

Early termination by Client in event of Contractor's non- performance

European Society of
Construction Law
and
Instituut voor Bouwrecht
Amsterdam, 15 October 2010

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Termination in contract law

Definition:

- “... it is common for most commercial contracts to grant one or both parties certain rights to terminate the contract in certain circumstances.”
- “...the law of most jurisdictions will, to a greater or lesser extent, also grant a party the right to terminate a contract in limited circumstances due to the other party being in breach of the contract.”

FIDIC Contracts: Law and Practice, 2009

Termination in contract law

Termination for convenience **at discretion** **at will**

“...to permit an Employer to terminate the Contract at any time and for any reason, whether financial, political or otherwise, where the Contractor is not in default.”

FIDIC Contracts: Law and Practice, 2009

Termination for cause

Defined events: breach, insolvency

“...grounds on which the Employer is entitled to terminate the Contract for cause...”

FIDIC Contracts: Law and Practice, 2009

Termination for non-fulfilment/breach of contract

Established at time of completion, i.e. failure to complete in accordance with contract by date for completion

Established during project, i.e. for breach/non-compliance during currency of contract: EARLY TERMINATION

Provisions in English JCT Contract

Termination for cause

“If the Contractor continues a specified default for 14 days from receipt of the notice (default notice) under clause 8.4.1, the Employer may on, or within 10 days from, the expiry of that 14 day period by a further notice to the Contractor terminate the Contractor’s employment under this Contract.”

Section 8.4 JCT

“If the Contractor is Insolvent, the Employer may at any time by notice to the Contractor terminate the Contractor’s employment under this Contract.”

Section 8.5 JCT

Provisions in English JCT Contract

Termination for cause

“The Employer shall be entitled by notice to the Contractor to terminate the Contractor’s employment...if...the Contractor or any person employed by him or acting on his behalf shall have committed an offence under the Prevention of Corruption Acts...”

Section 8.6 JCT

Provisions in FIDIC Red/Yellow/Silver Books

Termination for cause

“In any of these events or circumstances, the Employer may, upon giving 14 days’ notice to the Contractor, terminate the Contract and expel the Contractor from the Site. However, in the case of sub-paragraph (e) or (f), the Employer may by notice terminate the Contract immediately...”

e. becomes bankrupt or insolvent, goes into liquidation...

f. gives or offers to give (directly or indirectly) to any person any bribe, gift, gratuity, commission or other thing of value, as an inducement or reward...”

Sub-clause 15.2

“As soon as practicable after a notice of termination under Sub-Clause 15.2 [Termination by Employer] has taken effect, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine the value of the Works, Goods and Contractor’s Documents, and any other sums due to the Contractor for work executed in accordance with the Contract.”

Sub-clause 15.3

Provisions in FIDIC Red/Yellow/Silver Books

Termination for convenience

“The Employer shall be entitled to terminate the Contract, at any time for the Employer’s convenience, by giving notice of such termination to the Contractor. The termination shall take effect 28 days after the later of the dates on which the Contractor receives this notice or the Employer returns the Performance Security. The Employer shall not terminate the Contract under this Sub-Clause in order to execute the Works himself or to arrange for the Works to be executed by another contractor.”

Sub-clause 15.5

Provisions in FIDIC DBO Gold Book

Termination for convenience

“If at any time the Employer elects to terminate the Contract for reasons other than those specified in Sub-Clause 15.2 [Termination for Contractor’s Default], and subject to the applicable Law of the Contract, he shall notify the Contractor in writing, with a copy to the Employer’s Representative. Such termination shall be deemed to be a termination for the convenience of the Employer.

Upon issuing a Notice to terminate under this Sub-Clause, the Employer shall immediately make arrangements to return the Performance Security to the Contractor, and the termination shall take effect 28 days after the date the Contractor receives the Notice, or 28 days after he receives the Performance Security, whichever is the later. Upon issuing the Notice, the Employer shall immediately cease to have any right of use of any of the Contractor’s Documents, and shall forthwith return all and any such Contractor’s Documents to the Contractor.”

Sub-clause 15.5

Provisions in FIDIC DBO Gold Book

Termination for convenience

“The Employer shall not terminate the Contract under this Sub-Clause in order to execute or operate the Works (or any part thereof) himself, or arrange for the Works (or any part thereof) to be executed by another contractor.”

