



DISPUTE MANAGEMENT IN AFRICA INFRASTRUCTURE PROJECTS (DiMAP)
2022

ACCRA, GHANA

CASE STUDY FOR BREAK-OUT SESSION (OIL AND GAS)

Background

In 2018, due to increased demand and production of crude oil by the country's offshore oil fields, Ghana O&G Ltd decided it would construct a new oil refinery in the country as a competitor to the country's other existing oil refineries, which are few in number.

Ghana O&G Ltd (the "Employer") and Slick Builder Ltd (the "Contractor") entered into an Engineering, Procurement and Construction Contract (the "EPC") under which the Contractor agreed to design, engineer, procure, construct, test and complete the refinery (the "Works").

Shortly after the contract was entered into and the construction of the refinery had commenced, a major variation to the contract was instructed in order for a new cracking unit to be added to the refinery. This caused significant delay and disruption to the works being carried out by the Contractor.

Further difficulties arose when, at the end of 2019, disaster struck with the outbreak of Covid-19. This caused further delays and disruptions with various restrictions imposed on the project and its workers.

The Employer granted partial relief for each of these two events after they happened. With regards to the major variation, the Employer agreed to review the impact this would have on the project's overall schedule. The Employer also issued a further variation for the costs incurred by the Contractor.

With regards to the Covid-19 issues, the Contractor notified the Employer by email (12 December 2019) that covid was likely to delay its works. The Contractor did this promptly and within 7 days of it becoming aware of the delay.

The Employer however was very concerned with the slow progress of the works as it had taken longer to carry out the variation works than the Contractor's initial estimate. The project is financed and is required to be complete by certain key dates under the finance arrangement.

The Employer is under significant pressure from the project financiers as these dates are looking unlikely to be met.

The Employer and the Contractor met on 18 December 2019 and agreed that the Contractor was not to submit any further Covid related notices until the Project was back on foot and both parties had a better understanding of the impacts of Covid. This agreement is made between the senior representatives of the Employer and Contractor and is recorded in meeting minutes. The Employer did not want the Contractor to keep submitting notices of potential delay as it was under increasing pressure from the Project financiers.

[Break – watch should the Contractor do?]

Should the Contractor:

- Submit a full complete notice despite the Employer's request?
- Should the Contractor suspend works until the Employer agrees that the Contractor can keep submitting notices?
- Should the Contractor continue and not submit a notice?

Question continued.

The Contractor continues with the works and does not submit a fully detailed claim or a formal notice of Covid Delays.

Due to the poor performance of the Project the Board of Directors of the Employer decide to replace the Employer's executive team.

The new executive team, does not wish to honour the deal of the previous executive team and states the Contractor is out of time to issue any notice of claim.

What options does the Contractor have?

The Claims

As a result of the issues outlined above, the Contractor made claims to the Employer requesting both extensions of time and additional costs for the completion of the project.

The EPC is based on the FIDIC Silver Book and is governed by English law.

The major variation to the contract was introduced by the Employer and concerned units which were not included in the original design of the refinery. These were therefore necessary but meant that the Works were disrupted and delayed and additional work was to be carried out.

The Contractor's claims in relation Covid-19 concerned the following:

- lockdowns at the project worker's accommodation;
- restriction of visa issuance by the Ghanaian Government;
- general restrictions of foreigners' entry into Ghana;
- the reduction of labour at the project site because of social distancing requirements; and
- transport delay into and out of Ghana due to increased health screening and border hold ups.

Several of the clauses under the FIDIC contract are relevant to these two claims. These include clause 8 which concerns in particular extensions of time, delays caused by authorities and notice requirements, clause 13 in relation to variations and adjustments, clause 18 in relation to force majeure events and clause 20 which sets out the procedure for Contractor's claims.

Appendix A – Relevant Contract Clauses

Clause 8 – Commencement, Delays and Suspension

8.5

Extension of Time
for Completion

The Contractor shall be entitled subject to Sub-Clause 20.2 [*Claims For Payment and/or EOT*] to Extension of Time if and to the extent that completion for the purposes of Sub-Clause 10.1 [*Taking Over the Works and Sections*] is or will be delayed by any of the following causes:

- a Variation (except that there shall be no requirement to comply with Sub-Clause 20.2 [*Claims For Payment and/or EOT*]);
- a cause of delay giving an entitlement to EOT under a Sub-Clause of these Conditions; or

- (c) any delay, impediment or prevention caused by or attributable to the Employer, the Employer's Personnel, or the Employer's other contractors on the Site (or any Unforeseeable shortages in the availability of Employer-Supplied Materials, if any, caused by epidemic or governmental actions).

