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Termination for convenience: What is the contractor entitled to?

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Construction contracts often include termination for convenience clauses. Three recent cases highlight the potential financial implications of terminating for convenience.

No entitlement to loss of profits on incomplete works

Most recently, in the Singapore case of TT International Limited v Ho Lee Construction Pte Ltd [2017] SGHC 62, the construction contract (being a Public Sector Standard Conditions of Contract for Construction Works ("PSSOC") form) permitted the employer to terminate the contract "at any time" by virtue of "a written notice of Termination". The termination for convenience clause provided that the contractor was entitled upon termination to payment for:

- all work executed prior to the date of termination; and
- any loss and expense suffered by the contractor in connection with, or as a consequence of, the termination.

The contract defined loss and expense as:

- the direct relevant costs of labour, plant and material or goods actually incurred;
- costs of an overhead nature actually and necessarily incurred on-site, but in either case, only in so far they would not otherwise have been incurred and which were not and should not have been provided for by the contractor; and
- 15% of any such costs, with such 15% to be "inclusive and in lieu of any profits".

The employer terminated the contract and the contractor claimed *inter alia* for loss of profits on uncompleted work flowing from the employer's termination of the contractor's employment. The court held that:

- the termination clause exhaustively set out the sums that the contractor was entitled to recover; and
- the contractor could not recover for loss of profits for uncompleted work upon termination.

In considering the second issue, the court noted that the contract was sufficiently clear in providing guidance on what could and could not be included in a claim for loss and expense, and specifically that the clause did not provide a separate claim for loss of profits.

The court also noted the use of past tense in the clause, particularly that costs had to be "actually incurred" or "actually and necessarily incurred". Consequently, the costs that could be claimed by the contractor in lieu of a claim for profits were limited to costs that had already been incurred by the contractor. The court also commented that disallowing recovery for loss of profits on uncompleted works is a feature of a "classic termination for convenience clause".

Entitlement for works performed at the point of termination

Two cases, one from Scotland and the other from Australia, illustrate how a contractor may, following a termination for convenience, be entitled to payment even if it was not otherwise presently entitled to payment for that work when the contract was terminated.

- In Centre for Maritime and Industrial Safety Technology Ltd v Ineos Manufacturing Scotland Ltd [2014] CSOH 5, the court considered a termination for convenience clause which specified that the contractor shall be paid in respect of services "performed up to the date of termination and other substantiated associated direct costs". The contract provided that the payment for works performed under to the contract was to be made in 12 equal instalments. The court, however, held that the contractor would be entitled for payment of all work performed up to the date of termination, stating that it was "entitled to be paid on the basis of a fair assessment of the value of services satisfactorily performed during the period"; and accordingly, if this was the "whole of the services due to be provided by them during the year" then the contractor "would be entitled to payment of the whole lump sum".

- A similar approach was recently applied in Basetec Services Pty Ltd v Leighton Contractors Pty Ltd (No 6) [2016] FCA 1534 in which the judgement confirmed the point of a termination clause of convenience is to "identify the amounts which may be recovered by the Contractor" and it found that this was for all "work executed prior to the date of termination".

Comment

Termination for convenience clauses are a common feature in standard form construction contracts. However, the financial consequences of terminating for convenience vary from contract to contract, thus necessitating close review of the wording of each relevant provision. In the international arena, the FIDIC Red Book 1999 contains similar provisions to the PSSOC form (as considered in TT International Limited v Ho Lee Construction), permitting both the employer to terminate at any time for convenience but excluding the contractor's entitlement to compensation for loss of profits on unperformed work.

Aside from contractual provisions, the underlying laws of some countries confer rights of termination for convenience and also prescribe the consequences of termination. For example, under Article 707 of the Qatar Civil Code, an employer has a right to terminate a construction contract at any time, and if it does so the contractor is entitled to payment for loss of profit on unperformed works.

As existing projects around the world come under financial strain, employers are increasingly considering using any rights available to them to terminate their projects for convenience. However, there are often huge variances in the consequences of terminating for convenience, and it is therefore essential that employers fully understand the implications of pressing the "stop" button.

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