independent and able and willing to render fair decisions.

(C) Delays (Clause 44 And Others)

In the United Kingdom and the United States, a Contractor is ordinarily required to complete a construction contract within a fixed period of time. After the expiration of that period, he becomes liable to the Employer for liquidated damages for delay. Similarly, the FIDIC Conditions[63] provide that the works must be completed within the time period stated in the contract. After this period, the Contractor becomes liable for liquidated damages for each day or part of a day of delay.[64]

Nevertheless, it is commonplace, perhaps especially in international construction, for events to occur that disturb or disrupt the Contractor's work and prevent him from completing the works by the date fixed in the contract.[65] These events may be caused:

- by the Employer (*e.g.*, delay in giving possession of the site) or someone for whose acts he is responsible (*e.g.*, delay of the Engineer in issuing drawings),
- by the Contractor or someone for whose acts he is responsible (*e.g.*, a subcontractor or supplier), or
- by matters or persons for which or whom neither party is responsible (*e.g.*, weather conditions, natural events or war).

Where events occur to disrupt the Contractor's progress and delay completion and they are not caused by the Contractor or someone for whose acts he is responsible, the Contractor may be entitled to two types of relief:

(a) an extension of the completion date, postponing the date from which the Contractor may be held liable for liquidated damages, and/or

(b) compensation for the additional costs he may incur owing to the disruption of his program and/or the additional time he will have to work on the site.

(a) Extension of Time. Clause 44 specifies the circumstances in which the Engineer may, either at his own initiative[66] or at the request of the Contractor, grant the Contractor an extension of time for the completion of the works. The grounds that may justify such an extension are set forth in broad terms:

> Should the amount of extra or additional work of any kind or any cause of delay referred to in these Conditions, or exceptional adverse climatic conditions, or other special circumstances of any kind whatsoever which may occur, other than through a default of the Contractor, be such as fairly to entitle the Contractor to an extension of time for the completion of the Works, the Engineer shall determine the amount of such extension and shall notify the Employer and the Contractor accordingly. Provided that the Engineer is not bound to take into account any extra or additional work or other special circum-

> stances unless the Contractor has within twenty-eight days after such work has been commenced, or such circumstances have arisen, or as soon thereafter as is practicable, submitted to the Engineer's Representative full and detailed particulars of any extension of time to which he may consider himself entitled in order that such submission may be investigated at the time.

As can be seen from this clause, in the absence of a decision by the Engineer granting an extension of time, the Contractor must ordinarily, in order to claim such an extension:

(1) demonstrate that one of the circumstances described in Clause 44 has occurred; and

(2) within 28 days, generally from the occurrence of such circumstances, give "full and detailed particulars" of the extension requested to the Engineer's Representative.

The circumstances justifying an extension include:

- variations of the works (extra or additional work),
- any cause of delay referred to in the FIDIC Conditions (*e.g.*, under Clause 42(1), the failure of the Employer to give prompt possession of the site),
- exceptional adverse climatic conditions, and
- any other "special circumstances" of any kind whatsoever, other than any that occur through default of the Contractor, which fairly entitle the Contractor to an extension. Special circumstances would certainly include acts of the Employer and others, such as, in certain cases, the Engineer, for whose acts he is responsible.[67] They should also generally include matters for which neither party is responsible.

While the Contractor should ordinarily give "full and detailed particulars" of any extension of time he claims to the Engineer's Representative within 28 days, this is not an absolute requirement. The Engineer has discretion to grant a time extension even if the Contractor has failed to request it.

In making his decision on an extension of time claim, the Engineer is, of course, bound to act fairly as between the parties. As with other decisions of the Engineer, however, the decision can, at the request of either party, be opened up, revised and reviewed in arbitration pursuant to Clause 67.

(b) Compensation for the Extension of Time. The fact that a Contractor may be entitled to an extension of time under Clause 44 does not necessarily mean that he may claim compensation for additional costs, if any, incurred, for example, for a disruption of his program or for being obliged to work longer on the site. Clause 44 does not deal with compensation; it deals only with "time." Nor does any other clause of the FIDIC Conditions deal, in a comprehensive manner, with the question of compensation for delays in completion.

