# Issues arising on termination of a construction contract



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We were privileged to be tasked with chairing the first International Construction Projects (ICP) Committee session at the IBA Annual Conference in Rome on Tuesday 9 October 2018, with our designated topic being 'Issues arising on termination of a construction contract'.

Both our practices have seen a sharp upturn in the number of termination-related disputes in recent years. These disputes have included situations where:

• contracts were terminated on spurious grounds because the Owner found someone cheaper or simply decided that they did not like their original contractor anymore;

• contracts were terminated by the Owner using termination for convenience provisions and then using someone else to complete the works; and

• contractors have terminated (or threatened to terminate) for prolonged non-payment, or the Owner's alleged failure to provide sufficient appropriate information about their financial arrangements.

It is also increasingly common in our experience for Owners to terminate for convenience even where there were robust grounds for terminating for default, simply to ensure that the Contractor leaves quickly without the involvement of local courts. Again, it is not uncommon in our experience, for Owners to 'buy out' a non-performing Contractor so they leave quickly and on good terms, allowing the project to be continued by others.

Termination cases are interesting because, unlike many construction cases, they often have an 'all or nothing' outcome; the termination is either valid or it is not and the assessment of quantum is completely different depending on the finding on liability. Additionally, the law on termination can vary dramatically from jurisdiction to jurisdiction, and different common and civil law jurisdictions can take very different approaches to assessing the validity of a termination from other, closely related, common and civil law jurisdictions.

We therefore asked our panellists to address three issues:

• first, comparing termination for default to termination for convenience;

• second, considering what requirements exist as to the substance and form of a termination notice; and

• third, looking at the legal consequences of a wrongful termination and in particular, whether, when, where and how a Contractor can try to block a wrongful termination and the claims available to a Contractor who is the victim of a wrongful termination.

Each issue was addressed by a civil and common law practitioner, and with our panellists located in jurisdictions from Singapore to Scotland (and several in between) we provided a broad overview of the issues from around the world.

## Terminating for default versus terminating for convenience

*Civil law perspective*

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A construction agreement under civil law is a bilateral agreement ('agreement for work') and is considered as instantaneous, where a party delivers the work and the counterparty the contract price. Thus, the relationship that is created from it, between the employer and contractor, expires with the due fulfilment of the parties' obligations and is terminated pursuant to the general reasons for the termination of all bilateral contracts, such as the mutual discharge of the contracting parties due to the accidental inability of any of them to fulfil their obligations. However, in practice, construction agreements create a de facto long-lasting relationship, which is the reason why the law provides for earlier termination for default or convenience.

Under the Greek Civil Code (GCC), for example, the employer is entitled, at any time before the physical completion of the works, to terminate the contract for convenience (without reason) (Article 700). As regards the general law of obligations, this is an important deviation from the standard of permitting unilateral termination only for default or good reason.

The termination provided by Article 700 applies directly after the employer's respective declaration and without notice. Upon its exercise, the contract is terminated *ex nunc* and the parties are discharged from the non-fulfilled obligations, without any claims that have arisen up to the point of termination being affected. However, the contract is not overturned in its entirety because it remains applicable as to the agreed fee, which remains payable to the contractor irrespective of the termination.

Upon termination, under Article 700, the Employer shall pay the contract price, but anything the contractor saved due to termination is deductible from the amount due, such as expenses not incurred by the contractor, any other works executed during the term of the terminated contract and anything else that was wilfully omitted for its benefit. The basic consequence of the termination, in accordance with Article 700, is also the creation of the obligation for the contractor to deliver and for the employer to accept the executed part of the works.

Besides termination for convenience, the Employer has the right to terminate the agreement for good reason. A specific form of such right is the right of withdrawal in case of substantially delayed construction. More specifically, in the event that the contractor delays the commencement of the execution of the works or, albeit its prompt commencement, delays the pace of the works in a way that makes the prompt completion of the project impossible, the employer has the right to withdraw from the contract without waiting for the delivery of the project, provided the employer is not the one liable for the delay (Article 686). Further, the right of early withdrawal is available to the employer irrespective of the existence of the conditions of default of the contractor, any liability on its part or the condition of force majeure. For the withdrawal to be valid, the respective notice must mention the exact reasons for it, otherwise it is presumed as a termination of Article 700 since an invalid withdrawal may be applicable as a termination for convenience upon conversion.