When determining each EOT under Sub-Clause 20.2 [*Claims For Payment and/or EOT*], the Employer's Representative shall review previous determinations under Sub-Clause 3.5 [*Agreement or Determination*] and may increase, but shall not decrease, the total EOT.

If a delay caused by a matter which is the Employer's responsibility is concurrent with a delay caused by a matter which is the Contractor's responsibility, the Contractor's entitlement to EOT shall be assessed in accordance with the rules and procedures stated in the Special Provisions (if not stated, as appropriate taking due regard of all relevant circumstances).

8.6

Delays Caused by Authorities

If:

- (a) the Contractor has diligently followed the procedures laid down by the relevant legally constituted public authorities or private utility entities in the Country;
- (b) these authorities or entities delay or disrupt the Contractor's work; and
- (c) the delay or disruption was Unforeseeable,

then this delay or disruption will be considered as a cause of delay under sub-paragraph (b) of Sub-Clause 8.5 [*Extension of Time for Completion*].

Clause 13 – Variations and Adjustments

**Adjustments for
Changes in Laws**

Subject to the following provisions of this Sub-Clause, the Contract Price shall be adjusted to take account of any increase or decrease in Cost resulting from a change in:

- (a) the Laws of the Country (including the introduction of new Laws and the repeal or modification of existing Laws);
- (b) the judicial or official governmental interpretation or implementation of the Laws referred to in sub-paragraph (a) above;
- (c) any permit, permission, license or approval obtained by the Employer or the Contractor under sub-paragraph (a) or (b), respectively, of Sub-Clause 1.12 [*Compliance with Laws*]; or
- (d) the requirements for any permit, permission, licence and/or approval to be obtained by the Contractor under sub-paragraph (b) of Sub-Clause 1.12 [*Compliance with Laws*],

made and/or officially published after the Base Date, which affect the Contractor in the performance of obligations under the Contract. In this Sub-Clause "change in Laws" means any of the changes under sub-paragraphs (a), (b), (c) and/or (d) above.

If the Contractor suffers delay and/or incurs an increase in Cost as a result of any change in Laws, the Contractor shall be entitled subject to Sub-Clause 20.2 [*Claims For Payment and/or EOT*] to EOT and/or payment of such Cost.

If there is a decrease in Cost as a result of any change in Laws, the Employer shall be entitled subject to Sub-Clause 20.2 [*Claims For Payment and/or EOT*] to a reduction in the Contract Price.

If any adjustment to the execution of the Works becomes necessary as a result of any change in Laws:

- (i) the Contractor shall promptly give a Notice to the Employer, or
- (ii) the Employer shall promptly give a Notice to the Contractor (with detailed supporting particulars).

Thereafter, the Employer shall either instruct a Variation under Sub-Clause 13.3.1 [*Variation by Instruction*] or request a proposal under Sub-Clause 13.3.2 [*Variation by Request for Proposal*].

Clause 18 – Exceptional Events

18 Exceptional Events

18.1

Exceptional Events

"Exceptional Event" means an event or circumstance which:

- (i) is beyond a Party's control;
- (ii) the Party could not reasonably have provided against before entering into the Contract;
- (iii) having arisen, such Party could not reasonably have avoided or overcome; and
- (iv) is not substantially attributable to the other Party.

An Exceptional Event may comprise but is not limited to any of the following events or circumstances provided that conditions (i) to (iv) above are satisfied:

- (a) war, hostilities (whether war be declared or not), invasion, act of foreign enemies;
- (b) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war;
- (c) riot, commotion or disorder by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors;
- (d) strike or lockout not solely involving the Contractor's Personnel and other employees of the Contractor and Subcontractors;
- (e) encountering munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity; or
- (f) natural catastrophes such as earthquake, tsunami, volcanic activity, hurricane or typhoon.

18.4

Consequences of an Exceptional Event

If the Contractor is the affected Party and suffers delay and/or incurs Cost by reason of the Exceptional Event of which he/she gave a Notice under Sub-Clause 18.2 [*Notice of an Exceptional Event*], the Contractor shall be entitled subject to Sub-Clause 20.2 [*Claims For Payment and/or EOT*] to:

- (a) EOT; and/or
- (b) if the Exceptional Event is of the kind described in sub-paragraphs (a) to (e) of Sub-Clause 18.1 [*Exceptional Events*] and, in the case of sub-paragraphs (b) to (e) of that Sub-Clause, occurs in the Country, payment of such Cost.

