Can an Employer Instruct an Airport Instead of a Road?

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What is the point of a variations clause?

It is almost inevitable that, however well thought through a construction project is at design stage, when it comes to be built, there will be a need for some variations. The FIDIC 1999 Red, Yellow and Silver Books, for example, devote an entire chapter to the subject (Clause 13 – Variations and Adjustments).

At least under English law an employer is not entitled unilaterally to vary the original works unless the new work is of a kind contemplated by the clauses of the contract which provide for the ordering of extras. The purpose of a "variation clause" is to enable an employer to avoid having to enter into a new contract with the same contractor, or perhaps another contractor, to have him perform the variation. If the employer were to approach a new contractor, he would face re-tendering costs, possible increases in prices, delay and clashes between the original and new contractors on site. If on the other hand the employer is able to vary the original contract, costs and inconvenience may be kept to a minimum.

The contractor may argue however that the nature of the proposed varied works falls outside the scope of his original pricing mechanism and he should be properly compensated for that. Therefore, arguably, a well-drafted variations clause will address the type of changes that that the employer may instruct and provide a clear mechanism for valuing them.

What does the FIDIC Variation clause say?

A variation is defined in the FIDIC Red Book as meaning "any change to the Works, which is instructed or approved as a Variation under Clause 13 [*Variation and Adjustments*]." Sub-Clause 13.1 of the FIDIC Red Book provides that:

> *"Variations may be initiated by the Engineer at any time prior to issuing the Taking-Over Certificate for the Works, either by an instruction or by a request to the Contractor to submit a proposal."*

The Sub-Clause goes on to provide that the Contractor *"shall execute and be bound by each Variation"*. The only exception which enables the Engineer to cancel, confirm or vary the instruction is where the Contractor promptly gives notice and particulars to the Engineer stating that he *"cannot readily obtain the Goods required for the Variation"*. The Sub-Clause goes on to list what a Variation "may" include. From the wording it is not clear whether the word "may" is intended to mean that the list that follows is an exhaustive or non-exhaustive one although the latter is more likely. Sub-Clause 12.3 of the Red Book provides a mechanism to the Engineer to evaluate instructed Variations. The valuation clause is quite difficult to interpret but is not the subject of this short article.

Neither the FIDIC Yellow Book nor the Silver Book contains a list of possible Variations like the one provided in the Red Book. Nor do they make provision for the valuation of Variations in the same way that the Red Book does. Sub-Clause 13.1 of both Yellow and Silver Books however picks up on one of the scenarios in the Red Book list referred to above, namely that a Variation shall not comprise the omission of any work which is to be carried out by others. Therefore, unless it is considered that Variations under the Red Book are restricted to the categories listed, all of the FIDIC Red, Yellow and Silver Book contracts allow the Employer to instruct a variation which the Contractor is then bound to execute. On a strict construction of Clause 13, there is no restriction on the nature or scope of additional work that can be instructed as long as it is a "change to the Works".

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Whether the FIDIC Variation Clause is Sufficiently Comprehensive?

What, therefore, is a change to the works? The Concise Oxford Dictionary defines "change" as: "Making or becoming different; substitution of one for another variety". Does that definition help? How different can the change make the project? What if the change makes the project an entirely different proposition to that which was tendered for? So to take the extreme example posed in the title, if the employer wished the contractor to build an airport as a variation to a road project, would that be permissible?

Back in 1876, Lord Cairns in the English case of *Thorn v London Corporation* distinguished between additional or varied work that was *contemplated* by the contract, and work that was not. He described work not contemplated by the contract as *"additional or varied work, so peculiar, so unexpected, and so different from what any person reckoned or calculated upon, that it is not within the contract at all"* and concluded that such work would not fall within the variation clause.[1] Other cases in England have followed this approach.

In the United States a "cardinal-change" doctrine has developed. Initially it referred to the legal principle by which a contractor is released from the obligation to work under the terms of a government contract if the government has made a major or cardinal change to that contract by directing the contractor to perform work not within its general scope. In some States the doctrine is now also recognised in relation to private contracts. The law has developed to the point in the US where in some States the doctrine also covers circumstances where a large number of small changes are instructed which individually would fall within the ambit of the variations clause but which collectively have the effect of completely changing the scope of works.

Under the doctrine, when a contractor claims that there has been a cardinal change, it is essentially an assertion that the employer has breached the contract. The purpose of the doctrine is to provide a remedy for the contractor who feels obliged to execute changed or additional work despite his protest that the change is cardinal. A court addressing the issue of "cardinal-change" and the contractor's claim for damages would be likely to consider:

1. The individual and cumulative impact of changes;
2. The degree of added complexity and difficulty of the work;
3. Any disruption caused to the contractor's performance;
4. The overall impact upon contract cost and time of performance; and
5. The effect of change on compensation or risk allocation.

The American courts (using a similar approach to the English courts) would in effect ask whether the employer has made changes to a project beyond what the parties reasonably could have anticipated at the time the contract was entered into.

Plainly it will be a question of fact whether a change falls within the Thorn test for a legitimate variation or whether it crosses the threshold of a cardinal change. It is suggested that it would be inappropriate to set out in the FIDIC General Conditions an exhaustive set of criteria to aid in that determination. The question however is whether the principles referred to in Thorn or that of a cardinal change should find expression in the FIDIC conditions at all.

Conclusion

Having witnessed the consequences of employers' attempts to impose a "cardinal change" on contractors, in the author's view it would be sensible for the FIDIC standard forms of contract to include in their "variation clause" greater clarity on what does constitute a change, perhaps adopting wording derived from the *Thorn test*, and for the concept of a cardinal change to be expressly recognised. Major disputes might thereby be avoided.

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1 1 App Cas 120.

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