The exercise of this right rescinds the contract *ex tunc* as if the contract was never concluded. Consequently, the mutual obligations cease to exist while the parties are obliged to return anything delivered in accordance with the provisions of unjust enrichment. In the event of such withdrawal, the GCC provides for reasonable damages.

The right to withdraw when the works are substantially delayed is a specific application of the right to terminate for good cause, which is recognised in all long-term contracts. Both aforementioned rights are justified by the need of each of the parties to terminate the contractual commitment when, due to specific incidents and the continuous nature of the relationship, it will be against good faith to continue it. In the case of withdrawal under Article 686, a good reason is the certainty that the project will not be completed within the deadlines at the time agreed and that this will result in increasing the damages that the employer will suffer.

The exercise of the right under Article 686 results in the immediate termination of the contract with retrospective effect, meaning that the right of the parties to make subsequent claims ceases to exist. At the same time, the parties are obliged to return anything delivered up to that moment in accordance with the provisions of unjust enrichment. More specifically, the Contractor, on the one hand, is obliged to return part or all of the fee that they may have received, as well as anything provided to him by the employer for the execution of the project, while the employer must return the value of part of the project that may have been executed, provided that it is not possible to return it as such, especially if it has been incorporated in the project or consumed.

Further, withdrawal is always possible when the contractor is in default, that is, liable for the delay in the fulfilment of the obligations under Article 686, as well as in its main obligation to promptly deliver the works. The employer retains its full rights arising from the default. More specifically, the employer may either withdraw before the main obligation becomes due and payable or wait until it becomes due and payable and request the execution of the project and compensation for damages for the delay pursuant to paragraph 1 of Article 343, or to set a reasonable deadline under Article 383 and, following its expiration, to withdraw and request reasonable compensation pursuant to Article 387, the amount of which will be decided by the court based on criteria such as the financial condition of the parties and the ability to cover the damages from another source, or to request compensation for damages for non-implementation, which covers the positive interest, namely what the employer would have if the contractor's obligation was fulfilled.

Comparing termination rights for default and for convenience leads to the conclusion that there is a similarity as to the requirements for their application, but they differ in results and consequences. In the event of concurrency, the right of withdrawal is preferable, since it discharges the employer from the obligation to pay the contract price, provided, however, that the facts can be proved.

Contractor's default is a circumstance allowing the Employer to terminate the agreement under public works contracts as well where the Employer may forfeit the contractor, call on their bonds and seek further damages. Under public works contracts, the contractor's rights to terminate are limited to delayed payment or non-payment, as well as in the case of a long-term suspension of works.

## Common law perspective

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*Termination for default*

Not every breach of contract gives the innocent party the right to terminate the contract. For most breaches, the remedy for the innocent party lies in damages.

At common law, the innocent party will only be able to terminate a contract if:

• the term breached is a 'condition' of the contract – a condition (or 'essential term') is a term of a contract where the intention of the parties to the contract was to designate that term as one that is so important that any breach, regardless of the actual consequences of such a breach, would entitle the innocent party to terminate the contract. The focus here is not so much on the consequences of the breach, but on the nature of the term breached;

• there is a sufficiently serious breach of an intermediate or innominate term of the contract – the focus is on the consequences of the breach, such as where the breach deprives the non-breaching party of substantially the whole benefit of the contract; or

• there is a renunciation of the contract by a party – where the party in breach of contract, by its words or conduct, unequivocally conveys to the innocent party that it does not mean to perform the contract any further.

In addition to the common law rights of termination, parties usually provide in their contracts for circumstances in which each party may terminate the contract, for example, Clause 15.2 of the FIDIC Silver Book (1999). These rights operate in addition to common law rights to terminate, unless the latter are expressly (or impliedly) excluded.

*Termination for convenience*

There is no common law right to terminate for convenience. However, most common law jurisdictions allow parties to contract for the right to terminate for convenience.