Certain clauses, however, provide that the Contractor may recover extra payment for delays in specific situations:

- Clause 6(4) (delays by the Engineer in furnishing drawings);
- Clause 40(1) (suspension of work by the Engineer); and
- Clause 42(1) (delay by the Employer in giving possession of the site).

Moreover, other clauses provide that the Contractor is entitled to be compensated for extra work, *e.g.*, work resulting from adverse physical conditions or artificial obstructions under Clause 12, or from a variation order under Clause 51. Upon the basis of clauses entitling the Contractor to compensation for extra work, the Contractor may fairly contend that if such work delayed completion, the Contractor should be compensated for the cost attributable thereto.[68]

Even in the absence of a contract clause providing, directly or indirectly, that the Contractor is entitled to extra payment for a particular type of delay, the Contractor may nevertheless be able to recover upon the basis of the relevant principles of the municipal law that governs the contract. Under almost all legal systems, the principles of law that govern contractual liability entitle a party to recover compensation for a delay in his performance caused by the other party or by someone for whose acts the other party is responsible.

Much less clear is the extent to which the Contractor can recover compensation for delays caused by matters or parties for which neither the Employer nor the Contractor is responsible, directly or indirectly. This will be determined by reference to the precise terms of the particular contract, the municipal law applicable and the facts of each case.

Any claim based on principles of municipal law may, however, for the reasons indicated earlier (see Section I in an earlier article), arguably be beyond the Engineer's power to pay or settle and, therefore, may not be resoluble except in international arbitration.

IV. Other Claims

As noted, the FIDIC Conditions contain more than 30 clauses under which the Contractor may be entitled to an additional payment or an extension of time for completion of the works. While it is not feasible to examine them all here, the relevant clauses are very briefly indicated below:

- 5(2) (cost of ambiguities in contract documents);
- 6(4) (cost of delays in issuance of Engineer's drawings or orders);
- 12 (cost of unforeseen physical conditions or artificial obstructions);
- 17 (expense of errors in position of works);
- 18 (value of boreholes ordered);
- 20(1) (cost of "excepted risks");
- 22(2) (third-party damage);
- 26(3) (fees required by law);
- 27 (expense of disposal of fossils);
- 30(2) (cost of strengthening highways and bridges);
- 30(3) (indemnity for third-party claims for damage or injury to highways and bridges);
- 31 (cost of providing opportunities for other contractors);
- 36(2) (cost of samples);
- 36(4) (cost of tests);
- 38(2) (expense of uncovering the works);
- 40(1) (cost of suspensions);
- 42(1) (cost of failure of Employer to give possession of the site);
- 44 (extensions of time for completion);
- 47(3) (bonus for early completion);
- 49(3) (cost of repairs not attributable to Contractor's work);
- 50 (cost of searching for defects for which Contractor is not liable);
- 51 (variations);
- 52(2)(a) (valuation of variations);

- 52(3) (variations exceeding 10 percent);
- 63(2) (valuation at date of forfeiture);
- 65(1) and (2) (indemnity against "special risks");
- 65(4) (increased costs arising from "special risks");
- 65(8) (payment if contract terminated);
- 66 (payment in event of frustration);
- 69(3) (payment on default of the Employer);
- 70(1) (increase or decrease of costs);
- 70(2) (changes in costs due to subsequent legislation); and
- 71 (losses due to currency restrictions).

Footnotes

(Editor's Note: Footnotes are numbered consecutively through the series of articles.)

[49]*See, e.g.*, Clause 12.

[50]DUNCAN WALLACE, *supra* note 1, at 506; SWEET, *supra* note 33, at 346.

[51]*See* Clause 13.

[52]See note 18 *supra* for a perspective on the doctrine of "implied terms" under the common law by a lawyer from a civil law country.

[53]HUDSON'S BUILDING AND ENGINEERING CONTRACTS 549 (Sweet & Maxwell, London 10th ed. 1970, 1st Supp. 1979) (HUDSON'S).

[54]*Id.*, at 551. Consequently, unless the Contractor refuses to execute such work, or unless the Contractor and the Employer fail to agree on the price therefor, an amendment to the construction contract or a new contract would have to be concluded between the parties.

[55]It is necessary to specify "in relation to extra or additional work," as a variation order may also "decrease" the quality of work or "omit" work. *See* Clause 51.

