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India-CRUX Construction Dispute Causation Series Part I: 'Change in Scope'

HKA-AZB & Partners Joint Publication

CRUX is HKA's integrated research program which provides unprecedented insight in relation to common dispute causation factors for engineering and construction projects on a sectoral and regional basis. At present, the CRUX database encompasses more than 1,400 projects in 94 countries (including India) representing a total capital expenditure of more than US\$2 trillion. An interactive [dashboard](#) has been developed which allows the user to search by region and sector thus giving free-range and allowing searches relevant to any criteria.

The aim of this publication Series is to focus on the top dispute causative factors relevant to India specifically. The first of this Series focuses on 'Change in Scope' in construction projects and provides a high-level insight into the potential triggers, guidance on managing them and their legal position under Indian law.

Dispute causation factors which will be covered in follow-up articles in this Series include – access to site/workface was restricted and/or late, unforeseen physical conditions, materials and/or products delivered late, late approvals, design issues, poor subcontractor/supplier management, spurious claims, cashflow and payment issues, and contract management and/or administration failure.

The findings from the CRUX reports conclude that change in scope is one of the main causes of dispute in engineering and construction projects and the potential triggers for this change are listed below:

Potential triggers for change in scope

- Increase/decrease in project scale and complexity
- Change in project vision/direction affecting scope definition
- Unclear division of responsibility and/or risk allocation
- Budgetary constraints/limitations
- Interface issues
- Employer and contractor communication management issues
- Unforeseen conditions
- Environmental factors
- Inconsistent pricing methods impacting labour and materials
- Improper scheduling and subsequent time extension requests
- Material availability and sourcing delays
- Improper setting out of work stages
- Inefficient tender process (including tender queries/request for information process) impacting the execution stage
- Disconnect between contractual terms and scope from an execution standpoint and/or inadequate contractual machinery to facilitate scope change
- Changing market sentiments
- Technological advancements requiring design changes
- New political, governmental or legislative requirements

Guidance on managing change in scope issues

While taking into consideration the above triggers, it is important to consider the details below in relation to the Pre-Execution and Execution stages of the project.

Pre-Execution Stage

Contractual mechanisms are key in addressing the causation triggers and at the stage of entering into the construction contract, it is vital to verify that the change process is being managed through a comprehensive variation clause. The contractual clause should clearly state the pre-conditions to be satisfied, contractual entitlement and adequate remedies appreciating each party's risk and responsibilities. It should also be adaptable and viable from a commercial and technical standpoint.

It is incorrect to assume that, because a standard form of contract is being used, the change process is appropriate and therefore that no change to the contractual mechanism is required. In many circumstances, a bespoke project-specific approach is recommended.

At this stage, internal change process procedures should be reviewed and aligned accordingly with respect to the contractual variation mechanism. It can often be useful, from a practical standpoint, to obtain insight from similar projects regarding their change process and how it is managed.

Execution stage

Efficient change process management during the execution stage involves the early identification of a change, the proper monitoring of the specific change and the submission of contractually compliant variation requests at the appropriate time.

It is important to utilise a well-suited variation log to facilitate capturing the detailed particulars, conduct systematic dialogues to address change requests through a variation committee at the project level, adopt a streamlined approach through a suitable variation request template to ensure sufficient detail and evidence is captured, and engage external parties to provide independent variation claim assessment.

Legal position in India

The following section summarises certain key considerations from the Indian legal standpoint relating to change in scope dispute causation factor:

- A valid change in scope provision must be built into the contract, specifying the manner in which a change is to be communicated and the process to be followed.
- Scope change requests impact the pricing of the project, and contracts usually provide for an increase or decrease in the cost depending on the change.
- Standard form contracts by a few public authorities include:
 - National Highways Authority of India (NHAI): A change in scope if required by NHAI, must be communicated within 6 months from the date of the project commencement; a change in scope if required by the contractor must be communicated within 90 days from the date of the project commencement; the contractor is required to prepare a proposal as to the change and submit it to NHAI; the employer retains discretion in whether to permit a change in scope or not; the total value of all changes in scope are to be capped at 10% of the contract price.

- Central Public Works Department: A change in scope is limited to a reduction in scope if a supervening cause results in changes to work being required.; in which case the contractor's payment is to be commensurate with the rates prescribed in the contract for works executed pursuant to such reduced scope; but the contractor is prevented from having entitlement for compensation for any profit or advantage which might have accrued during the course of execution of works in full but which was not derived in consequence of the execution of reduced scope.
- National Buildings Construction Corporation (India) Limited (NBCC): NBCC is entitled to make alterations, direct omissions or additions to drawings, designs and instructions. Based on request raised by the contractor, a time extension may be granted with additional cost provided there is deviation from the scope of work.
- Disputes in relation to change in scope typically pertain to loss claimed owing to (i) failure of the employer to make payment to the contractor pursuant to a change in scope or (ii) an unauthorised change in scope by the contractor.
- No damages or compensation will be awarded unless the loss is proved through evidence. In a contract providing for liquidated damages (a pre-agreed sum indicative of loss in case of breach), the affected party can receive as reasonable compensation the prescribed liquidated damages fixed by both parties provided it is found to be genuine by the Court.
- Where contracts are awarded pursuant to public tenders, and a subsequent change in scope is undertaken which has the effect of substantially modifying the contract, Courts may intervene and strike down such act as being beyond the scope of the original tender.

Conclusion

Change in scope during the project lifecycle is inevitable. It can lead to disputes between the parties and strained relations between stakeholders if not properly managed.

Adopting a proactive approach from the outset and complying with an efficient change process management strategy thus giving due importance to the legal position will ensure commercial and project objectives are preserved, and potentially assist in the avoidance of disputes.

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ABOUT HKA

HKA is the world's leading consultancy of choice for multi-disciplinary expert and specialist services in risk mitigation and dispute resolution within the capital projects and infrastructure sector. We also have particular experience advising clients on the economic impact of commercial and investment treaty disputes, forensic accounting matters and in cybersecurity and privacy governance and compliance. In addition, HKA supports companies that conduct business with the US Federal Government, providing them with consulting services on complex government contracting matters.

As trusted independent consultants, experts and advisors, we deliver solutions amid uncertainty, dispute and overrun, and provide the insights that make the best possible outcomes a reality for public and private sector clients worldwide.

HKA has in excess of 1,000 consultants, experts and advisors in more than 40 offices across 18 countries.

ABOUT AZB & PARTNERS

AZB & Partners' dispute resolution team is recognised as a market-leading group and is considered the preferred partner for civil, criminal, commercial and constitutional disputes. We represent our clients in an array of courts and tribunals and conduct arbitrations, mediations, and negotiations on their behalf, within India and internationally.

Our work spans every industry, including construction, real estate, IT, aviation, banking and finance and infrastructure. AZB & Partners were recognised as a 'Band 1 Firm' for Dispute Resolution by Chambers Global (2020-2021), by Chambers Asia-Pacific (2020-2022) and Tier 1 Firm' for Dispute Resolution (Litigation) and Dispute Resolution (Arbitration) by Legal 500 Asia Pacific (2020-2021).