It is an established principle of common law that the employer cannot, without clear words allowing it, exercise a power to omit work in order to employ another contractor to do that work. By extension, it is arguable that the employer cannot terminate the contract for convenience so as to give work to another contractor or to carry out the work itself. Clause 15.5 of the FIDIC Silver Book (1999) reflects this philosophy by expressly stating

that: **'The Employer shall not terminate the Contract under this Sub-Clause, order to execute the Works himself or to arrange for the Works to be executed by another contractor' [emphasis added]**

*Electing between common law termination or contractual termination*

Where a party has the right to terminate under both common law and contract but elects to terminate pursuant to the contract rather than alleging a repudiatory breach, it will be precluded from claiming 'loss of bargain' damages unless the contract expressly preserves the right to do so. For example, in *Phones 4U Ltd (in administration) v EE Ltd* [2018] EWHC 49, a claim for damages by EE (a mobile network operator) for loss of bargain was rejected because the termination notice relied solely on the contractual right to terminate for convenience.

*Compliance with contractual provisions*

'(a) Termination of the parties' relationship under the terms of [commercial] contracts is a serious step. **There needs to be substantive compliance with the contractual provisions to achieve an effective contractual termination**.

(b) Generally, where notice has to be given to effect termination, it needs to be in **sufficiently clear terms to communicate to the recipient clearly the decision to exercise the contractual right to terminate**.

(c) It is a matter of contractual interpretation, first, as to what the requirements for the notice are and, secondly, **whether each and every specific requirement is an indispensable condition compliance without which the termination cannot be effective**. That interpretation needs to be tempered by reference to commercial common sense' [emphasis added].

*Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* [2014] EWHC 1028

Given that an ineffective or wrongful termination can amount to a renunciation of the contract (which entitles the other party to, in turn, terminate the contract and claim damages), the importance of complying with contractual procedures cannot be overstated.

Some practical issues with Clause 15.2 of the FIDIC Silver Book (1999) are: '…the Employer may, **upon giving 14 days' notice to the Contractor, terminate the Contract and expel the Contractor from the Site**' [emphasis added].

• Exactly how many notices are required under Clause 15.2? Is the Contract automatically terminated after 14 days or is a further notice confirming the termination required after 14 days have elapsed?

• Does the 14 days' notice effectively operate as a cure period? What happens if the Contractor remedies or takes steps to remedy the breach within the 14 days? Does the Employer then lose the right to terminate?

These issues have been addressed in the new 2017 Silver Book: here, the Employer will need to first serve a 'Notice of Intention to Terminate', before serving a 'Notice of Termination' if the breach is not remedied.

## Termination notices – substance and form

*What requirements are there for the form and substance of a valid termination notice?*

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## Civil law perspective

*How to end a contract under German Law*

German law provides several possibilities to end a contract. In most cases, these possibilities are dealt with in statutes, especially in the German Civil Code (*Bürgerliches Gesetzbuch* or BGB). They vary depending on the type of contract concerned (sales contract, lease contract and so on) and the reason for the intention to end the contract.

The devices of most importance in the legal practice are rescission (*Rücktritt,* section 323 of the BGB) and termination (*Kündigung*, eg, section 314 of the BGB). If a party rescinds a contract, the contract is deemed void from the beginning. The contract is void *ex tunc*. Any services rendered or deliveries made under the contract by the parties up to when rescission becomes effective have been made without legal basis as the initial basis, the contract, is deemed to never have existed. Thus, the parties have to return anything they have received by the other party. If this is not possible they have to refund the appropriate value.

A termination, to the contrary, terminates the contract for the future (*ex nunc*). The contract remains valid up to the date when termination becomes effective. Any services performed or deliveries made under the contract until termination were made due to the contract and do not have to be refunded or returned, respectively.

*How to end a construction contract under German Law*

Until 2002, the 'normal' way to end a construction contract was a rescission in accordance with section 323 of the BGB. This legal concept was criticised as in most cases in which a *Rücktritt* was executed, the contractor had begun to perform the works. As, generally, the owner of land becomes the owner of any building that is built on its land (sections 93 and 94 of the BGB), the employer was enriched by the works performed and had to refund

their value to the contractor. It was argued that it would be much easier if the contract remained the legal basis for all services performed until the date on which the contract ended.