Sub-clause 15.5 (cont/d)

- **Wegan Constructions Pty Ltd v Wodonga Sewerage Authority [1978]**
- **Commissioner for Main Roads v. Reed & Stuart Pty Limited and another [1974]**

See also ESCL Research on exercise of power to terminate below

Provisions in FIDIC DBO Gold Book

Termination for convenience

“As soon as practicable after a Notice of termination under Sub-Clause 15.5 [Termination for Employer’s Convenience] has taken effect, the Employer’s Representative shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine the value of the Works, Goods and Contractor’s Documents, and any other sums due to the Contractor for work executed in accordance with the Contract.”

Sub-clause 15.6

Provisions in Dutch contracts

UAV-GC 2005

“The Contractor shall make every effort in order to obtain...the permits and/or licences, exemptions, orders and permissions...in so far as these are necessary for the Works as planned, for the use of the Works and for the realisation of the Long-Term Maintenance...In the event of failure on the part of the Contractor... the Employer shall be entitled to terminate the Contract by registered letter...”

Clause 10

“The Employer shall have the right to terminate the Contract at all times.”

Clause 16.8

“If the Contractor continues to default in the performance of his obligations the Employer shall be entitled to complete or have others complete the Works and/or the Long-Term Maintenance at the Contractor’s expense, without prejudice to the Employer’s rights to damages.”

Clause 43.2

Provisions in Dutch contracts

DBFM Agreement

“The Contracting Authority may terminate this Agreement on a date of its choosing if an Immediate Termination Event should arise.”

Clause 10.1

Examples of Immediate Termination Event

- *A Bank Guarantee is not provided;*
- *The Commencement Certificate is not obtained;*
- *Financial Close is not achieved;*
- *The Availability Certificate is not obtained; and*
- *The Contractor suspends the execution of practically all Work for [15] successive Business Days.*

Schedule 1

Provisions in Dutch contracts

DBFM Agreement

“The Contracting Authority may terminate this Agreement on a date that it specifies if a Contractor Default exists and the Contractor does not remedy that situation within a reasonable period of time...unless the Contractor Default...does not warrant termination with all of the associated consequences.”

Clause 10.2

“The Contracting Authority may terminate this Agreement at any time on a date that it specifies.”

Clause 10.4

Contractor Default

- a) *Is not the result of a Contracting Authority Default;*
- b) *Is not the result of a Delay Event, a Compensation Event or a Force Majeure Event; or*
- c) *Is not an Immediate Termination Event.*

Schedule 1

How power of termination is exercised

ESCL Research

Ethics in Construction Law – A review of the position in eight European countries, International Construction Law Review, Volume 24, 2007 – Part 4

Question: Does the Employer normally have unlimited powers to terminate or vary the contract without good reason?

How power of termination for convenience is exercised

ESCL Research

- **Netherlands** - Yes. Article 7:764 of the Dutch Civil Code.
(Koos Rozemond)
- **Austria** – Yes, subject to compensating the Contractor.
- **England/Wales** – No, subject to genuinely agreed contract provisions.
- **France** – No. Article 1134 of the French Civil Code.
- **Germany** – Yes, subject to compensating the Contractor if he suffers adverse financial consequences.
- **Greece** – No. Article 700 of the Greek Civil Code authorises the employer to terminate a contract in a non-abusive manner and not contrary to the principles of good faith.
- **Sweden** – Yes, subject to compensation.

How power of termination for convenience is exercised

US and other common law jurisdictions require reasonableness/good faith

John Tackaberry, “Termination for Convenience”, April 2002 Society of Construction Law Paper 104

“a termination for convenience clause...must be construed strictly”

Concept of temporary disconformity in common law

Examples of temporary disconformity

- **Eu Asia Engineering v Wing Hong Contractors, Hong Kong High Court, [1990]**
Defects in concrete – ‘honeycombing’
- **Adkin v Brown, New Zealand Court of Appeal [2002]**
Structural defects capable of being repaired

Not temporary disconformity

Early termination for breach

Remediation contract example

Need for 'dual obligation'

