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# **IBA – INTERNATIONAL CONSTRUCTION PROJECTS COMMITTEE**

## **8TH BIENNIAL CONSTRUCTION PROJECTS FROM CONCEPTION TO COMPLETION CONFERENCE**

Berlin, 16-18 March, 2023

### Session 2: Project establishment: The perfect variations clause

#### Speakers:

Dr. Semiha Melis Mani – Strabag, Vienna  
Ian de Vaz – Wong Partnership, Singapore  
Shane O'Neill – Arthur Cox, Dublin

#### Chair:

Ricardo E. Barreiro-Deymonnaz – Barreiro. Oliva. De Luca. Jaca. Nicastro, Buenos Aires



# Part I - Variation Right and Procedure

## Variation Right and Procedure

- Who has the right to instruct a Variation?
- How the Variations shall be instructed?
- When the Variations shall be instructed?

## Variation Right and Procedure

- What are the obligations of the Contractor?
- May the Contractor refuse to perform the Variation?
- May the Contractor request a variation?

# Part II - Definition of Variation

## Definition of Variation

### Key Principles

- The importance of the *original* scope of Works (express) + works that are “*indispensably necessary*” (implied)
- Variation is effected to the *scope* of Works
- Variation clauses are not a *carte blanche* to make changes
- Limitations on the right to vary work; for example, even if work costs *more* than anticipated (see: ***Bottoms v Mayor of York*** (1892))

## Limits on the right to vary

### Additions

- Generally, variations that “*go to the root of the contract*” or constitute “*cardinal changes*” are impermissible, in terms of:
  - nature of the work (qualitative)
  - magnitude of the work (quantitative)
- Usually, a *highly* fact-sensitive inquiry
- Strict procedural compliance
- Recovery in the absence of variation instructions?



## Limits on the right to vary

### Omissions

- Basic principle: Generally, absent a variations clause, removing or omitting work from the original scope is wrongful and constitutes a breach of contract for which the remedy is a claim for loss of profits (see: ***Chadmax Plastics v Hansen and Yunchen*** [1984] 1 BCL 52)
- Only genuine or *bona fide* omissions are valid i.e. the item of work is omitted and not done at all (see: ***Commissioner of Main Roads v Stuart Pty Ltd*** [1974] 131 CLR 378)
- Clear wording may permit the omission of works for it to be awarded to a third party (see: ***Carr v JA Berriman Pty Ltd*** (1953) 27 ALJ 273).

# Part III - Valuation

## Valuation

- By agreement
- No agreement:
  - Cost plan
  - Fair valuation
  - Daywork rates
- What should a valuation cover?

# Modular Variations Clause

## Modular Variations Clause – Part I

### 1. Variation Right

1.1. The [Employer] and/or the [Engineer] and/or the [Employer's Agent] shall have the [right] [power] to instruct Variations on the Works.

1.2. Instructions on Variations shall be always in writing and issued in the form of a Variation Order.

1.3. Variations may be instructed at any time prior to the [issuance of the Preliminary Completion Certificate] [issuance of the Completion of Works Certificate] [expiration of the Defects Liability Term].

## Modular Variations Clause – Part I

### 1. Variation Right

1.4. If upon receipt of a Variation Order the Contractor does not give reasoned notice of its inability to execute the Variation within YZ days of receiving the Variation Order, the Contractor shall be bound by such Variation Order.

1.5. The [Employer] and/or the [Engineer] and/or the [Employer's Agent] may request in writing that the [Contractor] research the financial and scheduling implications of any Variation intender by the [Employer]. The [Employer] must provide the [Contractor] all relevant information about the proposed Variation to facilitate the analysis.

## Modular Variations Clause – Part I

### 1. Variation Right

1.6. The [Contractor] shall provide to the [Employer] and/or the [Engineer] and/or the [Employer's Agent] a detailed cost estimate of the proposed Variation based on the [Cost Plan] within XY working days of receipt of such written request. This cost estimate shall include all costs, rates, fees and items detailed in article 3.3. below, as well as any extension of time required for the completion of the Works.

1.7. The Contractor shall not make any Variation to the Works without an appropriate Variation Order issued by the [Employer] [Engineer] [Employer's Agent] in accordance with this clause, with the exception of Variations necessary in case of emergencies or situations where there is an immediate threat to any persons' health or safety, or to the Project's structural stability or integrity.

## Modular Variations Clause – Part I

### 1. Variation Right

1.8. The Contractor may submit to the [Employer] [Engineer] [Employer's Agent] proposals on variations on Works, at any time prior to the [issuance of the Preliminary Completion Certificate] [issuance of the Completion of Works Certificate] [expiration of the Defects Liability Term]. Variations proposed by the Contractor shall be based on acceleration methods or strategies, reduction of costs, technological improvements, or on any other aspects that may benefit the Employer.

1.9. The Contractor's proposal shall include all matters relevant for execution of the Variation including any modifications to the programme, methodology and its proposed valuation for the Variation. If such proposals are accepted (whether as submitted or with modifications) the [Employer] [Engineer] [Employer's Agent] shall issue an appropriate Variation Order under this clause.



## Modular Variations Clause – Part II

### 2. Definition of Variation

2.1. A Variation means:

- (a) changes in the quantity of Works;
- (b) changes in the quality of Works;
- (c) changes on the location of Works;
- (d) the demolition, omission or substitution of Works; and/or
- (e) changes in the Contractor's obligations under the Contract or restrictions imposed by the Employer in relation to matters such as, access to or use of the site, limitations of working space and/or of working hours, the execution, timing or completion of the Works in any specific order or to any specific timescale.

## Modular Variations Clause – Part II

### 2. Definition of Variation

**OR**

2.1. A Variation means an alteration of Works to be performed regarding its design, methodology, sequence, quantity, quality or working conditions whether by way of substitution, addition or omission.

**OR**

2.1. A Variation means any change to the original contract description of Works.

## Modular Variations Clause – Part II

### 2. Definition of Variation

2.2. Subject to Clause 2.3, a Variation shall include any changes as aforesaid which may alter the ultimate use to which the Works will be put.

2.3. A Variation shall exclude any:

- (a) addition to Works that constitute a cardinal change or which otherwise bears no reasonable relationship to the original contract description of Works; and
- (b) omission of any part of the Works that is or will be awarded to a third party [unless the Contractor is already in culpable delay and/or breach of contract at the time of the variation instruction and it is issued in good faith to reasonably assist the Contractor to recover its delay or otherwise mitigate its breach of contract (as the case may be)].

## Modular Variations Clause – Part III

### 3. Valuation

3.1. The value of a Variation shall be agreed by the [Employer] [Engineer] [Employer's Agent] and the Contractor.

3.2. If the parties cannot reach an agreement on the value of a Variation, the following valuation parameters shall apply:

- (a) If the Variation requires changes to work similar to work in the Contract Documents, then the same rate under the Contract shall be used for valuing a Variation;
- (b) If a Variation requires changes to work not similar to work contemplated in Contract Documents, then the Variation shall be measured and valued at fair market rates and prices;
- (c) Fair market rates and prices shall also be applied to value the Variations set forth in article 2.1.(e) above.

## Modular Variations Clause – Part III

### 3. Valuation

3.3. Any valuation of a Variation shall include allowance for the addition or omission of the relevant design work, to the extent applicable and any necessary addition to or reduction in the provision of site administration, site facilities, temporary works, Contractor's direct costs, overheads, margins and profit.

3.4. The Price and the Completion Term shall be adjusted according to Variations.

# Questions?



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