The legal situation changed in 2002 when a right to terminate a 'contract continuing for a longer period' was implemented in section 314 of the BGB and again on 1 January 2018 by a new regulation in section648 a of the BGB, according to which a construction contract may be terminated by both parties without notice for good reason.

In most German construction contracts that are entered into by the public administration or commercial entities, the parties agree on the Vergabe und Vertragsordnung für Bauleistungen – Teil B (VOB/B), a standard form of contract. The VOB/B provides that a construction contract may only be ended by means of a termination, not by rescission. The following description concentrates on the VOB/B.

*Form of Termination under VOB/B*

In all cases where the VOB/B provides for the possibility to terminate a contract, notice of termination has to be given in writing.[1]

In most cases, before terminating the contract, the terminating party has to set a reasonable deadline and to declare its intention to terminate the contract on expiry of the deadline.[2] This should warn the other party and give it the opportunity to fulfil its obligations.

Generally, under German law when a party terminates a contract it does not have to state the reasons. Thus, it is admissible to submit (for the first time or additionally) reasons to justify the termination, subsequently, as long as the reasons existed prior to termination.[3] It is not necessary that the terminating party was aware of these reasons when terminating the contract.[4] If, however, following termination a new reason to terminate the contract occurs, it is not possible to submit this reason subsequently. A new termination notice has to be issued instead.

However, a termination under the VOB/B requires that before termination takes place, a reasonable period is set to warn the other party. The party intending to terminate has to state why it intends to terminate the contract (eg, delay, outstanding payments and defects) to give the other party the chance to fulfil its obligations. Under these conditions it is not admissible to submit further reasons, subsequently. Rather, before a termination can be justified by any further reasons, the terminating party has to set a new period and repeat its intention to terminate the contract in order to fulfil its contractual obligations under the VOB/B and, subsequently, issue a new termination notice.

**Notes**

1 Section 8 (6) and § 9 (2) sentence 1 VOB/B.

2 Section 8 (3) no 1 and section 9 (2) sentence 2 VOB/B.

3 Federal Court of Justice („Bundesgerichtshof“ BGH) June 23, 2005 – VII ZR 197/03, BauR 2005, 1477.

4 Court of Appeal („Oberlandesgericht“ OLG) Schleswig February 9, 2010 – 16 U 16/06.

5 OLG Stuttgart July 14, 2011 – 10 U 59/10, BauR 2012, 1130; OLG Stuttgart March 3, 2015 – 10 U 62/14, BauR 2015, 1500.

## Common law perspective

**Edward Corbett**
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Getting termination wrong can be a very expensive business. A wrongful termination will be regarded in most common law jurisdictions as a repudiation, leading to liability to the terminated party in damages. If the Employer gets it wrong, it will be liable for the Contractor's loss of profit and other damages; if the Contractor gets it wrong, it will be liable at least for the Employer's extra completion cost.

What does getting it wrong mean? Of course, if the termination purports to be in accordance with the terms of a construction contract termination provision, such as FIDIC's Clauses 15 and 16, the most serious error is to rely on grounds that are held by the dispute adjudication board (DAB) or arbitrator not to exist. For example, the arbitrator may find that there were reasonable excuses for the delay, under Clause 15.2(c). Those errors are outside the scope of this article.

Errors in the substance or form of the termination notice are common. The question is whether such errors are fatal to the termination, leading to repudiation or whether a valid termination can still be achieved.

*Form*

Addressing form first, most contracts specify how a notice is to be given. FIDIC contracts normally require notices to be written and to identify an address, a means of communication and to whom copies should be sent. Sometimes, the notice needs to call itself a notice or identify the clause under which notice is being given.[1]

It has been said that as termination is a radical step, particularly where the contractual grounds are ones that would not amount to repudiation in the general law, then careful compliance with the contract must be observed.[2]

Repudiation is a severe or 'fundamental' breach of contract, likened to tearing up the contract or showing an intention no longer to be bound by it.[3] Under English law, for example, a single non-payment by the Employer is not regarded as a repudiation. Under Clause 16.2, however, such a single non-payment is a ground for termination. Some tribunals have held that if a party wants to avail themselves of such a right of termination that would not exist in the general law, then strict compliance with form is required.

