



Management of Contracts & Contract Claims



8 - 26 September 2024



Kuala Lumpur (Malaysia)

# Management of Contracts & Contract Claims

course code: P4087 From: 8 - 26 September 2024 Venue: Kuala Lumpur (Malaysia) - Royale chulan hotel course Fees: 6750 Euro

## INTRODUCTION

While the object of international contracting is to write and manage contracts so as to minimize disputes, some disagreements are inevitable. These can arise from failures by one of the parties, but also often arise from misunderstandings as to obligations under the contract.

This programme will look at how claims (and counter claims) arise; how they can be reduced or avoided by good contracts management; how they should be evaluated when received, or prepared when being delivered and how to resolve disputes arising from such claims. It will also, and most importantly, look at ways of avoiding disputed claims in the first place.

Once a dispute starts, it can usually be solved most effectively by negotiation between the parties. However, if this does not prove effective, some sort of third party intervention is required.

Traditionally, this has tended to focus on either involving state courts (litigation) or the equivalent private method of getting a third party to make a decision (arbitration). However, there are now many more techniques available in the international market, including expert determination, mini-arbitration, pendulum arbitration, adjudication, and other techniques whereby a third party decides the matter for the parties. In addition, there are also mediation, conciliation, hybrid solutions such as Arb/Med, where a third party facilitates the settlement by the parties themselves, rather than imposing a decision. Many of these techniques rely on looking at the parties' interests, rather than their strict legal rights.

All of these processes, and indeed, claims and counterclaims generally, become more complicated when placed in an international context. This is particularly the case where a foreign law and/or legal system is involved, with which you may not be familiar, and which may include rules which conflict with those of your own country.

The programme will deal with commercial disputes arising from Contracts written in the English language, but will use techniques which have wide application to the resolution of disputes.

## PROGRAMME OBJECTIVES

- Provide an understanding of how and why claims and counterclaims arise
- Explain the differences between claims and counterclaims
- Identify common causes of claims and disputes, and how to avoid them
- Discuss how to develop contracts management procedures to avoid disputes over claims and counterclaims, while resisting unjustified claims
- Enhance understanding of basic negotiation techniques to be used when resolving disputes
- Provide an understanding of some of the main methods of dispute resolution involving third parties
- Develop an understanding of Traditional and Alternative Dispute Resolution techniques, including different ways of resolving disputes without recourse to courts or arbitration
- Provide strategies and tactics for negotiating during disputes
- Explain how to use contract provisions to reduce the risk of claims and disputes

## COMPETENCIES EMPHASISED

- Claims avoidance
- Claims management
- Negotiating
- Dispute avoidance
- Developing strategies and tactics
- How to prepare counterclaims
- Understanding issues in a complex international environment
- Analysing and drafting contract clauses
- Understanding of different legal systems and their approaches to contracts
- Commercial awareness
- Looking to resolve disputes based on interests, not just rights

## PERSONAL IMPACT

- Increased recognition of the causes of claims and disputes
- Improved contracts management leading to fewer disputes and more rapid resolution of those that do arise
- Develop negotiation skills, which will be useful tools in all types of negotiating
- Heighten understanding of the available methods of resolving disputes
- Increase working knowledge of legal implications and potential problems with foreign legal systems
- Improve understanding of different approaches to resolution of disputes in an international context
- Understand the issues arising from the enforcement of judgments or awards where the parties are in different countries
- Improve ability to reduce the risk of claims and disputes
- How to manage dispute resolution processes

## ORGANISATIONAL IMPACT

- Expanding the expertise of personnel involved in claims review, negotiation and management will allow project and general management teams to be more effective
- Disputes should be reduced and those that still exist should be settled more quickly, with less cost, delay and disruption
- A better understanding of alternative dispute resolution processes will allow the correct technique to be chosen that is most effective in relation to the particular dispute
- A better understanding of legal and practical issues will allow the more effective management of external legal and other resources
- Skills learned on the course will allow negotiations to be conducted with more confidence, and with the ability to deal with issues quickly and with certainty, thus reducing the time taken to bring negotiations to a conclusion
- Non-lawyers will find it easier to instruct and work with specialist lawyer colleagues, improving the performance of both parties
- Claim and dispute avoidance skills will be enhanced, as will the ability to manage such issues as do arise in an effective manner

Participants will be introduced to some of the latest international practices in dispute resolution and shown how to build such practices into their contract documents.