Clause 20 – Employer's and Contractor's Claims

20 Employer's and Contractor's Claims

20.1

Claims

A Claim may arise:

- (a) if the Employer considers that the Employer is entitled to any additional payment from the Contractor (or reduction in the Contract Price) and/or to an extension of the DNP;
- (b) if the Contractor considers that the Contractor is entitled to any additional payment from the Employer and/or to EOT; or
- (c) if either Party considers that he/she is entitled to another entitlement or relief against the other Party. Such other entitlement or relief

may be of any kind whatsoever (including in connection with any certificate, determination, instruction, Notice, opinion or valuation of the Employer) except to the extent that it involves any entitlement referred to in sub-paragraphs (a) and/or (b) above.

In the case of a Claim under sub-paragraph (a) or (b) above, Sub-Clause 20.2 [Claims For Payment and/or EOT] shall apply.

In the case of a Claim under sub-paragraph (c) above, where the other Party has disagreed with the requested entitlement or relief (or is deemed to have disagreed if he/she does not respond within a reasonable time), a Dispute shall not be deemed to have arisen but the claiming Party may, by giving a Notice refer the Claim to the Employer's Representative and Sub-Clause 3.5 [Agreement or Determination] shall apply. This Notice shall be given as soon as practicable after the claiming Party becomes aware of the disagreement (or deemed disagreement) and shall include details of the claiming Party's case and the other Party's disagreement (or deemed disagreement).

20.2

Claims For Payment and/or EOT

If either Party considers that he/she is entitled to any additional payment by the other Party (or, in the case of the Employer, a reduction in the Contract Price) and/or to EOT (in the case of the Contractor) or an extension of the DNP (in the case of the Employer) under any Clause of these Conditions or otherwise in connection with the Contract, the following Claim procedure shall apply:

20.2.1 Notice of Claim

The claiming Party shall give a Notice to the other Party, describing the event or circumstance giving rise to the cost, loss, delay or extension of DNP for which the Claim is made as soon as practicable, and no later than 28 days after the claiming Party became aware, or should have become aware, of the event or circumstance (the "Notice of Claim" in these Conditions).

If the claiming Party fails to give a Notice of Claim within this period of 28 days, the claiming Party shall not be entitled to any additional payment, the Contract Price shall not be reduced (in the case of the Employer as the claiming Party), the Time for Completion (in the case of the Contractor as the claiming Party) or the DNP (in the case of the Employer as the claiming Party) shall not be extended, and the other Party shall be discharged from any liability in connection with the event or circumstance giving rise to the Claim.

20.2.2 Initial response

If the other Party considers that the claiming Party has failed to give the Notice of Claim within the period of 28 days under Sub-Clause 20.2.1 [Notice of Claim] the other Party shall, within 14 days after receiving the Notice of Claim, give a Notice to the claiming Party accordingly (with reasons).

If the other Party does not give such a Notice within this period of 14 days, the Notice of Claim shall be deemed to be a valid Notice.

If the claiming Party receives a Notice from the other Party under this Sub-Clause and disagrees with the other Party or considers there are circumstances which justify late submission of the Notice of Claim, the

claiming Party shall include in its fully detailed Claim under Sub-Clause 20.2.4 [Fully detailed claim] details of such disagreement or why such late submission is justified (as the case may be).

20.2.4 Fully detailed Claim

In this Sub-Clause 20.2, "fully detailed Claim" means a submission which includes:

- (a) a detailed description of the event or circumstance giving rise to the Claim;
- (b) a statement of the contractual and/or other legal basis of the Claim;
- (c) all contemporary records on which the claiming Party relies; and
- (d) detailed supporting particulars of the amount of additional payment claimed (or amount of reduction of the Contract Price in the case of the Employer as the claiming Party), and/or EOT claimed (in the case of the Contractor) or extension of the DNP claimed (in the case of the Employer).

Within either:

- (i) 84 days after the claiming Party became aware, or should have become aware, of the event or circumstance giving rise to the Claim, or
- (ii) such other period (if any) as may be proposed by the claiming Party and agreed by the other Party

the claiming Party shall submit to the Employer's Representative a fully detailed Claim.