However, in the Gibraltar airport case,[4] Justice Akenhead held that the delivery of the notice of termination to the site office rather than the specified head office of the contractor was not an indispensable requirement of either FIDIC Yellow Book Clause 15.2 or Clause 1.3:

• the project manager was based at the site office;

• the site office had been used for receipt and sending of communications in practice; and

• the notice was received by Obrascón Huarte Lain (OHL) on the day it was sent and its contents were immediately passed on to the senior directorate.

It therefore appears that there is some leeway in that courts and arbitrators may take a common-sense approach to non-compliance where the breach is *de minimis* or where it has had no prejudicial effect on the other party.

*Substance*

If the purpose of the notice is to give the defaulting party a final opportunity to rectify the default on pain of termination, then logic suggests that the default has to be stated. Similarly, if the notice is a 'show-cause' notice inviting the defaulting party to explain why the contract should not be terminated, the ground for termination would have to be set out.

The FIDIC 1999 contracts contain no requirements as to the content of the notice and are ambiguous as to whether the 14-day notice period is intended as a cure period. The 2017 editions resolve this ambiguity and, for most defaults, the notice period is a final chance to remedy the breach. Clauses 15.2.2 and 16.2.2 refer to the 'matter described': a description of the default is therefore required.

What if there is no description or the ground later relied on is not mentioned in the notice? Where a contract provides a cure period and refers to a 'matter described', the failure to specify the default would very likely be fatal to the termination. It could be argued that the failure would be insignificant in cases where the default was obvious or beyond repair, such as where a contractor has abandoned the project and demobilised from the country or gone into liquidation.

Interesting questions arise where a party learns of a ground for termination only after having terminated on a different basis. This may be due to the discovery of facts or the taking of legal advice. The question is most acute where the ground notified is wrongful but the discovered ground would have justified termination.

At common law, a terminating party is not liable for ending the contract when the other party was in repudiatory breach, whether or not the terminating party knew it at the time – *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 ChD 339 (employer successfully defended a claim for wrongful dismissal on the grounds of breaches by the employee not known to the employer at the time of termination).

Facts known but not cited at the time may also be relied on later – see *Reinwood Ltd v L Brown & Sons Ltd* [2008] EWCA Civ 1090.

However, each case must be considered on its facts. A party cannot raise new reasons to justify a termination if:

• the breach could have been put right, if it had been brought to the other party's attention in time – *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce ('Lorico')* [1997] EWCA Civ 1958; and

• the party wishing to terminate has waived its right to rely on the breach or is estopped from doing so (usually when a party knows of a breach but does not act on it).

Termination is a risky business. The advice to clients is always: to take great care with both form and substance.

**Notes**

1 FIDIC 2017 contracts define a Notice as: '"Notice" means a written communication identified as a Notice and issued in accordance with Sub-Clause 1.3 [Notices and Other Communications]'.

2 Akenhead J in *Obrascon Huarte Lain SA v Attorney General for Gibraltar* [2014] EWHC 1028 (TCC): 'Termination of the parties' relationship under the terms of such contracts is serious step. There needs to be substantive compliance with the contractual provisions to achieve an effective contractual termination… Generally, where notice has to be given to effect termination, it needs to be in sufficiently clear terms to communicate to the recipient clearly the decision to exercise the contractual right to terminate.'

3 Language reflected in FIDIC 1999 Clause 15.2 in the ground 'abandons the Works or otherwise plainly demonstrates the intention not to continue performance of his obligations under the Contract'.

4 *Obrascon Huarte Lain v A-G for Gibraltar* (2015) BLR 521.