- **JCT:** “The Contractor shall carry out and complete the Works...”
- **FIDIC:**
 - “The Contractor shall design, execute and complete the Works...” (Red/Yellow/Silver Books)
 - “The Contractor shall design, execute and complete the Works and provide the Operation Service...” (Gold Book)

Not temporary disconformity

Early termination for breach

Need for 'dual obligation'

- **Dutch Law:**
 - “The Contractor shall carry out Design Work and Construction Work...shall realise the Works...” (UAV-GC 2005)
 - “The Contractor shall carry out all Work...do everything that is necessary to realise the above...” (DBFM Agreement)

Not temporary disconformity

Early termination for breach

- **Surrey Heath Borough Council v Lovell Construction [1988]** – a building had largely been destroyed by a fire.
- **Nene Housing Society v National Westminster Bank Ltd [1980]** – serious defects in the work had not been corrected at the time of the termination.
- **William Tomkinson and Sons Ltd v The Parochial Church Council of St. Michael [1990]** – the contractor had not rectified the defects when requested to do so.

Dutch example

A contractor is obliged to mow the grass between the roads in order for the grass not to block the view between the roads. The client notices more than once that the contractor fails to perform his duties under the contract and has given him notice in writing and a reasonable time to cure the situation. When the contractor fails to do so, the client wants to terminate the contract. The contractor's defences: the client has no right to intervene with his work other than the agreed upon moments of control.

Rice v Great Yarmouth Borough Council [2000]

Contractor contracted with Employer (the Council) to provide grounds maintenance services for a period of four years. The Council terminated the contract 8 months after the contract had been entered into and a number of default notices had been served on Rice for failing to prepare pitches for football and cricket, and to maintain flower borders and grass lawns. Rice successfully argued there was no breach. The Council appealed.

Rice v Great Yarmouth Borough Council [2000]

Quotation from judgment of Court

- “The question for the court... in any case like this is whether the cumulative effect of the breaches of contract complained of is so serious as to justify the innocent party in bringing the contract to a premature end.”
- “It is clear that the test of what is sufficiently serious to bring the case within... (this test) is severe.”

Rice v Great Yarmouth Borough Council [2000]

- **“Building contracts differ from these (maintenance) contracts in that there will, it is hoped, be an end product. Defects may or should be remedied during or, in some cases, after completion...These contracts contemplated a multitude of different results at different times...”**
- **“These contracts are, however, like building contracts in that the accumulation of past breaches is relevant, not only for its own sake, but also for what it shows about the future.”**

Rice v Great Yarmouth Borough Council [2000]

- **“...the quality of work was deteriorating and the number of defects was multiplying, many of which (the contract supervisor) had tried unsuccessfully to have put right... the contractors had neither the ability, competence or the will by this time to complete the work in the manner required by the contract.”**

(quoted from Sutcliffe v Chippendale & Edmondson [1971])

- **...such a breach may still be a question of fact and degree...”**

(quoted from Foster Wheeler Wood Group Engineering v Chevron [1996])

Rice v Great Yarmouth Borough Council [2000]

Dismissing the appeal, the Court of Appeal held that the judge had correctly concluded that the Council had not had the right to terminate the contract after assessing the significance of the breaches found against the background of the contract as a whole and the circumstances of the case, including the role played by the Council (in requiring the Contractor to redeploy workmen).

Conclusion I

- **The law in most jurisdictions makes provision for parties to terminate their contracts.**
 - **Parties to modern construction contracts typically make express provision for:**
 - **The scope of the entitlement; and**
 - **The procedure, including any compensation mechanism.**
- English contracts
- Dutch contracts
- FIDIC contracts
- **Provision usually for:**
 - **Termination for cause/breach**
 - **Termination for convenience**

Conclusion II

- **Both types of termination provision can give Employer right of Early Termination.**
- **Exercise of termination rights, especially termination for convenience, is subject to control in some jurisdictions e.g. not in bad faith.**
- **Exercise of termination rights for breach may be subject in common law jurisdictions to temporary disconformity doctrine.**
- **“Termination of a contract is always a serious step to take because it will almost inevitably have significant consequences, both practical and legal, for the parties.”**

FIDIC Contracts: Law and Practice, 2009

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