If within this time limit the claiming Party fails to submit the statement under sub-paragraph (b) above, the Notice of Claim shall be deemed to have lapsed, it shall no longer be considered as a valid Notice, and the Employer's Representative shall, within 14 days after this time limit has expired, give a Notice to the claiming Party accordingly.

If the Employer's Representative does not give such a Notice within this period of 14 days, the Notice of Claim shall be deemed to be a valid Notice. If the other Party disagrees with such deemed valid Notice of Claim the other Party shall give a Notice to the Employer's Representative which shall include details of the disagreement. Thereafter, the agreement or determination of the Claim under Sub-Clause 20.2.5 [*Agreement or determination of the Claim*] shall include a review by the Employer's Representative of such disagreement.

If the claiming Party receives a Notice from the other Party under this Sub-Clause 20.2.4 and if the claiming Party disagrees with such Notice or considers there are circumstances which justify late submission of the statement under sub-paragraph (b) above, the fully detailed claim shall include details of the claiming Party's disagreement or why such late submission is justified (as the case may be).

If the event or circumstance giving rise to the Claim has a continuing effect, Sub-Clause 20.2.6 [*Claims of continuing effect*] shall apply.

20.2.5 Agreement or determination of the Claim

After receiving a fully detailed Claim under Sub-Clause 20.2.4 [*Fully detailed Claim*], or an interim or final fully detailed Claim (as the case may be) under Sub-Clause 20.2.6 [*Claims of continuing effect*], the Employer's Representative shall proceed under Sub-Clause 3.5 [*Agreement or Determination*] to agree or determine:

- (a) the additional payment (if any) to which the claiming Party is entitled (or the reduction of the Contract Price (in the case of the Employer as the claiming Party); and/or
- (b) the extension (if any) of the Time for Completion (before or after its expiry) under Sub-Clause 8.5 [*Extension of Time for Completion*] (in the case of the Contractor as the claiming Party), or the extension (if any) of the DNP (before its expiry) under Sub-Clause 11.3 [*Extension of Defects Notification Period*] (in the case of the Employer as the claiming Party),

to which the claiming Party is entitled under the Contract.

If a Notice is given under Sub-Clause 20.2.2 [*Initial response*] and/or under Sub-Clause 20.2.4 [*Fully detailed Claim*], the Claim shall nevertheless be agreed or determined in accordance with this Sub-Clause 20.2.5. The agreement or determination of the Claim shall include whether or not the Notice of Claim shall be treated as a valid Notice taking account of the details (if any) included in the fully detailed claim of the claiming Party's disagreement with such Notice(s) or why late submission is justified (as the case may be). The circumstances which may be taken into account (but shall not be binding) may include:

- whether or to what extent the other Party would be prejudiced by acceptance of the late submission;
- in the case of the time limit under Sub-Clause 20.2.1 [*Notice of Claim*], any evidence of the other Party's prior knowledge of the event or circumstance giving rise to the Claim, which the claiming Party may include in its supporting particulars; and/or
- in the case of the time limit under Sub-Clause 20.2.4 [*Fully detailed Claim*], any evidence of the other Party's prior knowledge of the contractual and/or other legal basis of the Claim, which the claiming Party may include in its supporting particulars.

If, having received the fully detailed Claim under Sub-Clause 20.2.4 [*Fully detailed Claim*], or in the case of a Claim under Sub-Clause 20.2.6 [*Claims of continuing effect*] an interim or final fully detailed Claim (as the case may be), the Employer's Representative requires necessary additional particulars:

- (i) he/she shall promptly give a Notice to the Contractor, describing the additional particulars and the reasons for requiring them;
- (ii) he/she shall nevertheless give his/her response on the contractual or other basis of the Claim, by giving a Notice to the Contractor, within

- the time limit for agreement under Sub-Clause 3.5.3 [*Time limits*];
- (iii) as soon as practicable after receiving the Notice under sub-paragraph (i) above, the Contractor shall submit the additional particulars; and
 - (iv) the Employer's Representative shall then proceed under Sub-Clause 3.5 [*Agreement or Determination*] to agree or determine the matters under sub-paragraphs (a) and/or (b) above (and, for the purpose of Sub-Clause 3.5.3 [*Time limits*], the date the Employer's Representative receives the additional particulars from the Contractor shall be the date of commencement of the time limit for agreement under Sub-Clause 3.5.3).