## The legal consequences of a wrongful termination

*Whether, when, where and how a contractor can try to block a wrongful termination, and the claims available to a contractor who is the victim of a wrongful termination*

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## Civil law perspective

*Termination*

The reform of the French Civil Code, which entered into force on 1 October 2016, introduced a new Article 1224, which provides that:

*'Termination results either from the application of a termination clause, or, where the non-performance is sufficiently serious, from notice by the creditor to the debtor or from a judicial decision'.*

As a result, a contract can be terminated:

• on the basis of a termination clause with a unilateral notice referring to the clause unless the parties have agreed otherwise; or

• without a termination clause, but in the event of a very serious breach, through court decision or with unilateral notice from the creditor.

As per Article 1226:

*'A creditor may, at his own risk, terminate the contract by notice. Unless there is urgency, he must previously have put the debtor in default on notice to perform his undertaking within a reasonable time.*

*The notice to perform must state expressly that if the debtor fails to fulfil his obligation, the creditor will have a right to terminate the contract.*

*Where the non-performance persists, the creditor notifies the debtor of the termination of the contract and the reasons on which it is based.*

*The debtor may at any time bring proceedings to challenge such a termination. The creditor must then establish the seriousness of the non-performance.'*

The defaulting party can challenge the termination notice and commence legal proceedings against the terminating party in order to obtain an order from the court to compel performance.

In fact, as per Article 1228:

*'A court may, according to the circumstances, recognise or declare the termination of the contract or order its performance with the possibility of allowing the debtor further time to do so, or award only damages.'*

If termination is without good cause or done abruptly, the terminated party may argue that termination violated the principle of good faith.

If termination does not occur within any of the aforementioned options and there are no exceptions that apply, the termination would itself amount to a breach of the contract. The wrongfully terminated party would thus have the remedies available to a non-defaulting party.

*Remedies*

The remedies available to a non-defaulting party are defined in Article 1217 of the French Civil Code whereby:

*'A party towards whom an undertaking has not been performed or has been performed imperfectly, may:*

*• refuse to perform or suspend performance of his own obligations;*

*• seek enforced performance in kind of the undertaking;*

*• request a reduction in price;*

*• provoke the termination of the contract;*

*• claim reparation of the consequences of non-performance.*

*Sanctions which are not incompatible may be combined; damages may always be added to any of the others.'*

As per Article 1223 of the French Civil Code:

*'Having given notice to perform, a creditor may accept an imperfect contractual performance and reduce the price proportionally. If he has not yet paid, the creditor must give notice of his decision to reduce the price as quickly as possible.'*

*Specific performance*

As per Article 1221:

*'A creditor of an obligation may, having given notice to perform, seek performance in kind unless performance is impossible or if there is a manifest disproportion between its cost to the debtor and its interest for the creditor.'*

Even though no guidance in the new article is given as to the meaning of '*manifest disproportion*', French courts are likely to narrowly construe this condition and order specific performance except in extreme cases.

Furthermore, as per Article 1222:

'*Having given notice to perform, a creditor may also himself, within a reasonable time and at a reasonable cost, have an obligation performed or, with the prior authorisation of the court, may have something which has been done in breach of an obligation destroyed. He may claim reimbursement of sums of money employed for this purpose from the debtor.*

*He may also bring proceedings in order to require the debtor to advance a sum necessary for this performance or destruction.'*

*Damages*

The non-defaulting party can also seek damages. As per Article 1229:

*'Termination puts an end to the contract.*

*Termination takes effect, according to the situation, on the conditions provided by any termination clause, at the date of receipt by the debtor of a notice given by the creditor, or on the date set by the court or, in its absence, the day on which proceedings were brought.*

*Where the acts of performance exchanged were useful only on the full performance of the contract which has been terminated, the parties must restore the whole of what they have obtained from each other. Where the acts of performance which were exchanged were useful to both parties from time to time during the reciprocal performance of the contract, there is no place for restitution in respect of the period before the last act of performance which was not reflected in something received in return; in this case, termination is termed resiling from the contract.*

*Restitution takes place under the conditions provided by articles 1352 to 1352-9.'*

## Common law perspective

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*Can a contractor block a wrongful termination?*

There are two ways for a Contractor to attempt to block a wrongful termination: injunction (interdict in Scotland) or specific performance. These are effectively counterparts of each other: an injunction is to prevent an anticipated wrong, in this context, wrongful termination, while an application for specific performance is to require performance of contractual obligations. These remedies are at the discretion of the court that takes account of the whole facts and circumstances.