## TRAINING METHODOLOGY

Training will involve a high level of interaction and delegate participation. The trainer will explain issues using real examples, many from the trainer's personal experience, but will then involve the delegates in discussion, using the information provided. There will also be role play sessions on negotiating, where delegates will work as teams to seek to agree disputes in realistic scenarios.

Delegates are encouraged to bring real problem examples with them, for discussion on a confidential basis, and to share their experience of particular issues in their company or industry. Time will be allowed for general discussions, and for one-to-one discussion with the trainer.

## PROGRAMME OUTLINE

### How Claims and Counter Claims arise

- Causes of typical claims
  - Poor drafting of requirements
  - Lack of clarity in Scope of Work/Services
  - Misunderstanding of legal or technical obligations
    - By Client
    - By Contractor/Supplier
  - Deliberate "misunderstanding"
- Counter claims - how they differ from claims
- Rights of set-off
- Obligation to perform work
- Standards
- Programme
  - Acceleration
- Variations
- Extension of time
- Force majeure
- Overview of main contractual provisions relevant to claims and counter claims

### Types of Claims and Counter claims

- Types of claims, in construction and other areas - and their distinctive features
  - Re-measure disputes
  - Variations - disputes on valuation
  - Variations - disputes as to whether there is change
  - Breaches of contract
  - Quality of workmanship
    - Re-work
  - Rejection of goods
  - Full rejection
  - Partial rejection
  - Liquidated damages and penalties
  - Warranty claims
  - Interface problems - are these always the Contractor's responsibility?
  - Tracking change where client involvement is limited
  - Special issues with documentation in EPC and turnkey contracts
  - Special issues with EPC/Turnkey contracts

### Presenting and Evaluating Claims and Counter claims

- Requirements for claim presentation
  - Notices
  - Timing, and time limits
    - Are time limits binding?
  - Format
  - Information
  - Supporting documents
- Defining features of claims evaluation and management
- Recognising the causes of claims
- Warning signs of disputes
- Recording claims
- Reviewing claims
  - Requesting further information
  - Realistic appraisal
  - When to make admissions - and denials
  - Offers of settlement
  - Independent review
- Cumulative effects
- Managing claims quickly and effectively to avoid disputes
- Managing claims and disputes
- Involving lawyers
- Managing the legal process
- Setting goals
- Decision trees
- Controlling costs - and including them in your thinking

## Dispute Resolution

- What is a dispute?
- Introduction to dispute resolution methods and techniques
  - Stage negotiation - setting up internal dispute resolution within the contract
  - Measures of success - win-win negotiation
    - Understanding what constitutes a “win” for you
    - What will be a “win” for the other party?
    - Mirror negotiation/red teams
  - Negotiating “without prejudice”
  - Making offers
  - Compromise
  - Bargaining
- Interest-based negotiations
- Moving away from rights-based thinking
- Making the cake bigger - settling other issues
- Non-financial solutions
- Long-term business relationships
- Defusing conflict
- Personality clashes and how to avoid them
- Dealing with disputes as they arise - not letting them fester
- Traditional dispute resolution
  - Litigation
    - Use of foreign courts
    - Enforcement
  - Arbitration
  - Domestic

- International
- Single or panel
- Enforcement
- Issues with evidence and production of documents
- Mediation
- Med/Arb and Arb/Med
- Adjudication
- Expert determination
- Early Neutral Evaluation
- Mini-Arbitration
- Dispute Review Boards
- Pendulum arbitration
- Conflict and its resolution
- Differences between alternative dispute resolution methods
- Ethical concerns
  - Audit trails
  - Avoiding the suspicion of unethical behaviour
  - Problems with settlements based on interests, not rights
  - Applying the same anti-corruption systems to claims as to tendering
- Avoidance is better than resolution
- Avoiding claims and counter claims
- Avoiding disputes
- Avoiding litigation and arbitration
- Opportunities to role play a few straightforward negotiation scenarios involving typical contractual claims, counter claims and disputes
- Practical application of techniques
- Final questions and wrap-up