

# Convenient termination

Termination for convenience clauses are appearing more frequently in construction contracts here, usually when there is significant risk. Make sure you are clear on the implications if one is incorporated into your contract.

**RECENT PLACEMENT** of Australian prefabrication manufacturer Strongbuild into administration has raised questions around termination for convenience clauses. In the Strongbuild case, administrators were appointed and lending facilities withdrawn after Strongbuild's \$40 million southwest Sydney construction contract was terminated without cause.

## **Termination for cause**

Most cancellation rights in construction contracts only arise when triggered by certain events or actions - generally known as termination for cause. Such rights usually arise from breaches of contract or insolvency situations.

## **Termination for convenience**

However, termination for convenience clauses are becoming more common. Such clauses entitle a party, usually the principal, to terminate at will.

Termination for convenience is common in some overseas markets and standard forms but it is becoming a more regular feature in special conditions of New Zealand construction contracts.

There is no standard condition that allows a party to terminate at will in either NZS 3910:2013 *Conditions of contract for building and civil engineering construction* or the NZIA Standard Construction Contract. There is also no right to do so under the Construction Contracts Act 2003 or in common law.



## **Contracts with termination of convenience clauses**

An example of a common termination for convenience clause in construction contracts can be found in the International Federation of Consulting Engineers (FIDIC) standard construction contract (Red Book) and design and construction contract (Yellow Book) general conditions.

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The FIDIC Conditions of Contract for Construction (Red Book) 2017 clause 15.5 provides ‘The Employer shall be entitled to terminate the Contract at any time for the Employer’s convenience, by giving a Notice of such termination to the Contractor.’

There is also a termination for convenience clause in the Conditions of Contract for Consultancy Services (CCCS) that provides for termination for convenience and also allows recovery of actual and reasonable costs. CCCS is one of the most frequently used standard form consultancy agreements in New Zealand.

### ***Things to consider***

Termination for convenience clauses are often inserted in projects where there is significant political uncertainty, funding and project planning risk.

Contractors and consultants should consider several matters before drafting or signing down to clauses providing termination for convenience:

- Are you clear on the financial consequences of the termination?  
The contract should provide an appropriate calculation method for determining what establishment, demobilisation costs and margin are appropriate and fair in particular on the innocent party. Clauses often provide for costs incurred up to the date of termination plus demobilisation costs, but not all clauses allow for lost profit. Recent case law from Singapore has tested the issue of whether a contractor could claim the lost profit on uncompleted work given the opportunity cost to the contractor was lost. The Court, however, considered that disallowing recovery of lost profits for uncompleted work is the approach to be taken, unless the contract expressly provides otherwise.

- Consider whether the termination right is tempered by other contractual provisions. In some instances, there are express clauses providing for overriding obligations of good faith or reasonableness that might limit a party’s right to exercise a termination for convenience. As an example, in the UK, the New Engineering Contract (NEC) contract core clauses start with an obligation on parties to act ‘in a spirit of mutual trust and co-operation’. Some commentators argue that this may prohibit a principal attempting to terminate so that they can award the works to another party. However, this has not been tested by the Courts.
- Consider the broader implications of such a clause on the contract as a whole. There has been case law where the mere existence of a termination for convenience clause has been considered relevant for determining what the contractor was entitled to. Even in cases where the principal terminated for cause, the Courts have determined the fact that the principal could have terminated for convenience disallowed recovery of lost profits that the contractor might otherwise have been entitled to.

### ***Make sure you understand the clause***

Depending on how the clause is drafted, termination for convenience clauses do what they say - provide a party with the right to end a contract without requiring a specific triggering event.

If a termination for convenience clause is to be incorporated into your contract, make sure you understand how the clause operates, how it affects you and importantly what compensation you can recover. ◀

**Note** ▶ For specific advice on this or any other construction legal queries, contact your legal advisor or Kensington Swan on (09) 379 4196.