There are significant hurdles for a party seeking to obtain these remedies. The court will consider whether there is an adequate remedy available in damages and, if so, will be reluctant to grant the order. In the context of wrongful termination, it is difficult to mount an argument that damages will not suffice.

The reason for the court's reluctance stems partly from the fact that criminal sanctions flow from breach of injunctions or orders for specific performance and that it is often difficult to identify whether there has been compliance or not. An order preventing a termination is effectively an order requiring the employer to continue with performance of the contract. Construction contracts consist of a wide variety of rights and obligations

on each party and the courts will not police compliance with such wide-ranging provisions. Unless it is possible to frame the request for an order in sufficiently clear and precise terms, these are not likely to be successful.

One commentator describes them in these terms: 'Orders other than damages… are drastic, unpredictable and wide-ranging in their effects… difficult to supervise and enforceable by *imprisonment'*,[1] which summarises well the challenges posed.

*Claims available to a contractor subject to a wrongful termination*

The principle applied to claims for wrongful termination is that the Contractor is to be put in the same position as if the contract had been performed. That is subject to the usual factors applied to quantifying losses, including showing the causal link between the wrongful termination and the loss, the obligation to mitigate and damages being irrecoverable if too remote.

The question arising is: what would have been the monetary value if the contract had been performed?

Typical losses that fall into this category would include the value of work done to termination, loss of profit for remaining work and lost contribution to head office overheads.

There can be difficulties in proving losses. For example, the contractor will be required to show that the contract would have been profitable and how much profit would have been earned on the balance of work. If the pricing is weighted to front-load profitable activities, there may be little profit on later activities. Similarly, if the contractor has been working uneconomically (eg, piecemeal, disrupted material supply), often a reason in itself for the termination being on the agenda, profit will be impacted. Other factors would include any overpayment to the contractor pre-termination, such as through an agreement for advance payments or simply erroneously over-valuing work.

Other factors can also be relevant. In *The Mihalis Angelos*[2] charterers of a ship terminated the contract on grounds of force majeure. That was considered invalid and the shipowners accepted it as a repudiation of the contract by the charterer. However, the owners were unable to comply with a 'ready to load' provision, which allowed the charterer to terminate if the vessel was not ready to be loaded with its cargo by a certain date. The court held that the owners were only entitled to be put in the position of having their ship on a charter which, as soon as it arrived, could legally and would actually (on the evidence presented) have been cancelled. They were therefore only entitled to nominal damages for what was, in effect, a worthless charterparty.

That rationale was followed in *Engineering Construction Pte Ltd v Att Gen of Singapore (No 3)*[3]where the contractor was only entitled to nominal damages where there was a wrongful termination by the employer due to a contractual notice being served too early but where termination could have been effected validly.

In contrast, a surprisingly wide categorisation of losses arising was allowed in *Imperial Chemical Industries Limited v Merit Merrell Technology Limited*. Imperial Chemical Industries (ICI)[4] had pursued a strategy of withholding payments from Merit Merrell Technology (MMT) and seeking to terminate. In addition to loss of profit on the remaining work under the contract, the court awarded £1.3m in respect of a reduced final account settlement accepted by MMT on another project due to its weak financial position, which had arisen as a result of ICI's actions. It also awarded costs of wasted management time, professional advice in respect of insolvency matters, additional banking costs and a value added tax loan necessary for cashflow reasons. These heads of loss go further than would traditionally be thought to apply in a wrongful termination scenario.

These cases highlight the need to look at the whole facts and circumstances of the contract in assessing damages and that these can lead to unexpected outcomes in terms of assessment of losses recoverable.

**Notes**

1 Hudson's Building and Engineering Contracts para 7-064.

2 [1971] 1 QB 164.

3 (1998) 14 ConstLJ 120.

4 [2018] EWHC 1577 (TCC).

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