[56]Nor is such determination final and binding upon the Employer. *See* in this section (III), subsection (B), subparagraph (b)(2)—Variation Not Acknowledged by the Engineer—*infra*. Consequently, the fact that the Engineer may have ordered certain work to be done as a variation will not bind the Employer if, upon a true construction of the contract, it was included in the original scope of the work.

[57]Whatever the proper legal qualification ("variation" or not) of an instruction of the Engineer may be, during the execution of the works the Contractor must strictly comply with such instruction, unless it is legally or physically impossible. *See* Clause 13.

[58]Clause 51(2).

[59]*Id.*

[60]Clause 44 expressly refers to "extra or additional work of any kind" as a ground that may justify an extension of time. *See* this section (III), subsection (C)—Delays (Clause 44 and Others)—*infra*.

[61]HUDSON'S, *supra* note 53, at 541.

[62]The notice requirements prescribed by Clause 52(5) will be discussed in Section V in the next article in this series.

[63]Clause 43.

[64]Clause 47.

[65]Delays may often occur which are not on the critical path of construction activity and therefore do not delay completion. While these may, of course, also disrupt the Contractor's work program and justify a claim, discussion here will be limited to claims for events that delay the final completion date.

[66]An extension of time for execution of work may be advantageous, not only for the Contractor, but also for the Employer. If the delay was due to an act of the Employer or of a party for whom the Employer is responsible, the Employer's right to claim liquidated damages for delay on the basis of Clause 47 may, under English law, disappear if the extension of time for execution of work had not been granted to the Contractor. It is this consideration, in fact, rather than solicitude for the Contractor, which, under English practice, caused inclusion of a contractual provision empowering the Engineer to grant an extension of time for execution of work. *See* HUDSON'S, *supra* note 53, at 624.

[67]Though the Engineer is expected to act independently under Clause 44, in practice he may be reluctant to admit that he has himself been a source of delay in the execution of the works (*e.g.*, by delaying the issue of drawings or orders, *see* Clause 6(4)), as this may have unfavorable financial repercussions for him.

[68]Delays may cause the Contractor to suffer a wide variety of damages, *e.g.*, the nonutilization or underutilization of equipment and labor, losses in productivity and increased costs due to inflation, etc. To the amount of each such category of damage, the Contractor would ordinarily be entitled to add a percentage for site and head office overhead.

A Guide To Maritime Laws, Rules And Regulations

by Rolf Meyer-Reumann, Esq.

Anyone who needs to know the maritime regulations that apply in Saudi Arabia may find it difficult to get access to the latest version of particular legal provisions covering this area.

In Saudi Arabia, as in most countries, maritime activities are to some extent governed by general commercial law. But, because these activities are specialized, there are many laws, rules and regulations that apply only to them. In addition, while maritime operations are international in nature, there is no comprehensive international private law governing everything related to maritime law. Saudi Arabia, like most countries, issues its own laws related to its territory. These laws apply not only to maritime companies of the Kingdom, but to others whose activities fall under the jurisdiction of the country or to whom the laws become applicable for other reasons.[1]

In Saudi Arabia, again as in most countries, there is no separate law that covers all aspects of maritime activities. Related provisions are spread throughout various laws, rules and regulations. The laws are constantly changed by amendments that often become effective upon publication in the *Umm Al-Qura*, the official gazette. These amendments, either explicitly or by implication, may cancel previous provisions or add new provisions to a law, but generally, the laws are not abolished and republished completely in the amended version.

The difficulty in getting access to the necessary sources for Saudi regulations can be reduced if it is known which laws contain related provisions and where they are available.

This article lists the sources and the titles of Saudi laws, rules and regulations related to maritime activities, publications in which translations have been published, and available literature on the subjects. The references provided are not complete or comprehensive; rather they are intended to serve as an introductory guide.

Sources

The *Umm Al-Qura*

In Saudi Arabia, the basic source of laws, rules and regulations related to maritime activities is the official gazette, *Umm Al-Qura*, in which all laws, rules and regulations are to be published. As noted, the date of publication often is the effective date. Everything published in the official gazette is, of course, in Arabic, the Kingdom's official language.

Sometimes important instructions are directly circulated by the concerned ministry to the interested institutions and parties, such as port administrations, government agencies, chambers of commerce, shipowners, shipping agencies, shipping conferences, embassies, and so on.

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